



Legal Counsel

Guide on the U.S. Foreign Account Tax Compliance Act (FATCA) (Issue 2)



South African Revenue Service

Guide on the U.S. Foreign Account Tax Compliance Act (FATCA)

Preface

This is a general guide on the application and interpretation of specific issues arising from the statutory obligations placed on South African Financial Institutions¹ 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. The Agreement has been *Gazetted*² on 13 February 2015 with a date of entry into force of 28 October 2014.

For more information you may visit the SARS website at www.sars.gov.za.

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SOUTH AFRICAN REVENUE SERVICE

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¹ For the definition of "South African Financial Institution" refer to the **Glossary** appended to this guide.

² Government Notice 93.

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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 version 2. 0. 0-25 issued 8 December 2016;
- **“Competent Authority”** means the Commissioner for SARS or an authorised representative of the Commissioner;
- **“CRS”** means Common Reporting and Due Diligence Standards developed by the OECD;
- **“FATCA”** means the U.S. Foreign Account Tax Compliance Act;³
- **“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;⁴ and
- any other word or expression in this guide bears the meaning ascribed to it in the Agreement.

³ Part of the Hiring Incentives Restore Employment Act of 2010.

⁴ The U.S. issued final Regulations on 6 March 2014.

Automatic exchange of information

Automatic exchange of information (AEOI) involves the systematic and periodic transmission of “bulk” taxpayer information by the source country to the residence country. An effective model for automatic exchange of information requires a common standard on the information to be reported by financial institutions and exchanged with residence jurisdictions to establish a global approach to combatting offshore tax evasion.

The Organisation for Economic Co-operation and Development (OECD) has, together with the Group of Twenty (G20), developed a standardised, secure and cost effective model for bilateral automatic exchange of information.⁵ On 23 February 2014, the G20 Finance Ministers endorsed the Common Reporting Standards for automatic exchange of tax information (CRS Standard).⁶ South Africa is one of the early adopters of the CRS Standard and has committed to commence exchange of information automatically on a wider approach from 2017.

Section 26 of the Tax Administration Act 28 of 2011⁷ (TA Act) was amended to require a person to submit a return as required under an international tax agreement or an international tax standard.⁸ The SA CRS Regulation⁹ was published by the Minister and applies from 1 March 2016. These Regulations provide for the annual automatic exchange of information between South Africa and current and any future participating jurisdictions of financial account information, including balances, interest, dividends and sales proceeds from financial assets, reported by financial institutions to the respective jurisdictions. The information reported cover accounts held by individuals and entities, including trusts and foundations. It sets out the account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as due diligence procedures to be followed by financial institutions.

The SARS's Business Requirement Specification: Automatic Exchange of Information (BRS: AEOI) has been extended to require affected financial institutions to provide similar information as required under the Agreement on U.S. persons to all non-residents. Although the Agreement caters for elective thresholds (for example, \$50 000 threshold for Depository Accounts of New Individual Accounts)¹⁰, these will not apply to the extended ambit of the BRS catering for AEOI based on the OECD common reporting standards as well as domestic requirements.¹¹

⁵ The document is available on SARS's Media Release page, which can be accessed through the following path **www.sars.gov.za** ⇒ scroll down and select at the bottom of the page Media ⇒ Media Release Archive ⇒ 2014 ⇒ scroll down and select 3 April 2014 Specifications for the reporting-of-information-under FATCA, AEOI and domestic law.

⁶ Contained in Part II of the full version of the Standards.

⁷ Government Notice 509 in Government Gazette 37778 of 27 June 2014, available at **www.sars.gov.za** ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

⁸ Section 1 of the Tax Administration Act 28 of 2011.

⁹ Government Notice 39767.

¹⁰ See 4.1 Accounts not required to be reviewed, identified or reported.

¹¹ The document is available on SARS's Media Release page, which can be accessed through the following path **www.sars.gov.za** ⇒ scroll down and select at the bottom of the page Media ⇒ Media Release Archive ⇒ 2014 ⇒ scroll down and select 3 April 2014 Specifications for the reporting-of-information-under FATCA, AEOI and domestic law.

1. Introduction to FATCA

1.1 Background

In 2010 the United States in an effort to enhance tax compliance by U.S. Persons¹² in foreign jurisdictions or those with offshore accounts, introduced the Foreign Account Tax Compliance Act (FATCA) which institutes identification and reporting obligations on Reporting Financial Institutions.¹³ The reporting regime requires Reporting 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 intergovernmental agreement (IGA) to enable countries to assist their residents affected by FATCA.

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 to improve international tax compliance and to implement the provisions of FATCA (Agreement). The Agreement was *Gazetted*¹⁴ on 13 February 2015 with a date of entry into force of 28 October 2014. In terms of Article 10 of the Agreement, this was the date of South Africa's written notification to the United States that South Africa had completed its necessary internal procedures for entry into force of this Agreement. Therefore, Reporting South African Financial Institutions (Reporting Institutions) must comply with the requirements and obligations set out in the Agreement from 1 July 2014 (see **Annexure B**). 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.¹⁵

The U.S. has developed a framework to enter into IGAs with partner jurisdictions around the world to facilitate Financial Institutions¹⁶ compliance with FATCA:

- Model 1 IGAs provide for Financial Institutions to identify and report information with respect to each U.S. Reportable Account to their relevant domestic authority. The domestic authority [in South Africa's case, South African Revenue Service (SARS)] will in turn share the information with the U.S. IRS.
- Model 2 IGAs provide for Financial Institutions to identify and report information with respect to each U.S. Reportable Account directly to the U.S. IRS, which is supplemented by information exchange upon request between the U.S. IRS and its relevant government counterpart.

South Africa entered into a Model 1 IGA. SARS is therefore 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.

¹² The term "U.S. Person" is defined in the Agreement and means a U.S. citizen or resident individual, a partnership or corporation organised in the U.S., a trust (in certain instances) or an estate of a decedent that is a citizen or resident of the U.S. (for the complete definition refer to the **Glossary** appended to this guide).

¹³ For the definition of "Reporting Financial Institution" refer to the **Glossary** appended to this guide.

¹⁴ Government Notice 93.

¹⁵ In terms of Article 5.

¹⁶ For the definition of "Financial Institution" refer to the **Glossary** appended to this guide.

In accordance with the Agreement a Reporting South African Financial Institution (Reporting Institution)¹⁷ is required to obtain information on Reportable Accounts¹⁸ as from 1 July 2014 and report this information to SARS (see **Annexure B**). The manner in which reporting is to be done is specified in SARS's BRS: AEOI which is available on the SARS website.¹⁹

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 Accounts²⁰ and on payments to certain Nonparticipating Financial Institutions (NPFIs).²¹

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. Any branch of a Financial Institution not resident in South Africa will meet the definition of "South African Financial Institution", if the branch of that Financial Institution is located in South Africa.²²

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).²³

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 was 1 July 2014 to 28 February 2015 (see **Annexure C**). The information required for the first reporting period should have been submitted to SARS by 30 June 2015.²⁴ Thereafter the required information must be submitted annually at the end of May for the reporting period ending February.²⁵ Article 3(3)(a) prescribes the information required for each reporting period with respect to U.S. Reportable Accounts.

¹⁷ 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.

¹⁸ For the definition of "Reportable Account" refer to the **Glossary** appended to this guide.

¹⁹ The document is available on SARS's Automatic Exchange of Information page, which can be accessed through the following path www.sars.gov.za ⇒ Business and Employers ⇒ Third party data Submission Platform ⇒ Automatic Exchange of Information (FATCA and CRS), scroll down to Automatic Exchange of information (AEOI) documents and information and select 'BRS for Automatic Exchange of Information (AEOI) version 2. 0. 0-25 for submission by May 2017.

²⁰ For the definition of "U.S. Reportable Account" refer to the **Glossary** appended to this guide.

²¹ For the definition of "Nonparticipating Financial Institution" refer to the **Glossary** appended to this guide.

²² To be read in conjunction with Article 4(5)(a) – Special Rules Regarding Related Entities and Branches that are Nonparticipating Financial Institutions.

²³ For the definition of "Non-Financial Foreign Entity" refer to the **Glossary** appended to this guide.

²⁴ Government Notice 509 in *Government Gazette* 37778 of 27 June 2014, available at www.sars.gov.za ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

²⁵ 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.

1.2 Scope of FATCA

This section provides a broad overview of the scope of FATCA and 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 Accounts²⁶ where the Account Holder²⁷ is a –

- Specified U.S. Person; or
- passive entity with Controlling Persons²⁸ that are Specified U.S. Persons.²⁹

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” 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.

An Entity or its representative should ask the following questions to establish if it is required to obtain and provide to SARS the information described in the Agreement:

- Am I a “Financial Institution”? (see **2**)
- Do I maintain “Financial Accounts”? (see **3**)
- Are there indicators that any of the account holders are a U.S. Person or a Specified U.S. Person (see **3.4.1**)? (see **3**)
- After applying the relevant due diligence, do I have any Reportable Accounts? (see **4**)
- Am I a Non-Reporting Financial Institution or have accounts that are excluded from the definition of “Financial Account” under Annex II of the Agreement? (**Annexure E** and **Annexure F**)

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 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 (see **2.3**). 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 reporting 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 ³⁰(see **5.3.2** for further detail).

²⁶ For the definition of “Financial Account” refer to the **Glossary** appended to this guide.

²⁷ For the definition of “Account Holder” refer to the **Glossary** appended to this guide.

²⁸ For the definition of “Controlling Persons” refer to the **Glossary** appended to this guide.

²⁹ For the definition of “Specified U.S. Person” refer to the **Glossary** appended to this guide.

³⁰ Article 4(1)(b).

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)³¹

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 (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 Jurisdictions³² (Article 7)
- Consultations and amendments (Article 8)
- Annexes (Article 9)
- Terms of Agreement (Article 10)

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 who are clients and on payments to certain NPFIs.

1.3.3 Annex II

Annex II lists those Entities³³ that shall be treated as exempt beneficial owners or deemed-compliant FFIs and accounts that are excluded from the definition of “Financial Accounts”. Refer to **Annexure E** and **Annexure F**.

³¹ www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-04%20-%20FATCA%20IGA.pdf.

³² For the definition of “Partner Jurisdiction” refer to the **Glossary** appended to this guide.

³³ For the definition of “Entity” refer to the **Glossary** appended to this guide.

1.3.4 Memorandum of Understanding

The Memorandum of Understanding (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 Most favoured 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. SARS will post notices on its website if it has declined the more favourable terms.

