16 November 2012

Neil Higgins
HM Revenue & Customs
CTIAA Financial Products & Services Team
Room 3C/04
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London
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Email: fatca.consultation@hmrc.gsi.gov.uk

Dear Neil

Implementing the UK-US FATCA Agreement

As you are aware, IMA represents the UK-based investment management industry. Our members include independent fund managers, the investment arms of retail banks, life insurers and investment banks, and the managers of occupational pension schemes. They are responsible for the management of over £4 trillion of funds (based in the UK, Europe and elsewhere), including authorised investment funds, institutional funds (e.g. pensions and life funds), private client accounts and a wide range of pooled investment vehicles.

IMA strongly supports the Government's collaboration with the US on implementation of FATCA and the intergovernmental agreement (IGA) between the UK and the US. We welcome and fully support the Government's engagement with the financial sector in order to ensure that FATCA can be implemented in a practical manner and compliance costs are minimised. As a result of this engagement, the UK is now in a good position to be able to implement FATCA within the expected timeframe.

Our responses to selected questions are included in Appendix 1 to this letter. We look forward to continuing to work closely with the Government.

Please do not hesitate to contact me on 020 7831 0898 or at jmorley-smith@investmentuk.org should you wish to discuss in more detail.

Yours sincerely

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Appendices

1. IMA response to HMRC's consultation on the implementing the UK-US FATCA Agreement

2. Suggested guidance extracts

   2A – Definition of Custodial Entity applying to fund intermediaries
   2B – Practical application of the definition of Investment Entity in the context of funds
   2C – New individual accounts - Self-certification
   2D – Definition of new accounts in relation to funds

3. Paper on the impact of Article 4(1)(b)

Appendix 1

IMA response to HMRC's consultation on the implementing the UK-US FATCA Agreement

Q.1. Are there practical issues with applying the definition of Custodial Institution? If so, what are they and how would they arise? How could these issues be addressed in UK legislation or guidance?

In most cases it will be clear whether an entity is a Custodial Institution or not. In the context of funds, we expect platforms and other intermediaries who hold fund interests on behalf of investors (by acting as nominees of the investor for the fund interests) to be Custodial Institutions, and this should be made clear in the guidance. An example of how this might be worded is in Appendix 2 of this letter.

In some cases there may be doubt over whether a strict reading of the 20% condition in definition of Custodial Institution will apply to all intermediaries acting as nominees. This may be the case if, for example, the income derived from acting as nominee arises in another group company. Fund intermediaries and nominees will nevertheless still be Financial Institutions because they will be within the definition of Investment Entity.

In order to avoid confusion, we recommend that the guidance should be clear about what types of entities are expected to be within the definition of Custodial Institution in the context of funds (as the example in Appendix 2 illustrates).

Q.3. Do you agree that it would it be most appropriate for the fund to carry the obligations imposed on financial institutions and for the fund manager or other service provider to carry out the reporting on behalf of the fund? Is there a suitable alternative and if so how could it be provided for?

IMA agrees that the fund should carry the obligations imposed on financial institutions in respect of investors in the fund (as accountholders). We believe that it should be left to the fund to discharge the obligation to report in the manner most appropriate to it, as this will vary from fund structure to fund structure.

For example, authorised funds in the UK (which are authorised unit trusts, open-ended investment companies, and the soon to be launched tax-transparent funds) are required to have a fund manager that acts as operator of the fund and is normally assigned responsibility for fulfilling the regulatory obligations of the fund. By virtue of its regulatory status, the fund manager will normally have responsibility for FATCA compliance. But a fund manager is not itself a third party service provider.

Fund operators typically use third party service providers to provide fund administration, including maintaining records of investors and account balances and transactions – services provided by the transfer agent. In these cases the fund manager will typically appoint the third party service provider to fulfil FATCA due diligence and reporting requirements as they will have the necessary records for performing FATCA compliance.

Many corporate offshore funds (and in the UK, listed closed-ended investment companies – known as Investment Trust Companies (ITCs) or Venture Capital Trusts (VCTs)), on the other hand, do not have an 'operator' but instead are managed by a board of directors. The board of directors may outsource some of or all its functions, including the management of the assets, to external parties. But other than by virtue of contractual arrangements with third parties, it remains responsible for discharging FATCA obligations.

Although ITCs fall within the definition of Investment Entities, their equity interests (accounts) are bought and sold on a recognised exchange, and the ITC performs no AML/KYC checks on those buying or holding shares. Imposing account identification obligations on ITCs is against the spirit of the IGA, which looks to align FATCA obligations with existing AML requirements, and risks duplication. We fully support the submission of the Association of Investment Companies in calling for a definition of Financial Account to exclude shares or securities which are admitted to trading on UK markets.

Q.4. Are there any other definitions in Article 1 that give rise to uncertainty or raise practical issues which could usefully be clarified in the UK legislation or guidance, and if so how?

<u>Breadth of definition of Investment Entity</u>

The definition of Investment Entity in subparagraph 1(j)(3) includes entities that are "investing, administering or managing funds". This definition will include investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts, none of which will maintain Financial Accounts that are relevant to FATCA – the only relevant accounts are the investors in the funds. The breadth of the definition is likely to cause confusion, does not assist with meeting the objectives of FATCA.

However, IMA does not think the requirement for all such Financial Institutions to register is in itself problematic, provided the regulations and guidance are sufficiently clear that the obligation in relation to the financial accounts (being the investors in the funds) should lie with the fund alone (as indicated in our response to Q3 above), and provided that the registration process is simple.

Financial Accounts of Investment Entities are defined as the equity and debt interests in the Investment Entities in subparagraph 1(s)(1). This is intended to catch the equity and debt interest of funds. However, given the breadth of the definition of Investment Entity, the equity and debt interests of investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts will also be Financial Accounts. This serves no purpose.

IMA believes that the guidance should clarify that where entities are within the definition of Investment Entity only by virtue of "investing, administering or managing funds" (subparagraph 1(j)(3)), the only the equity and debt interests of the funds in question should be regarded as Financial Accounts.

An example of how this might be worded is in Appendix 2 of this letter.

<u>Management of segregated accounts</u>

In addition to the management of collective investment schemes, an investment manager may also be appointed to provide investment management services directly by the legal owner of assets as segregated accounts. In these cases, the segregated accounts are custodial accounts of a custodian (who will need to treat the investors as their accountholders as there is no interposing fund). Any additional reporting requirements imposed on the manager by virtue of managing the investments would represent duplicate FATCA reporting.

It is therefore important to clarify that no reporting is required by an investment manager on segregated accounts by virtue of them managing investments alone. This concept is in line with the idea that the fund is the only relevant UKFI in an investment management context.

Note that in cases where a discretionary investment manager also holds assets on behalf of clients (i.e. acts as custodian), reporting will be required on those accounts by virtue of the investment manager falling within the definition of Custodial Institution.

Q.6. In what circumstances would imposing a UK definition of "other income" include income types not included under FATCA? What would be the best way to address this issue, balancing reporting on a broader category of income with the administrative burdens of separating different types of income?

The Offshore Funds (Tax) Regulations (SI 2009/3001) have the following effect:

1) undistributed income in reporting offshore funds is treated as income for UK tax purposes; and

2) capital gains in non-reporting offshore funds are treated as income for UK tax purposes.

Neither of the circumstances above would give rise to income being reported for FATCA purposes. (However, (2) would be reported as gross proceeds from sale.) In the context of the IGA this is relevant for interests in offshore funds that are held through UK intermediaries that are Custodial Institutions.

Another circumstance in which the UK definition of other income would not otherwise be included under FATCA might be where compensation is paid for errors or similar ex-gratia payments.

Q.7. What would be the main concerns, especially for entities new to reporting account information, to take into account when considering whether to specify the data format and method of transmission?