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.³⁴

1.5 Interaction with U.S. Regulations

Reporting Institutions must apply the definitions described in the Agreement. The Agreement allows for the following exceptions to the rule:

- 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.

³⁴ Any industry comments can be sent to policycomments@sars.gov.za.

- In determining if an Entity is a Related Entity to another Entity under Article 1(1)(jj), South Africa may treat an Entity as not a Related Entity to 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.

A Financial Institution that wishes to apply a definition in the U.S. Regulations must notify SARS by sending an email to **SARS_EOI@sars.gov.za**.

1.6 Interaction with Financial Action Task Force Recommendations

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 Recommendations³⁵ set out a comprehensive and consistent framework of measures that countries should implement in order to combat money laundering and terrorist financing.

In terms of the Agreement, Reporting Institutions must apply the principles of the FATF Recommendations in interpreting the concepts “Investment Entity” and “Controlling Persons”.

2. Reporting Financial Institutions

A Reporting South African Financial Institution means any South African Financial Institution that is not a Non-Reporting South African Financial Institution, a deemed compliant FFI or exempt beneficial owner as described in Annex II.

A Non-Reporting South African Financial Institution is a South African Financial Institution (or another Entity resident in South Africa),³⁶ that is described as such in Annex II (refer to **Annexure E** for a summary of Exempt Beneficial Owners and Deemed Compliant FFIs).

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

There are three steps that an Entity must go through in determining whether it has a reporting obligation:

- Is the Entity South African?
- Is the Entity a Financial Institution?
- Is the Entity an Annex II Entity?

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.

³⁵ www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

³⁶ 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.

2.1 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.

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.³⁷

The term “resident” is not defined in the Agreement. For purposes of the Agreement the Financial Institution will be resident in the country where the Financial Institution is located.

A company not resident in South Africa 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”.

In most cases it will be clear whether or not a given Financial Institution is physically 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 Financial Institution liaise with the Competent Authority in order to resolve the issue.³⁸

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:

- 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., the Financial Institution has not entered into a FATCA Agreement with the IRS and if it cannot comply with the obligation to report directly to the U.S.³⁹

Under the facts described in Example 1 branch Z will be an NPFI in the absence of its country of residence having entered into an agreement, the Financial Institution has not entered into a FATCA agreement directly with the IRS (including instances where local

³⁷ To be read in conjunction with Article 4(5) – Special Rules Regarding Related Entities and Branches That Are Nonparticipating Financial Institutions.

³⁸ E-mail can be sent to **SARS_EOI@sars.gov.za**.

³⁹ See **5.3.2** for detailed information on NPFIs.

legislation prevents it from entering into the agreement) and if it has not complied with reporting and withholding.

2.2 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 (**2.2.1**)
- Depository Institution (**2.2.2**)
- Investment Entity (**2.2.3**)
- Specified Insurance Company (**2.2.4**)

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”.

The U.S. Regulations provide for a fifth category of Financial Institution for certain holding companies or treasury centres.⁴⁰ 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.

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.

2.2.1 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.⁴¹

If no income is received by an Entity, but the activities and operations performed by such an Entity consist of the holding, as a substantial portion of its business, financial assets for the benefit of others, then such an Entity will still meet the definition of a “Custodial Institution”.

⁴⁰ Section 1.1471(5)(e)(4)(v) of the U.S. Regulations.

⁴¹ Article 1(1)(h).

This would typically apply to Nominee Companies that do not earn fees for the holding of assets.

Examples of income from the following related financial services should be included in calculating the percentage of the entity's gross income so attributable:⁴²

- 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".

(a) 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.⁴³ In the case of such regulated nominees the administration of the underlying assets is generally performed by the applicable holding company or 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 the Financial Institution and the applicable holding company or administrator will be the Financial Institution and will have to determine whether it meets the definition of "Custodial Institution" or "Investment Entity".

(b) Collective Investment Scheme

In a Collective Investment Scheme (CIS) structure there is a master trust deed, the CIS, and there are then supplementary deeds which establish each portfolio (commonly refer to as unit trust funds). Often the relationship is one master deed to many supplementary deeds. The CIS will meet the definition of "Financial Institution". In most cases the CIS will have a management company. The management company could meet the definition of "sponsoring entity" of the CIS (all requirements under the Agreement must be met)⁴⁴ and would in that instance identify and report any U.S. Reportable Accounts on behalf of the CIS. The CIS would therefore be a Non-Reporting South African Financial Institution and would be treated

⁴² 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].

⁴³ Regulated by the Financial Services Board (FSB) under the Financial Markets Act 19 of 2012 (FMA), Financial Advisory and Intermediary Services 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).

⁴⁴ Annex II(IV)(B).

as a deemed-compliant FFI if it has a sponsoring entity that complies with the requirements under Annex II(IV)(B)(3).

(c) Central Securities Depository

Strate has a number of “participants” [Central Securities Depositories (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 they maintain detailed records of the beneficial owners. The MOU will apply in this instance and any reporting under the Agreement may be done at the CSDP or broker level.

2.2.2 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 accepts 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.⁴⁵ 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 000⁴⁶ to be spent at a later date, such as a pre-paid credit card or “e-money”⁴⁷ are 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.

⁴⁵ Act 94 of 1990.

⁴⁶ 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).

⁴⁷ The term “e-money” includes anything which can be converted into money or used as a payment mechanism.

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, any political subdivision of South Africa (includes a province or municipality) and any wholly-owned agency or instrument 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.

2.2.3 Investment Entity

An “Investment Entity”⁴⁸ 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.
- 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 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.

A trust may be considered to be an Investment Entity in cases where the trust or its activities are being “professionally managed”. In this regard, a trust will be considered to be professionally managed where the trustees appoint a Financial Institution to carry out the day-to-day functions of the trust or the financial assets of the trust are managed by the Financial Institution.

A Financial Institution will only be considered to be managing the assets of a trust where it manages the investment strategy for the assets. A Financial Institution that is engaged by a trust solely to acquire or dispose of financial assets, does not amount to management of the assets by the Financial Institution. A family trust which invests into a product (which includes a segregated mandate) offered by a Financial Institution, does not meet the “managed by” test.

Where the Financial Institution manages assets on a pooled basis and the trust merely buys into the product that is being managed on a pooled basis, it will not amount to the assets being “professionally managed”. In this instance the trust has merely invested in fixed assets that change in value relative to the assets in the pool.

⁴⁸ An “Investment Entity” is defined in Article 1(1)(j).

This would include investments in managed portfolios that are sold on a retail basis. In this regard the trust will be considered to be an NFFE that holds a financial account or similar asset.

The definition in the Agreement is different from the definition of “Investment Entity” set out in the U.S. Regulations.⁴⁹ If a Financial Institution wishes to apply the definition of “Investment Entity” in the U.S. Regulations it should inform SARS accordingly by sending an email to **SARS_EOI@sars.gov.za**.

Example 2 – Investment Entity – relating to “managed by”

Facts:

Entity A (whether it be a trust, partnership, corporation etc) seeks investment advice from Entity B (which is a Financial Institution and appropriately regulated). Entity B provides Entity A with several options:

1. Invest funds in a banking high interest account
2. Invest funds in a collective scheme
3. Invest funds in a retirement product
4. Invest funds in a segregated mandate offered and managed by Entity B

Result:

In each of the above cases, Entity A will not meet the “managed by” test. The term “managed” refers to full capacity to manage all the assets of a third party (which includes financial and non-financial assets of such third party).

2.2.4 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 –⁵⁰

- 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,

⁴⁹ 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).

⁵⁰ Article 1(1)(z)(1) to (3).

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.

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 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 or Annuity Contract to U.S. residents.⁵¹ The onus of proof of the existence of such a law or regulation rests on the Financial Institution.

2.3 Annex II Entities (treated as exempt beneficial owners or deemed compliant Foreign Financial Institutions)

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 (see **Annexure G**), exempt beneficial owners are 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 Fund⁵²

⁵¹ Annex I(II)(A)(3).

⁵² Reference made to retirement funds for this purpose will include provident funds and preservation funds.

- 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

2.3.1 Investment Entities that qualify as deemed-compliant Foreign Financial Institutions

Annex II⁵³ provides for several categories of Investment Entities (summarised below) that qualify as deemed-compliant FFIs. Financial Institutions described in Annex II(IV) are Non-Reporting South African Financial Institutions that shall be treated as deemed-compliant FFIs for purposes of section 1471 of the U.S. Internal Revenue Code.

(a) Trustee-Documented Trust

The term Trustee-Documented Trust for purposes of the Agreement means a South African trust and applies where the trustee of that trust is a Reporting Institution and reports all information pursuant to the Agreement on behalf of the trust. Under South African law (South African trusts are regulated under the Trust Property Control Act)⁵⁴ 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.⁵⁵ Section 6(4) of the Trust Property Control Act provides that authorisation can be given to a trustee which is a corporation. Such authorisation is given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable and any substitution for such nominee of some other person must be endorsed on the authorisation. A Trustee-Documented Trust meeting the necessary requirements, will thus be exempt from reporting.

(b) Sponsored investment entity and controlled foreign corporation

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.

A Financial Institution is a sponsored controlled foreign corporation if it meets the requirement listed in Annex II(IV)(2).

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 [see **2.2.1(b)**].

⁵³ Annex II(IV).

⁵⁴ 57 of 1988.

⁵⁵ 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.

(c) Sponsored, closely held investment vehicle

The requirements under this category are very similar to the requirements listed under sponsored investment entity [see **2.3.1(b)**]. A South African Financial Institution and the sponsoring entity must meet all the requirements listed under Annex II(IV)C.

(d) Investment advisors and investment managers

When investment advisors and investment managers meet the definition of “Investment Entity” it will be considered a Non-Reporting South African Financial Institutions if it is established in South Africa solely because it –

- renders investment advice to, and acts on behalf of; or
- manages portfolios for, and acts on behalf of,

a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a Financial Institution other than an NPFI.

(e) Collective investment vehicle

An Investment Entity established in South Africa that is regulated as a collective investment vehicle under the Collective Investment Schemes Control Act⁵⁶ will be considered a deemed-compliant FFI provided that all of the interests in the collective investment vehicle (including debt interest in excess of \$50 000) are held by or through one or more exempt beneficial owners, Active NFFEs described in Annex I(VI)(B)(4), U.S. Persons that are not Specified U.S. Persons or Financial Institutions that are not NPFIs.

2.4 Special rules regarding related entities and branches that are Nonparticipating Financial Institutions

If a South African Financial Institution, that otherwise meets the requirements described in Article 4(1) [Treatment of Reporting South African Financial Institutions] or is described in Article 4(3) [Specific treatment of South African retirement plans] or Article 4(4) [Identification and treatment of other deemed-compliant FFIs and exempt beneficial owners] has a Related Entity or branch –

- that operates in a jurisdiction that prevents such Related Entity or branch from fulfilling the requirements of a Participating FFI or deemed-compliant FFI for purposes of section 1471 of the U.S. Internal Revenue Code; or
- has a Related Entity or branch that is treated as an NPFI solely due to the expiration of the transitional rule for Limited FFIs and limited branches under the U.S. Treasury Regulations,

such South African Financial Institution shall continue to be in compliance with the terms of this Agreement and shall continue to be treated as a deemed-compliant FFI or exempt beneficial owner as appropriate for purposes of section 1471 of the U.S. Internal Revenue Code provided that –

- the South African Financial Institution treats such Related Entity or branch as a separate NPFI for purposes of all the reporting and withholding requirements of this Agreement and such Related Entity or branch identifies itself to withholding agents as an NPFI;
- each such Related Entity or branch identifies its U.S. accounts and reports the information with respect to those accounts as required under section 1471 of the U.S.

⁵⁶ 45 of 2002.

Internal Revenue Code to the extent permitted under the relevant laws pertaining to the Related Entity or branch; and

- such Related Entity or branch does not specifically solicit U.S. accounts held by persons that are not resident in the jurisdiction where such Related Entity or branch is located or accounts held by NPFIs that are not established in the jurisdiction where such Related Entity or branch is located and such Related Entity or branch is not used by the South African Financial Institution or any other Related Entity to circumvent the obligations under this Agreement or under section 1471 of the U.S. Internal Revenue Code, as appropriate.

If a Financial Institution wishes to apply the definition of “Limited FFI” in the U.S. Regulations it must inform SARS accordingly by sending an email to: **SARS_EOI@sars.gov.za**.

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. A Financial Institution that wishes to apply a definition in the U.S. Internal Revenue Code must notify⁵⁷ SARS. The relevant definition is included in **Annexure A**.

2.5 Securitisation Vehicles

The term securitisation is defined in a note issued by the South African Reserve Bank as the process by which a company converts various assests on its balance sheet into marketable securities which can be sold to investors and traded in the capital market⁵⁸, and is an established method of refinancing certain exposures by entities. If a role player of any securitisation scheme or structure which includes synthetic securitisation and traditional securitisation scheme as defined in the Government Gazette No 30628⁵⁹ is regarded as a Reporting Institution⁶⁰, who holds any Reportable Accounts,⁶¹ the due diligence procedures as set forth by the Annex I⁶² should be adhered to for each role player. However, if the role player is regarded as an exempt beneficial owner or deemed compliant FFI in terms of Annex II, Section I and II of the Agreement it is not necessary for such a role player to perform reporting or due diligence obligations under the Agreement.

⁵⁷ The Financial Institution must send an e-mail to **SARS_EOI@sars.gov.za**.

⁵⁸ N Gumata & J Mokoena : “Note on the impact of securitisation transactions on credit extension by banks”, in South African Reserve Bank Quaterly Bulletin, December 2005.

⁵⁹ Issued 1 January 2008.

⁶⁰ See paragraph 2 for detailed information on Reporting Financial Institutions.

⁶¹ See paragraph 3 for detailed information on Financial Accounts.

⁶² See paragraph 4 for detailed information on the Due diligence obligations under Annex I of

3. Financial Accounts

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 in the Agreement as U.S. Reportable Accounts.

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

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

- if it maintains any Financial Accounts;
- the type of Financial Accounts held;
- if the accounts under review are eligible for an exemption under Annex II(V) of 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.

3.1 Definition of “Financial Account”

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.

A Financial Account is, in the first instance, an account maintained by a Financial Institution but does not include any account that is excluded from the definition of “Financial Account” in Annex II. 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.

A Financial Account means an account maintained by a Financial Institution and includes –

- 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 interest that are regularly traded on an established securities market) in the Financial Institution;

- in the case of a Financial Institution not described above, any equity or debt interest in the Financial Institution (other than interests that are regularly traded on an established securities market), if –
 - 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;⁶³ and
 - the class of interest was established with a purpose of avoiding reporting in accordance with this Agreement; and
- any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a noninvestment-linked, non-transferable immediate life annuity that is issued to an individual and monetises a pension or disability benefit provided under an account that is excluded from the definition of “Financial Account” in Annex II.

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.

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.
- 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.⁶⁴

For purpose of the Agreement, interests are “regularly traded” if there is a meaningful volume of trading with respect to the interest on an ongoing basis. 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.

For purposes of the definition of “Financial Account” in Article 1(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 interest first registered on the books of such Financial Institution prior to 1 July 2014 and with respect to interest first registered on the books of such Financial Institution on or after 1 July 2014. A Financial Institution is not required to apply the preceding sentence prior to 1 January 2016.⁶⁵

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

⁶⁴ 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.

⁶⁵ Article 1(1)(s)(3).

3.1.1 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)⁶⁶ 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.

3.1.2 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.

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.

3.1.3 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 held for investment 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;

⁶⁶ Annex II(V)(G).

- a swap based upon a nonfinancial index;
- a contract for difference;⁶⁷
- 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 and fall under the definition of “Depository Account”.

3.2 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. Territory⁶⁸ for the benefit or account of another person such 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 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.

⁶⁷ 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.

⁶⁸ The term “U.S. Territory” is defined in the Agreement to mean American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands.

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. It should be noted that in instances where the Reporting Institution reviews electronically searchable data and discovers a current effective power of attorney or signatory authority granted to a person with a U.S. address, then the Reporting Institution must treat the account as a U.S. Reportable Account,⁶⁹ unless the Reporting Institution elects to apply Annex I(II)(B)(4) [see **4.2.1(b)**] and one of the exceptions applies with respect to that account.⁷⁰

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 Act⁷¹ 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.

3.3 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 U.S. Reportable Accounts.

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;⁷² and
 - Non-Retirement Savings Accounts maintained in South Africa (other than an insurance or Annuity Contract) that satisfy specific requirements under the laws of South Africa (for example, tax-free savings and investment accounts that meet all the requirements under Annex II(V) may be excluded from the definition of “Financial Accounts”);
- Certain term life insurance contracts;
- Accounts held by an estate;

⁶⁹ Annex I(II)(B)(1)(f).

⁷⁰ Under Annex I(II)(B)(4) the Reporting Institution may elect not to treat the Account as U.S. Reportable Account if it obtains, has previously reviewed and maintains a record of self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes. In some instances described in Annex I(II)(B)(4) other documentary evidence defined in Annex I(VI)(D) is also required to be obtained by the Reporting Institution.

⁷¹ Act 94 of 1990.

⁷² The requirements under the laws of South Africa are listed in Annex II(V)(A).

- Certain escrow accounts;
- Partner Jurisdiction Accounts;
- Living Annuities; and
- 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.

3.4 Reportable Accounts

For the purpose of the Agreement, the term Reportable Account in South Africa refers to a U.S. Reportable Account.

As mentioned above and subject to the exemptions mentioned in **3.3** 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 **3.4.1** and **3.4.2**.

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,⁷³ or a sponsoring entity on behalf of the sponsored investment entity,⁷⁴ 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.⁷⁵

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.

3.4.1 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 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 group⁷⁶ as the foregoing corporations, both categories not qualifying as Specified U.S. Persons for the purpose of the Agreement.

⁷³ Provided for under Article 5(3).

⁷⁴ Provided for under Annex II(IV).

⁷⁵ In terms of Annex I(1)(B)(4).

⁷⁶ For the definition of “affiliated group” refer to the **Annexure A** 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”).

3.4.2 Controlling Persons

Article 2 sets out certain obligations to obtain and exchange information. In terms of Article 2(2)(a)(1) each Reporting Institution has to obtain and report for each U.S. Reportable Account –

“the name, address, and U.S. TIN of each Specified U.S. Person that is an Account Holder of such account and, in the case of a Non-U.S. Entity that, after application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;”.

The due diligence procedures in Annex I (see 4) will have to be carried out on an account in order to identify the Controlling Persons in relation to the account.

For purposes of the Agreement the term “Controlling Persons” (as defined) means the natural persons who exercise control over an Entity. The term “Entity” is defined in the Agreement to mean a legal person or a legal arrangement such as a trust, partnership or association.

The Agreement specifically provides who the Controlling Persons are 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.

Under section 1 of the Trust Property Control Act⁷⁷ 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.⁷⁸ 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.

⁷⁷ 57 of 1988.

⁷⁸ 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.

The trustees are held accountable and they are the only persons that administer 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.

According to Regulations,⁷⁹ in the case of a partnership, information must –

- 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.

In the case of extraordinary partnerships (commanditarian 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 all the partners who are Specified U.S. Persons, if any U.S. indicia is found when performing the due diligence procedure prescribed in Annex I to 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.

An amendment to the FICA Act⁸⁰ was proposed in the Financial Intelligence Centre Amendment Bill⁸¹. The Bill was passed in the Parliament of South Africa in May 2016, but must still be signed off by the President of the Republic of South Africa. For purposes of determining a Controlling Person a Reporting Institution should in future consider the amended legislation once enacted.

⁷⁹ Regulation 13 of FICA (GNR. 1595 of 20 December 2002: Money Laundering and Terrorist Financing Control Regulations).

⁸⁰ Financial Intelligence Centre Act 38 of 2001.

⁸¹ B 33B of 2015.

4. Due diligence obligations under Annex I of the Agreement

Annex I to the Agreement sets out the procedures applicable for the identification and reporting by Reporting South African Financial Institutions of Reportable Accounts and on payments to certain NPFIs.

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 (4.2)
- New Individual Accounts (4.3)
- Preexisting Entity Accounts (4.4)
- New Entity Accounts (4.5)

According to Notice 2014-33 published by the IRS on 2 May 2014,⁸² 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 4.5.1).⁸³

Reporting Institutions must report information on Reportable Accounts maintained by the Reporting Institution as at February of every year, notwithstanding the remedial period of 18 months under Article 5(2)(b) [see 6.4]. If the Reporting Institution does not have the information required under the Agreement for a Reportable Account, the account must still be reported on the return to SARS under the required classification as specified in the BRS.

The applicable review, identification and communication requirements vary in accordance with the balance or value of the account as of the applicable cut-off date. The \$50 000 *de minimis* rule is applicable for New Individual Accounts that are either Depository Accounts or Cash Value Insurance Contracts.⁸⁴

The same applies with respect to a credit card account or a revolving credit facility treated as a New Entity Account.⁸⁵ A credit card account or a revolving credit facility treated as a New Entity Account is not required to be reviewed, identified or reported provided that the Reporting Institution maintaining such account implements policies and procedures to prevent an account balance owed to the Account Holder that exceeds \$50 000. Banking accounts where transactions meet the *de minimis* requirements (for example, banking products for the low-income market) will not have to be reviewed, identified or reported as long as the Financial Institution has policy and procedures in place to prevent any customer ever being able to exceed the *de minimis* limits.

For accounts denominated in a currency other than U.S. dollars (see 4.8), the applicable threshold amount must be converted into such other currency⁸⁶ using a published spot rate

⁸² www.irs.gov/pub/irs-drop/n-14-33.pdf.

⁸³ Therefore onboarding would be effective from 1 January 2015.

⁸⁴ Annex I(III)(A).

⁸⁵ Annex I(V)(A).

⁸⁶ In South Africa it would generally be Rand.

as of the last day of the calendar year preceding the year in which the balance or value shall be determined.⁸⁷

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.⁸⁸ For High Value Accounts⁸⁹ 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.⁹⁰

Subject to Annex I(II)(E)(1)⁹¹, 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 in this Annex I.

Unless otherwise provided, information with respect to a U.S. Reportable Account shall be reported annually as follows:

- 2014 reporting year (reporting period 1 July 2014 to 28 February 2015) – report to SARS by 30 June 2015
- 2015 reporting year (reporting period 1 March 2015 to 29 February 2016 – report to SARS by 31 May 2016
- 2016 reporting year (reporting period 1 March 2016 to 28 February 2017 – report to SARS by 31 May 2017
- For the 2017 reporting year and onward the reporting period will also end 28/29 February – report to SARS by 31 May.

4.1 Accounts not required to be reviewed, identified or reported

With each account below unless the Reporting Institution elects otherwise, either with respect to all Accounts or, separately, with respect to any clearly identified group of such accounts, where the implementing rules in South Africa provide for such an election, the following accounts are not required to be reviewed, identified or reported.

4.1.1 Preexisting Individual Accounts [Annex I(II)(A)]

The following Preexisting Individual Accounts are not required to be reviewed, identified or reported as U.S. Reportable Accounts:

- A Preexisting Individual Account with a balance or value that does not exceed \$50 000 as of 30 June 2014.⁹²
- A Preexisting Individual Account that is a Cash Value Insurance Contract or an Annuity Contract with a balance or value of \$250 000 or less as of 30 June 2014.⁹³

⁸⁷ Annex I(VI)(C)(4).

⁸⁸ Annex I(VI)(C)(1) and (2).

⁸⁹ Accounts with a balance or value that exceeds \$1 000 000.

⁹⁰ Annex I(VI)(C)(3).

⁹¹ See 4.2.5.

⁹² Subject to the additional procedures applicable to High Value Accounts (see 4.2.3).

⁹³ Subject to the additional procedures applicable to High Value Accounts (see 4.2.3).

- A Preexisting Individual Account that is a Cash Value Insurance Contract or an Annuity Contract, provided the law or regulations of South Africa or the United States effectively prevent the sale of such a Cash Value Insurance Contract or an Annuity Contract to U.S. residents (for example, if the relevant Financial Institution does not have the required registration under U.S. law, and the law of South Africa requires reporting or withholding with respect to insurance products held by residents of South Africa).
- A Depository Account with a balance of \$50 000 or less.

4.1.2 New Individual Accounts [Annex I(III)(A)]

The following New Individual Accounts are not required to be reviewed, identified, or reported as U.S. Reportable Accounts:

- A Depository Account unless the account balance exceeds \$50 000 at the end of any calendar year or other appropriate reporting period.
- A Cash Value Insurance Contract unless the Cash Value exceeds \$50 000 at the end of any calendar year or other appropriate reporting period.

Notwithstanding the de minimus concession provided, a Reporting Institution may adopt more stringent internal policies in order to identify a U.S. Reportable account regardless of the account balance of the New Individual Account.

4.1.3 Preexisting Entity Accounts [Annex I(IV)(A)]

A Preexisting Entity Account with an account balance or value that does not exceed \$250 000 as of 30 June 2014, is not required to be reviewed, identified, or reported as a U.S. Reportable Account until the account balance or value exceeds \$1 000 000.

4.1.4 New Entity Accounts [Annex I(V)(A)]

A credit card account or a revolving credit facility treated as a New Entity Account is not required to be reviewed, identified or reported, provided that the Reporting Institution maintaining such account implements policies and procedures to prevent an account balance owed to the Account Holder that exceeds \$50 000.

4.2 Preexisting Individual Accounts

A Reporting Institution that maintains a Preexisting Individual Account that is not required to be reviewed, identified or reported (see 4.1.1) or not an excluded account,⁹⁴ will need to apply the Preexisting Individual Account due diligence procedures to determine whether the account is a U.S. Reportable account.⁹⁵

The following rules and procedures apply for purposes of identifying U.S. Reportable Accounts among Preexisting Accounts held by individuals (Preexisting Individual Accounts). There are separate due diligence procedures for Lower Value Account and Higher Value Accounts.

⁹⁴ Accounts may be excluded from Financial Accounts under Annex II(V).

⁹⁵ In terms of Article I(1)(cc) 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 [unless there is a change in circumstance (see 6.1)].

4.2.1 Review procedures for Lower Value Accounts [Annex I(II)(B)]

Lower Value Accounts are 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.

(a) Electronic record search

The Reporting Institution must review electronically-searchable data maintained by it for any of the following U.S. indicia:⁹⁶

- Identification of the Account Holder as a U.S. citizen or resident;
- Unambiguous indication of a U.S. place of birth;
- Current U.S. mailing or residence address (including a U.S. post office box);
- Current U.S. telephone number;
- Standing instructions to transfer funds to an account maintained in the United States;
- Currently effective power of attorney or signatory authority granted to a person with a U.S. address; or
- An “in-care-of” or “hold mail” address that is the sole address the Reporting Institution has on file for the Account Holder. In the case of a Preexisting Individual Account that is a Lower Value Account, an “in-care-of” address outside the United States or “hold mail” address shall not be treated as U.S. indicia.

If none of the U.S. indicia listed above are discovered in the electronic record search, then no further action is required until there is a change in circumstances that results in U.S. indicia being associated with the account, or the account becomes a High Value Account described in 4.2.4.

If any of the U.S. indicia listed above are discovered in the electronic search, or if there is a change in circumstances that results in one or more U.S. indicia being associated with the account, then the Reporting Institution must treat the account as a U.S. Reportable Account unless it elects to apply one of the exceptions below [see 4.2.1(b)] with respect to that account.

Example 3 – Reviewing for U.S. indicia (indicia found)

Facts:

Customer A has a Depository Account that has a balance of \$70 000 as of 30 June 2014 at Reporting Institution B. Reporting Institution B reviews its electronically searchable data for U.S. indicia in relation to the account. Customer A is identified as a result of the review as having a U.S. place of birth (U.S. indicia).

Result:

Reporting Institution B must treat Customer A's Account as a U.S. Reportable Account unless Reporting Institution B elects to apply one of the exceptions discussed below (see 4.2.1.2) and the exceptions apply in relation to the account.

⁹⁶ Annex I(II)(B)(1).

Example 4 – Reviewing for U.S. indicia (indicia not found)

Facts:

Customer C has a Depository Account that has a balance of \$70 000 as of 30 June 2014 at Reporting Institution D. The Reporting Institution reviews its electronically searchable data for U.S. indicia in relation to the Account. No U.S. indicia are found. Four months after the review Customer C changed its contact number to a U.S. telephone number (U.S. indicia) with Reporting Institution D.

Result:

Reporting Institution D must treat Customer C's Account as a U.S. Reportable Account unless Reporting Institution D elects to apply one of the exceptions discussed below and the exceptions applies in relation to the account.

(b) Exceptions to treating an account as a U.S. Reportable Account [Annex I(II)(B)(4)]

Notwithstanding U.S. indicia found in reviewing electronic searchable data [4.2.1(a)], there are a number of separate exceptions where a Reporting Institution is not required to treat an account as a U.S. Reportable Account. This exception applies depending on the type of U.S. indicia that the Reporting Institution identifies in relation to the account that it maintains:

1. Where the Account Holder information unambiguously indicates a U.S. place of birth, the Reporting Institution obtains, or has previously reviewed and maintains a record of:
 - A self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form);
 - A non-U.S. passport or other government-issued identification evidencing the Account Holder's citizenship or nationality in a country other than the United States; and
 - A copy of the Account Holder's Certificate of Loss of Nationality of the United States or a reasonable explanation of:
 - The reason the Account Holder does not have such a certificate despite relinquishing U.S. citizenship; or
 - The reason the Account Holder did not obtain U.S. citizenship at birth.
2. Where the Account Holder information contains a current U.S. mailing or residence address, or one or more U.S. telephone numbers that are the only telephone numbers associated with the account, the Reporting Institution obtains, or has previously reviewed and maintains a record of:
 - A self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); and
 - Documentary evidence, as described in 4.6, establishing the Account Holder's non-U.S. status.

3. Where the Account Holder information contains standing instructions to transfer funds to an account maintained in the United States, the Reporting Institution obtains, or has previously reviewed and maintains a record of:
 - A self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); and
 - Documentary evidence, as described in **4.6**, establishing the Account Holder's non-U.S. status.
4. Where the Account Holder information contains a currently effective power of attorney or signatory authority granted to a person with a U.S. address, has an "in-care-of" address or "hold mail" address that is the sole address identified for the Account Holder, or has one or more U.S. telephone numbers (if a non-U.S. telephone number is also associated with the account), the Reporting Institution obtains, or has previously reviewed and maintains a record of:
 - A self-certification that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); or
 - Documentary evidence, as described in **4.6**, establishing the Account Holder's non-U.S. status.

4.2.3 Additional procedures [Annex I(II)(C)]

Review of Preexisting Individual Accounts that are Lower Value Accounts for U.S. indicia must be completed by 30 June 2016.

If there is a change of circumstances with respect to a Preexisting Individual Account that is a Lower Value Account that results in one or more U.S. indicia described in **4.2.1(a)** being associated with the account, then the Reporting Institution must treat the account as a U.S. Reportable Account unless the exceptions in **4.2.1(b)** applies.

Except for Depository Accounts with a balance of \$50 000 or less, any Preexisting Individual Account that has been identified as a U.S. Reportable Account under this section shall be treated as a U.S. Reportable Account in all subsequent years, unless the Account Holder ceases to be a Specified U.S. Person.⁹⁷

4.2.4 Enhanced review procedure for High Value Accounts [Annex I(II)(D)]

High Value Accounts are Accounts with a balance or value that exceeds \$1 000 000 as of 30 June 2014 or 31 December of 2015 or any subsequent year.

(a) Electronic record search [Annex I(II)(D)(1)]

The Reporting Institution must review electronically searchable data maintained by the Reporting Institution for any of the U.S. indicia described in **4.2.1(a)**.

(b) Paper record search [Annex I(II)(D)(2)]

If the Reporting Institution's electronically searchable databases include fields for, and capture all of the information described in **4.2.4(c)** (Exceptions to treating an Individual Account as a U.S. Reportable Account), then no further paper record search is required.

⁹⁷ Annex I(II)(C)(3).

If the electronic databases do not capture all of this information, then with respect to a High Value Account, the Reporting Institution must also review the current customer master file and, to the extent not contained in the current customer master file, the following documents associated with the account and obtained by the Reporting Institution within the last five years for any of the U.S. indicia described **4.2.1(a)**:

- The most recent documentary evidence collected with respect to the account;
- The most recent account opening contract or documentation;
- The most recent documentation obtained by the Reporting South African Financial Institution pursuant to Anti-Money Laundering/Know Your Customer (AML/KYC) Procedures or for other regulatory purposes;
- Any power of attorney or signature authority forms currently in effect; and
- Any standing instructions to transfer funds currently in effect.

(c) Exception where databases contain sufficient information [Annex I(II)(D)(3)].

A Reporting Institution is not required to perform the paper record search described **4.2.4(b)** if the Reporting Institution's electronically searchable information includes the following:

- The Account Holder's nationality or residence status;
- The Account Holder's residence address and mailing address currently on file with the Reporting Institution;
- The Account Holder's telephone number(s) currently on file, if any, with the Reporting Institution;
- Whether there are standing instructions to transfer funds in the account to another account (including an account at another branch of the Reporting Institution or another Financial Institution);
- Whether there is a current "in-care-of" address or "hold mail" address for the Account Holder; and
- Whether there is any power of attorney or signatory authority for the account.

(d) Relationship manager inquiry for actual knowledge [Annex I(II)(D)(4)]

In addition to the electronic and paper record searches described above, the Reporting Institution must treat as a U.S. Reportable Account any High Value Account assigned to a relationship manager (including any Financial Accounts aggregated with such High Value Account) if the relationship manager has actual knowledge that the Account Holder is a Specified U.S. Person.

(e) Effect of finding U.S. indicia [Annex I(II)(D)(5)]

If none of the U.S. indicia listed in **4.2.1(a)** are discovered in the enhanced review of High Value Accounts described above, and the account is not identified as held by a Specified U.S. Person in **4.2.4(d)** (relationship manager inquiry for actual knowledge), then no further action is required until there is a change in circumstances that results in one or more U.S. indicia being associated with the account.

If any of the U.S. indicia listed in **4.2.1(a)** (electronic record search) are discovered in the enhanced review of High Value Accounts described above, or if there is a subsequent change in circumstances that results in one or more U.S. indicia being associated with the account, then the Reporting Institution must treat the account as a U.S. Reportable Account

unless it elects to apply **4.2.1(b)** and one of the exceptions in such subparagraph applies with respect to that account.

Except for Depository Accounts with a balance of \$50 000 or less (see **4.1.1**), any Preexisting Individual Account that has been identified as a U.S. Reportable Account under this section shall be treated as a U.S. Reportable Account in all subsequent years, unless the Account Holder ceases to be a Specified U.S. Person.

4.2.5 Additional procedure applicable to High Value Accounts [Annex I(II)(E)]

If a Preexisting Individual Account is a High Value Account as of 30 June 2014, the Reporting Institution must complete the enhanced review procedures described in **4.2.4** with respect to such account by 30 June 2015. If based on this review such account is identified as a U.S. Reportable Account on or before 31 December 2014, the Reporting Institution must report the required information about such account with respect to 2014 in the first report on the account and on an annual basis thereafter. In the case of an account identified as a U.S. Reportable Account after 31 December 2014 and on or before 30 June 2015, the Reporting Institution is not required to report information about such account with respect to 2014, but must report information about the account on an annual basis thereafter.

If a Preexisting Individual Account is not a High Value Account as of 30 June 2014, but becomes a High Value Account as of the last day of 2015 or any subsequent calendar year, the Reporting Institution must complete the enhanced review procedures described in **4.2.4** 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. If based on this review such account is identified as a U.S. Reportable Account, the Reporting Institution must report the required information about such account with respect to the year in which it is identified as a U.S. Reportable Account and subsequent years on an annual basis, unless the Account Holder ceases to be a Specified U.S. Person.

Once a Reporting Institution applies the enhanced review procedures described in **4.2.4** to a High Value Account, the Reporting Institution is not required to re-apply such procedures, other than the relationship manager inquiry described in **4.2.4(d)**, to the same High Value Account in any subsequent year.

If there is a change of circumstances with respect to a High Value Account that results in one or more U.S. indicia described in **4.2.1(a)** being associated with the account, then the Reporting Institution must treat the account as a U.S. Reportable Account unless it elects to apply one of the exceptions in **4.2.1(b)**.

A Reporting Institution must implement procedures to ensure that a relationship manager identifies any change in circumstances of an account. For example, if a relationship manager is notified that the Account Holder has a new mailing address in the United States, the Reporting South African Financial Institution is required to treat the new address as a change in circumstances and, if it elects to apply the exceptions, is required to obtain the appropriate documentation from the Account Holder.

4.2.6 Preexisting Individual Accounts that have been documented for certain other purposes [Annex I(II)(F)]

A Reporting Institution that has 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 under a qualified intermediary, withholding foreign partnership, or withholding foreign trust agreement with the IRS, or to fulfil its obligations under chapter 61

of Title 26 of the United States Code, is not required to perform the procedures described in **4.2.1(a)** with respect to Lower Value Accounts or **4.2.4(a)** through **4.2.4(c)** with respect to High Value Accounts.

4.3 New Individual Accounts

The following rules and procedures apply for purposes of identifying U.S. Reportable Accounts among Financial Accounts held by individuals and opened on or after 1 July 2014.

4.3.1 Other New Individual Accounts [Annex I(III)(B)]

With respect to New Individual Accounts not described in **4.1.2**, upon account opening (or within 90 days after the end of the calendar year in which the account ceases to be described in **4.1.2**), the Reporting Institution must obtain a self-certification, which may be part of the account opening documentation, that allows the Reporting Institution to determine whether the Account Holder is resident in the United States for tax purposes (for this purpose, 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 jurisdiction). The Reporting Institution must also confirm the reasonableness of such self-certification based on the information obtained by the Reporting Institution in connection with the opening of the account, including any documentation collected pursuant to AML/KYC Procedures.

If the self-certification 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 (which may be an IRS Form W-9 or other similar agreed form).

If there is a change of circumstances with respect 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 Reporting Institution cannot rely on the original self-certification and must obtain a valid self-certification that establishes whether the Account Holder is a U.S. citizen or resident for U.S. tax purposes. If the Reporting Institution is unable to obtain a valid self-certification, the Reporting Institution must treat the account as a U.S. Reportable Account.

4.4 Preexisting Entity Accounts

4.4.1 Entity Accounts subject to review [Annex I(IV)(B)]

A Preexisting Entity Account that has an account balance or value that exceeds \$250 000 as of 30 June 2014, and a Preexisting Entity Account that does not exceed \$250 000 as of 30 June 2014, but the account balance or value of which exceeds \$1 000 000 as of the last day of 2015 or any subsequent calendar year, must be reviewed in accordance with the procedures set forth in **4.4.3** below.

4.4.2 Entity Accounts with respect to which reporting is required [Annex I(IV)(C)]

With respect to Preexisting Entity Accounts described in **4.4.1**, only accounts that are held by one or more Entities that are Specified U.S. Persons, or by Passive NFFEs with one or more Controlling Persons who are U.S. citizens or residents, shall be treated as U.S. Reportable Accounts. In addition, accounts held by NPFIs shall be treated as accounts for which aggregate payments as described in Article 4(1)(b) are reported to the South African Competent Authority.

4.4.3 Review procedures for identifying Entity Accounts with respect to which reporting is required [Annex I(IV)(D)]

For Preexisting Entity Accounts described in 4.4.1, the Reporting Institution must apply the following review procedures to determine whether the account is held by one or more Specified U.S. Persons, by Passive NFFEs with one or more Controlling Persons who are U.S. citizens or residents, or by NPFIs.

(a) Determine whether the Entity is a Specified U.S. Person [Annex I(IV)(D)(1)]

Review information maintained for regulatory or customer relationship purposes (including information collected pursuant to AML/KYC Procedures) to determine whether the information indicates that the Account Holder is a U.S. Person. For this purpose, information indicating that the Account Holder is a U.S. Person includes a U.S. place of incorporation or organisation, or a U.S. address.

If the information indicates that the Account Holder is a U.S. Person, the Reporting Institution must treat the account as a U.S. Reportable Account unless it obtains a self-certification from the Account Holder (which may be on an IRS Form W-8 or W-9, or a similar agreed form), or reasonably determines based on information in its possession or that is publicly available, that the Account Holder is not a Specified U.S. Person.

(b) Determine whether a Non-U.S. Entity is a Financial Institution [Annex I(IV)(D)(2)]

Review information maintained for regulatory or customer relationship purposes (including information collected pursuant to AML/KYC Procedures) to determine whether the information indicates that the Account Holder is a Financial Institution.

If the information indicates that the Account Holder is a Financial Institution, or the Reporting Institution verifies the Account Holder's Global Intermediary Identification Number on the published IRS FFI list, then the account is not a U.S. Reportable Account.

(c) Determine whether a Financial Institution is a Nonparticipating Financial Institution, payments to which are subject to aggregate reporting under Article 4(1)(b) [Annex I(IV)(D)(3)]

A Reporting Institution may determine that the Account Holder is a South African Financial Institution or other Partner Jurisdiction Financial Institution if the Reporting Institution reasonably determines that the Account Holder has such status on the basis of the Account Holder's GIIN on the published IRS FFI list or other information that is publicly available or in the possession of the Reporting Institution, as applicable. In such case, no further review, identification, or reporting is required with respect to the account.

If the Account Holder is a South African Financial Institution or other Partner Jurisdiction Financial Institution treated by the IRS as an NPFI, then the account is not a U.S. Reportable Account, but payments to the Account Holder must be reported as contemplated in Article 4(1)(b) [see 5.3.2].

If the Account Holder is not a South African Financial Institution or other Partner Jurisdiction Financial Institution, then the Reporting Institution must treat the Account Holder as an NPFI payments to which are reportable under Article 4(1)(b), unless the Reporting Institution –

- obtains a self-certification (which may be on an IRS Form W-8 or similar agreed form) from the Account Holder that it is a certified deemed-compliant FFI, or an exempt beneficial owner, as those terms are defined in relevant U.S. Treasury Regulations; or
- in the case of a participating FFI or registered deemed-compliant FFI, verifies the Account Holder's Global Intermediary Identification Number on the published IRS FFI list.

(d) Determine whether an account held by a Non-Financial Foreign Entity is a U.S. Reportable Account [Annex I(IV)(D)(4)]

With respect to an Account Holder of a Preexisting Entity Account that is not identified as either a U.S. Person or a Financial Institution, the Reporting Institution must identify –

- whether the Account Holder has Controlling Persons,
- whether the Account Holder is a Passive NFFE, and
- whether any of the Controlling Persons of the Account Holder is a U.S. citizen or resident.

In making these determinations the Reporting Institution must follow the guidance in subparagraphs (a) through (d) below in the order most appropriate under the circumstances.

- a. For purposes of determining the Controlling Persons of an Account Holder, a Reporting Institution may rely on information collected and maintained pursuant to AML/KYC Procedures.
- b. For purposes of determining whether the Account Holder is a Passive NFFE, the Reporting Institution must obtain a self-certification (which may be on an IRS Form W-8 or W-9, or on a similar agreed form) from the Account Holder to establish its status, unless it has information in its possession or that is publicly available, based on which it can reasonably determine that the Account Holder is an Active NFFE.
- c. For purposes of determining whether a Controlling Person of a Passive NFFE is a U.S. citizen or resident for tax purposes, a Reporting Institution may rely on –
 - information collected and maintained pursuant to AML/KYC Procedures in the case of a Preexisting Entity Account held by one or more NFFEs with an account balance or value that does not exceed \$1 000 000; or
 - a self-certification (which may be on an IRS Form W-8 or W-9, or on a similar agreed form) from the Account Holder or such Controlling Person in the case of a Preexisting Entity Account held by one or more NFFEs with an account balance or value that exceeds \$1 000 000.
- d. If any Controlling Person of a Passive NFFE is a U.S. citizen or resident, the account shall be treated as a U.S. Reportable Account.

(e) Timing or review and additional procedures applicable to Preexisting Entity Accounts [Annex I(IV)(E)]

The following rules and procedures apply for purposes of identifying U.S. Reportable Accounts and accounts held by NPFIs among Preexisting Accounts held by Entities.

- Review of Preexisting Entity Accounts with an account balance or value that exceeds \$250 000 as of 30 June 2014 must be completed by 30 June 2016.
- Review of Preexisting Entity Accounts with an account balance or value that does not exceed \$250 000 as of 30 June 2014, but exceeds \$1 000 000 as of 31 December 2015 or any subsequent year, must be completed within six months after the last day of the calendar year in which the account balance or value exceeds \$1 000 000.
- If there is a change of circumstances with respect to a Preexisting Entity Account that causes the Reporting Institution to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the Reporting Institution must redetermine the status of the account in accordance with the procedures set forth in **4.4.3**.

4.5 New Entity Accounts

The following rules and procedures apply for purposes of identifying U.S. Reportable Accounts and accounts held by NPFIs among Financial Accounts held by Entities and opened on or after 1 July 2014.

4.5.1 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).

In Notice 2014-33⁹⁸ the IRS announced that it is expected that Annex I of future Model 1⁹⁹ 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.

⁹⁸ Section IV of Notice 2014-33 www.irs.gov/irb/2014-21_IRB/ar04.html [Accessed 16 November 2016].

⁹⁹ 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.

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.

4.5.2 Other New Entity Accounts [Annex I(V)(B)]

With respect to New Entity Accounts not described in **4.1.4**, the Reporting Institution must determine whether the Account Holder is –

- a Specified U.S. Person;
- a South African Financial Institution or other Partner Jurisdiction Financial Institution;
- a participating FFI, a deemed-compliant FFI, or an exempt beneficial owner, as those terms are defined in relevant U.S. Treasury Regulations; or
- an Active NFFE or Passive NFFE.

A Reporting Institution may determine that the Account Holder is an Active NFFE, a South African Financial Institution, or other Partner Jurisdiction Financial Institution if the Reporting Institution reasonably determines that the Account Holder has such status on the basis of the Account Holder's GIIN or other information that is publicly available or in the possession of the Reporting Institution, as applicable.

If the Account Holder is a South African Financial Institution or other Partner Jurisdiction Financial Institution treated by the IRS as an NPFI, then the account is not a U.S. Reportable Account, but payments to the Account Holder must be reported as described in **5.3.2**.

In all other cases, a Reporting Institution must obtain a self-certification from the Account Holder to establish the Account Holder's status. The type of self-certification is not specified in the Agreement.

Based on the self-certification, the following rules apply:

- If the Account Holder is a Specified U.S. Person, the Reporting Institution must treat the account as a U.S. Reportable Account.
- If the Account Holder is a Passive NFFE, the Reporting Institution must identify the Controlling Persons as determined under AML/KYC Procedures, and must determine whether any such person is a U.S. citizen or resident on the basis of a self-certification from the Account Holder or such person. If any such person is a U.S. citizen or resident, the Reporting Institution must treat the account as a U.S. Reportable Account.

- If the Account Holder is –
 - a U.S. Person that is not a Specified U.S. Person;
 - a South African Financial Institution or other Partner Jurisdiction Financial Institution;¹⁰⁰
 - a participating FFI, a deemed-compliant FFI, or an exempt beneficial owner, as those terms are defined in relevant U.S. Treasury Regulations;
 - an Active NFFE; or
 - a Passive NFFE none of the Controlling Persons of which is a U.S. citizen or resident,

then the account is not a U.S. Reportable Account, and no reporting is required with respect to the account.

- If the Account Holder is an NPFI (including a South African Financial Institution or other Partner Jurisdiction Financial Institution treated by the IRS as an NPFI), then the account is not a U.S. Reportable Account, but payments to the Account Holder must be reported as described in **5.3.2**.

4.6 Documentary evidence [Annex I(VI)(D)]

For purposes of this Annex I, acceptable documentary evidence includes any of the following:

- A certificate of residence issued by an authorised government body (for example, a government or agency thereof, or a municipality) of the jurisdiction in which the payee claims to be a resident.
- With respect to an individual, any valid identification issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes.
- With respect to an Entity, any official documentation issued by an authorised government body (for example, a government or agency thereof, or a municipality) that includes the name of the Entity and either the address of its principal office in the jurisdiction (or U.S. Territory) in which it claims to be a resident or the jurisdiction (or U.S. Territory) in which the Entity was incorporated or organised.
- Any financial statement, third-party credit report, bankruptcy filing, or U.S. Securities and Exchange Commission report.

4.7 Alternative procedures for financial accounts held by individual beneficiaries of a Cash Value Insurance Contract [Annex I(VI)(E)]

A Reporting Institution may presume that an individual beneficiary (other than the owner) of a Cash Value Insurance Contract receiving a death benefit is not a Specified U.S. Person and may treat such Financial Account as other than a U.S. Reportable Account unless the Reporting Institution has actual knowledge, or reason to know, that the beneficiary is a Specified U.S. Person.

A Reporting Institution has reason to know that a beneficiary of a Cash Value Insurance Contract is a Specified U.S. Person if the information collected by the Reporting Institution and associated with the beneficiary contains U.S. indicia as described in **4.2.1(a)**. If a

¹⁰⁰ Subject to payments to an NPFI Account Holder that have to be reported in terms of Article 4(1)(b).

Reporting Institution has actual knowledge, or reason to know, that the beneficiary is a Specified U.S. Person, the Reporting Institution must follow the procedures in Annex I(II)(B)(3).

4.8 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 and New Entity Accounts)
- Preexisting Individual Account that is a Cash Value Insurance Contract or an Annuity Contract with a balance or value of \$250 000
- \$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 year preceding the reporting period, in terms of Annex I(VI)(C)(4). The rate can be obtained from any of the major trading banks in South Africa. The IRS also publishes end of the year exchange rates on its website.¹⁰¹

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 4 – Preexisting Individual Accounts¹⁰²

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.

¹⁰¹ www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Treasury-Department-End-of-Year-Exchange-Rates.

¹⁰² Annex I(II)(A).

Example 5 – New Individual Accounts¹⁰³

Facts:

Depository Accounts or Cash Value Insurance Contracts do not have to be reviewed, identified and 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 Accounts¹⁰⁴ must be completed by 30 June 2016.¹⁰⁵

4.9 Self-certification

Reporting Institutions are required to apply the rules and procedures described in Annex I to identify Financial Accounts of Specified U.S. Persons. Certain Individuals and Entity Accounts are however not required to be reviewed, identified or reported.¹⁰⁶

As part of the process of identifying the status of Account Holders, entities and identifying Controlling Persons, Reporting Institutions can rely on a self-certification. Self-certifications for New Accounts can be in a format currently used by a Financial Institution when new accounts are opened. In certain specific instances described in Annex I of the Agreement, self-certification includes the use of U.S. W-8 and W-9 forms.

A self-certification cannot be relied upon if a Reporting Institution has reason to know that it is incorrect or unreliable or there is a change in circumstances which change the Account Holder's status.

¹⁰³ Annex I(III)(A).

¹⁰⁴ 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.

¹⁰⁵ Annex I(II)(C)(1).

¹⁰⁶ Preexisting Individual Accounts – [Annex I(II)(A)], New Individual Accounts – [Annex I(III)(A)], Preexisting Entity Accounts – [Annex I(IV)(A)], New Entity Accounts – [Annex I(V)(A)].

5. Reporting

5.1 General

The reporting obligations applicable to each Reporting South African Financial 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 prescribes the reporting obligation of a Reporting Institution with regard to payments made 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 (Reporting Institutions).

The Reporting Institution may use third party service providers to fulfil the obligations imposed on such Reporting Institution as contemplated in the Agreement but these obligations shall remain the responsibility of the Reporting Institution.¹⁰⁷

For example, a fund may use a fund administrator to fulfil its due-diligence requirements or a company may use a business process outsourcing provider to fulfil its due diligence requirements. However, in the event of any irregularities or failure to meet the legislative requirements the Reporting Institution, in this case the fund or the company, will be held accountable.

A Financial Institution that is an Investment Entity can be classified as a Non-Reporting South African Financial Institution if another Entity has agreed with the Financial Institution to act as a sponsoring entity for the Financial Institution. The Financial Institution would then be the sponsored investment entity and treated as deemed-compliant FFI. The sponsoring entity must comply with various requirements listed in Annex II(IV)(3) including performing on behalf of the Financial Institution all due diligence, withholding, reporting and other requirements that the Financial Institution would have been required to perform if it were a Reporting South African Institution.

A Reporting Institution, sponsoring entity or third party service provider undertaking due diligence on behalf of a Reporting Institution, must retain records of the documentary evidence after a period of five years from the date of the submission of the return.¹⁰⁸

Non-Reporting South African Financial Institutions and Active 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 NPFI (unless the account is closed).¹⁰⁹

¹⁰⁷ Article 5(3).

¹⁰⁸ Section 29(3)(b) of the Tax Administration Act.

¹⁰⁹ Annex II(III)(A), items 7 and 8.

- 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.¹¹⁰
- An NFFE that is an “excepted NFFE” as described in the U.S. Regulations.¹¹¹

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 and Financial Accounts opened after that date. Any Financial Account closed on or before 29 June 2014 is not subject to reporting obligations under the Agreement.

Article 3(a) describes the time and manner in which the information must be obtained and exchanged with respect to 2014 and all subsequent year. For the first reporting year (2014), the Reporting Institution was only required to obtain and exchange the information listed in 1 to 6 below. Additional information must have been reported for 2015 year with a certain exception. With respect to 2016 and subsequent years all information below should be obtained and reported (refer to **Annexure C**).

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 identified after application of the due diligence procedures in Annex I, 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 value¹¹² 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 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

¹¹⁰ Annex II(IV)(B).

¹¹¹ 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).”

¹¹² For Cash Value Insurance Contracts or Annuity Contracts, this includes the cash value or surrender value of the contract.

Where the account is a Depository Account, the total amount of gross interest paid or credited to the account is also required to be reported.

For other accounts, that is, Financial Accounts that are not Depository Accounts or Custodial Accounts, 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

In accordance with Article 4(1)(b) for each of 2015 (the period ended 29 February 2016) and 2016 (the period ended 28 February 2017), 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 term “NPFI” is defined in Article 1(1)(r) of the Agreement as meaning an NPFI, as that term is defined in relevant U.S. Treasury Regulations, but does not include a South African Financial or other Partner Jurisdiction Financial Institution other than a Financial Institution treated as an NPFI pursuant to Article 5(2)(b) [see **6.4**] of the Agreement or a corresponding provision in an agreement between the United States and a Partner Jurisdiction.

The definition of “nonparticipating FFI” is set out in subsection 1.1471-1(b)(75) of the U.S. Treasury Regulations to mean a foreign financial institution other than a participating foreign financial institution, a deemed compliant foreign financial institution, or an exempt beneficial owner.

A financial institution can be classified as an NPFI in the following circumstances:

- In terms of Article 5(2)(b), where the IRS Competent Authority notifies the South African Competent Authority that a Reporting South African Financial Institution has been significantly non-compliant (see **6.4**) with its FATCA obligations, the South African Competent Authority must apply such relevant domestic law and remedies to address the significant non-compliance. If such enforcement action does not resolve the significant non-compliance after 18 months, then the U.S. will treat that Reporting South African Financial Institution as an NPFI. 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 (see **6.3** and **6.4**).
- In terms of Annex I(IV)(D)(3)(b), where the Account Holder is a South African Financial Institution or Partner Jurisdiction FI treated by the IRS as an NPFI (see above).
- In terms of Annex I(IV)(D)(3)(c), where the Account Holder is a financial institution that is not a South African Financial Institution or Partner Jurisdiction FI, then the Reporting South African Financial Institution that maintains the account must treat the Account Holder presumptively as being an NPFI unless the Reporting South African Financial Institution obtains a self-certification that the Account Holder is certified deemed compliant or an exempt beneficial owner. The exception will also apply if the Reporting South African Financial Institution confirms the Account Holder’s status as a participating FFI or registered deemed compliant FFI on the

published IRS FFI list [by verifying the Account Holder's GIIN on the published IRS FFI list].

- In terms of Annex I(V)(B)(3)(d), where the Account Holder is an NPFI (including a South African Financial Institution or Partner Jurisdiction FI treated by the IRS as an NPFI).

Examples of payments that are to be reported on are:

- Non-U.S. source interest paid on a financial account held by an NPFI.
- Non-U.S. source dividends paid on a financial account held by an NPFI.
- Payments to an NPFI in connection with a securities lending transaction, sale-repurchase transaction, forward, future, option, swap, or similar transaction which are directly or indirectly contingent upon or determined by reference to, the payment of interest or a dividend from U.S. sources.
- Non-US source payments to an NPFI that are the proceeds or benefits of a cash value insurance contract or annuity contract.

However, the Reporting Institution will not need to report for example on the following:

- Any payments made that are not in respect of a Financial Account maintained by the Financial Institution.
- Payments for the following: services (including wages and other forms of employee compensation (such as stock options)), the use of property, office and equipment leases, software licenses, transportation, freight, gambling winnings, awards, prizes, scholarships, and interest on outstanding accounts payable arising from the acquisition of goods or services.

In determining what payments are reportable, Reporting Institutions may follow the U.S. guidance¹¹³ and Regulations.

A Reporting Institution that maintains an account that is held by an NPFI will be treated as having paid an amount to the NPFI if an amount has been paid or credited to the NPFI. The Reporting Institution will need to report the aggregate amount of such applicable payments during the year, irrespective of whether the payee only became an NPFI part way through the year.

In addition to the obligation of a Reporting Institution to report on payments to NPFIs, a Reporting Institution that makes a payment of, or acts as an intermediary with respect to U.S. Source Withholdable Payments to any NPFI, must provide the immediate payer of such U.S. Source Withholdable Payment the information required for withholding and reporting to occur with respect to such payment.

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:AEOL.

¹¹³ www.irs.gov/pub/irs-pdf/p515.pdf.

The information required under Article 4(1)(e) shall be provided to the immediate payer of such U.S. Source Withholdable Payment the information required for withholding and reporting with respect to such 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 was 1 July 2014 to 28 February 2015. The information required for the first reporting period must have been submitted to SARS by 30 June 2015.¹¹⁴ Thereafter the required information must be submitted annually at the end of May for the reporting period ending February.¹¹⁵

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
- 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)¹¹⁶

The Agreement provides that the reportable information shall be exchanged between the U.S. Competent Authority and the South African tax authorities no later than 30 September 2015.¹¹⁷

¹¹⁴ Government Notice 509 in *Government Gazette* 37778 of 27 June 2014, available at www.sars.gov.za ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

¹¹⁵ 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.

¹¹⁶ As mentioned above, reporting obligations apply with respect to 2014 only if the account under review exists as of 30 June 2014.

¹¹⁷ 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.

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 and 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 is to be done is specified in SARS's BRS: AEOI which is available on the SARS website.¹¹⁸

5.7 Duty to keep records

In terms of section 26 of the TA Act 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 TA 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.

¹¹⁸ The document is available on SARS's Automatic Exchange of Information page, which can be accessed through the following path www.sars.gov.za ⇒ Business and Employers ⇒ Third party data Submission Platform ⇒ Automatic Exchange of Information (FATCA and CRS), scroll down to 'Automatic Exchange of Information (AEOI) documents and information' and select 'BRS for Automatic Exchange of Information (AEOI) version 2. 0. 0-25 for submission by May 2017'.

A person obliged to keep records must keep the records in the form generally prescribed by the Commissioner for SARS by public notice.¹¹⁹ 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.¹²⁰

Electronic form of record keeping is generally prescribed by the Commissioner for SARS by public notice.¹²¹

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 Account¹²² 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 if the Reporting Institution has identified the account as a Reportable Account, in applying the due diligence procedures. Closure of an account means the day that the account is finally closed and the Reporting Institution transfers the funds in the account.

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.¹²³ 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.

¹¹⁹ Government Notice 508 in *Government Gazette* 37778 of 27 June 2014, available at www.sars.gov.za ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

¹²⁰ Section 29(3)(a) of the Tax Administration Act, 2011.

¹²¹ Government Notice. 787 in *Government Gazette* 35733 of 1 October 2014, available at www.sars.gov.za ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

¹²² Preexisting Account is an account at 30 June 2014.

¹²³ Annex I(II)(B)(2) and Annex I(II)(E)(2).

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
- 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; and
- discuss remedies/solutions to prevent future non-compliance.

The Competent Authority will inform the IRS of the outcome of these discussions.

A Financial Institution that fails to comply after a period of 18 months must be treated as an NPFi. The IRS will publish a list of entities that are to be treated as NPFIs. 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

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 Payment¹²⁴ to any NPFIs, must provide the information required for withholding and reporting to the immediate payer 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.

¹²⁴ 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.

U.S. TIN

The term “**U.S. TIN**” means a U.S. federal taxpayer identifying number.

Annexure A – Definitions

Expanded affiliated group as defined in section 1471(e)(2) of the U.S. Internal Revenue Code means:

For purposes of this section, the term “**expanded affiliated group**” means an affiliated group as defined in section 1504(a), determined—

- (A) by substituting “more than 50 percent” for “at least 80 percent” each place it appears, and
- (B) without regard to paragraphs (2) and (3) of section 1504(b).

A partnership or any other entity (other than a corporation) shall be treated as a member of an expanded affiliated group if such entity is controlled (within the meaning of section 954(d)(3)) by members of such group (including any entity treated as a member of such group by reason of this sentence).

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.

Annexure B – Summary of the key implementation steps under the Agreement

Action	Implementation Schedule
Registration	Reporting Institutions should register themselves on the U.S. IRS Online FATCA Registration Portal as Financial Institutions within a Model 1 IGA jurisdiction to obtain a GIIN, in order to be included on the U.S. IRS' Foreign Financial Institution List and thereby to avoid FATCA withholding tax on U.S. source payments.
Identification and documentation	For Accounts held by individuals (Individual Accounts) guidance is provided under the following sections of the Guide in relation to the applicable due diligence requirements as set out in Annex I of the Agreement: • In respect of accounts maintained as of 30 June 2014 (Preexisting Individual Accounts) in section 4.2 • In respect of accounts opened on or after 1 July 2014 (New Individual Accounts) in section 4.3 For Accounts held by persons who are not individuals (Entity Accounts) guidance is provided under the following sections of the Guide in relation to the applicable due diligence requirements as set out in Annex I of the Agreement: • In respect of accounts maintained as of 30 June 2014 (Preexisting Entity Account) in section 4.4 • In respect of accounts opened on or after 1 July 2014 (New Entity Accounts in section 4.5 (According to Notice 2013-33 published by the IRS FFIs will be allowed to treat Entity Accounts opened between 1 July 2014 and 31 December 2014 as Preexisting Accounts with certain exclusions.) [see 4.5.1]
Reporting	2014 reporting year (reporting period 1 July 2014 to 28 February 2015) – report to SARS

	by 30 June 2015 2015 reporting year (reporting period 1 March 2015 to 29 February 2016 – report to SARS by 31 May 2016 2016 reporting year (reporting period 1 March 2016 to 28 February 2017 – report to SARS by 31 May 2017
	For the 2017 reporting year and onward the reporting period will also end 28/29 February and be reportable by 31 May.

Annexure C – Overview of timelines:

	Reporting year ¹²⁵			
	2014	2015	2016	2017 and onwards
Information to be reported				
In respect of each Specified U.S. Person that is an Account Holder; or each Passive NFFE that is an Account Holder and each Controlling Person of the Passive NFFE who is a Specified U.S. Person:	Yes	Yes	Yes	Yes
- Name - Address - U.S. TIN (if any)	Yes	Yes	Yes	Yes
	If on record ¹²⁶	If on record	If on record	Yes ¹²⁷
Account Number	Yes	Yes	Yes	Yes
Name and GIIN of Reporting Institution	Yes	Yes	Yes	Yes
Account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value (as of the end of the reporting period or if the account was closed during the year, immediately before closure)	Yes	Yes	Yes	Yes
In the case of any Custodial Account:				
- Total gross amount of interest - Total gross amount of dividends - Total gross amount of other income - Total gross proceeds from the sale or redemption of property	No	Yes	Yes	Yes
	No	Yes	Yes	Yes
	No	Yes	Yes	Yes
	No	No	Yes	Yes
Paid or credited to the account (or with respect to the account)				
In the case of any Depository Account:				
Total gross amount of interest paid or credited to the account	No	Yes	Yes	Yes

¹²⁵ Refer to Annex B “Reporting”.

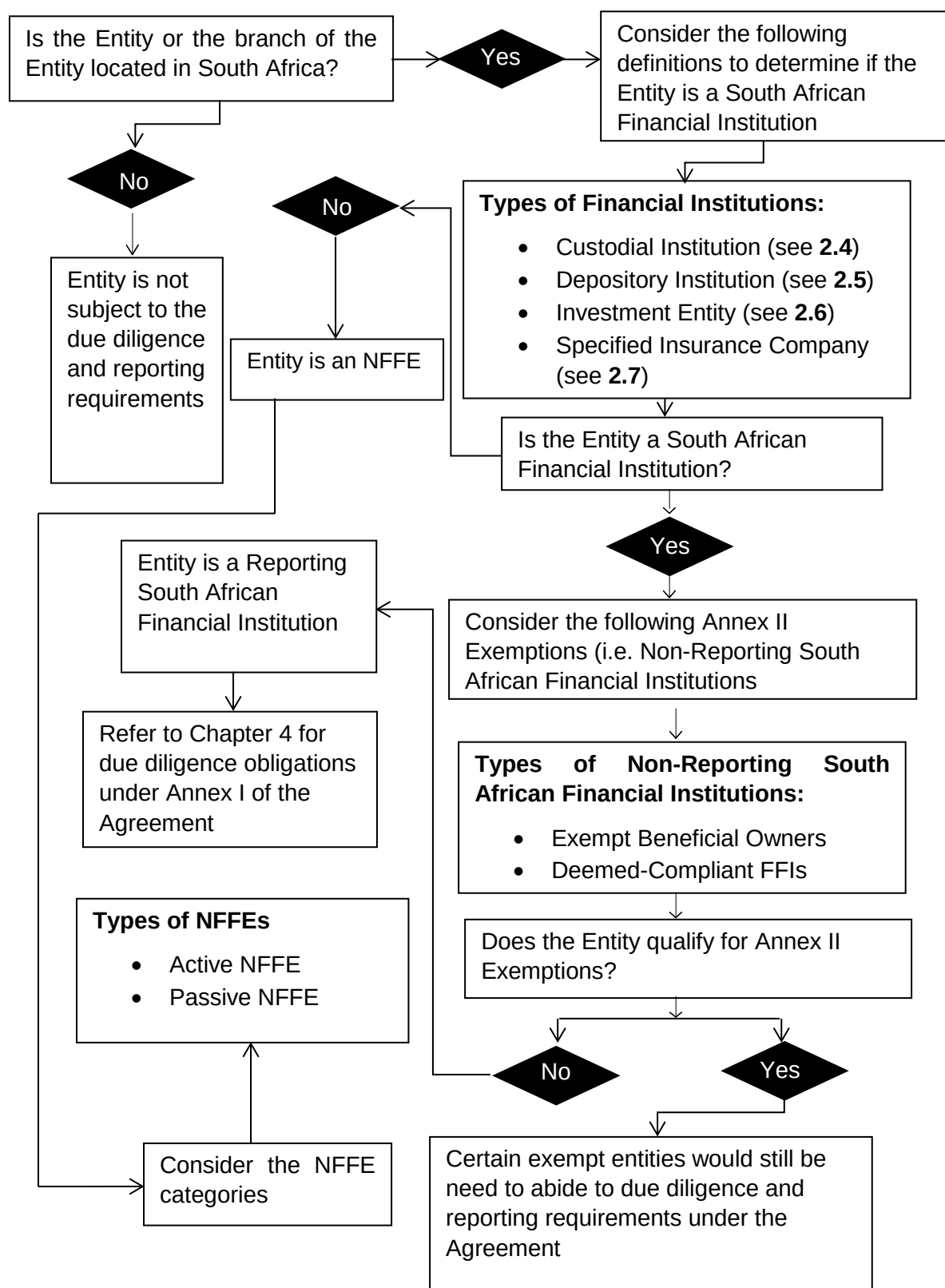
¹²⁶ In terms of Article 3(4) a Reporting Institution is not required to obtain and include the U.S. TIN of any relevant person if such taxpayer identifying number is not in the records of the Reporting Institution. In such case the date of birth of the relevant person should be reported, if it is in the records of the Reporting Institution.

¹²⁷ Article 6(4)(b).

In the case of any account other than a Custodial or a Depository Account: The Total gross amount paid or credited to the Account Holder with respect to the account including the aggregate amount of any redemption payments made to the Account Holder	No	Yes	Yes	Yes
Information to be reported with respect to payments to the financial account of each NPF ¹²⁸				
Name and address	No	Yes	Yes	No
Aggregate amount of payments	No	Yes	Yes	No

¹²⁸ Article 4(1)(b).

Annexure D – Classification of an Entity¹²⁹



¹²⁹ Source IRAS e-Tax Guide at www.iras.gov.sg/irashome/uploadedfiles/e-Tax_Guide/e-Tax%20Guide-Compliance%20Requirements%20of%20SG-US%20IGA%20on%20FATCA.pdf. Changed to apply for SA purposes.

Annexure E – Summary of Exempt Beneficial Owners and Deemed Compliant FFIs

Exempt Beneficial Owners	Deemed Compliant FFIs
Exempt Beneficial Owners other than Funds: • Governmental Entity • International Organisation • Central Bank	Small or Limited Scope Financial Institutions that Qualify as Deemed-Compliant FFIs: • Financial Institution with a Local Client Base • Local Bank • Financial Institution with Only Low-Value Accounts • Qualified Credit Card Issuer
Funds that qualify as Exempt Beneficial Owners: • Treaty-Qualified Retirement Fund • Broad Participation Retirement Fund • Narrow Participation Retirement Fund • Pension Fund of an Exempt Beneficial Owner • Investment Entity Wholly Owned by Exempt Beneficial Owners	Investment Entities that Qualify as Deemed-Compliant FFIs and Other Special Rules: • Trustee-Documented Trust • Sponsored Investment Entity and Controlled Foreign Corporation • Investment Advisors and Investment Managers • Collective Investment Vehicle

Annexure F – Account excluded from Financial Accounts

Type of Financial Accounts
Certain Saving Accounts • Retirement and Pension Account • Non-Retirement Savings Account
Certain Term Life Insurance Contracts
Account Held By an Estate
Escrow Accounts
Partner Jurisdiction Accounts
Living Annuities
Compulsory Annuities

Annexure G – Active NFFE

4. Active NFFE. An “Active NFFE” means any NFFE that meets any of the following criteria:

- a) Less than 50 percent of the NFFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50 percent of the assets held by the NFFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income;
- b) The stock of the NFFE is regularly traded on an established securities market or the NFFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market;
- c) The NFFE is organized in a U.S. Territory and all of the owners of the payee are bona fide residents of that U.S. Territory;
- d) The NFFE is a government (other than the U.S. government), a political subdivision of such government (which, for the avoidance of doubt, includes a state, province, county, or municipality), or a public body performing a function of such government or a political subdivision thereof, a government of a U.S. Territory, an international organization, a non-U.S. central bank of issue, or an Entity wholly owned by one or more of the foregoing;
- e) Substantially all of the activities of the NFFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution, except that an NFFE shall not qualify for this status if the NFFE functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;
- f) The NFFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFFE shall not qualify for this exception after the date that is 24 months after the date of the initial organization of the NFFE;
- g) The NFFE was not a Financial Institution in the past five years, and is in the process of liquidating its assets or is reorganizing with the intent to continue or recommence operations in a business other than that of a Financial Institution;
- h) The NFFE primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution;
- i) The NFFE is an “excepted NFFE” as described in relevant U.S. Treasury Regulations; or
- j) The NFFE meets all of the following requirements:
 - i It is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organization, business league, chamber of commerce, labor organization, agricultural or horticultural organization, civic league or an organization operated exclusively for the promotion of social welfare;
 - ii. It is exempt from income tax in its jurisdiction of residence;

- iii It has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
- iv The applicable laws of the NFFE's jurisdiction of residence or the NFFE's formation documents do not permit any income or assets of the NFFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFFE has purchased; and
- v The applicable laws of the NFFE's jurisdiction of residence or the NFFE's formation documents require that, upon the NFFE's liquidation or dissolution, all of its assets be distributed to a governmental entity or other non-profit organization, or escheat to the government of the NFFE's jurisdiction of residence or any political subdivision thereof.