Financial Institutions are spending significant amounts of money on developing FATCA reporting systems. We therefore welcome HMRC's approach of coordinating FATCA schema and data transmission design with other FATCA partners to ensure a consistent approach is adopted worldwide.

We also welcome the approach adopted in discussions with FATCA partners at the OECD of aligning FATCA reporting systems with existing information reporting systems, particularly TRACE. IMA believes that coordinating systems design in this way could result in significant costs savings for businesses.

As participants in the Business Advisory Group on TRACE and FATCA to the OECD, IMA fully supports the points raised by it in the meetings at the OECD in September and October this year, and in the subsequent letter to the OECD of 19th October. These are:

- Urgent clarification on the scope and application of [non-IGA] FATCA is needed in order for businesses to make progress on systems builds (in order to meet the expected implementation dates).
- Consistency is required in the implementation of FATCA in all (IGA and non-IGA) countries.
- To the extent possible, systems changes to accommodate FATCA should be minimised.

Q.8. By when would you need to know the data format and transmission method in order to be in a position to report in the first half of 2015? Would any transitional measures (such as phasing in the requirements) be useful to allow for any necessary systems changes to take place?

By June 2013 to allow for development and testing.

Q.10. Do you have any concerns regarding the implementation of Article 4 and if so how could they be addressed in UK legislation or guidance?

Article 4(1)(b)

IMA is concerned about the scope and impact of Article 4(1)(b) on Financial Institutions. Article 4(1)(b) requires UKFIs to report the names of any NPFFI to which it makes payments. The requirement is not limited to financial accountholders, but will also apply to, for example, payments of dividends to the equity interest holders of the UKFI and payments of interest to any party holding a debt interest in the UKFI. FIs that do not have any financial accounts (e.g. a listed company) are particularly affected by this as they do not have a contractual relationship with shareholders, they are not required to perform AML/KYC checks or perform any FATCA due diligence, but yet have to identify any NPFIs which hold an equity interest and report payments to them.

IMA believes that the scope and effect of Article 4(1)(b) has not been fully understood by UK Financial Institutions and we urge HMRC to consult further on the practical implications of the requirement. At Appendix 3 is a paper previously sent to the Government on the impact of Article 4(1)(b) and possible remedies.

Registration process

IMA shares the concerns expressed by other industry bodies on the continued uncertainty surrounding the registration process for UKFIs. There is now an urgent need to clarify how the registration process will work in practice, and how the UK regulations will mandate all UKFIs to register with the US.

Until more information is available about the registration process, and how UKFIs can be identified by a FATCA ID number, UKFIs are unable to make meaningful progress in implementing FATCA due diligence systems.

Registration at sub-funds or umbrella level

IMA believes that funds should have the option to register as an UKFI on either an umbrella level, or at a sub-fund level. This should be provided for specifically in UK guidance and funds should choose either option (but not both). Each umbrella or sub-fund should have its own FATCA identification number.

Simplified reporting for funds

Fund managers may have responsibility for hundreds of funds, and therefore it is essential that the reporting requirements should be simple, and preferably there should be the option to provide an aggregate report for a number of funds, together with the return for their fund managers (which will be nil returns in most cases). This would require nominating a single point of contact for multiple funds.

Moreover, certain funds will comprise more than one legal entity. For example, property funds often hold property via property holding companies (or SPVs) rather than directly. The property holding companies may be FIs in their own right. These fund structures are complicated and can consist of dozens, sometimes hundreds, of legal entities. Such fund structures would benefit from having consolidated reporting for UK entities within the structure. This could work in the same way, and alongside the bulk-reporting of funds managed by the same fund manager.

Phased introduction of reporting obligations

UKFIs would benefit from the option to report full information from commencement, rather than the gradual introduction of additional elements as envisioned by the IGA. Many UKFIs will fund it easier to build one report to the final specifications, rather than gradually to implement additional elements to the report over time.

Q.11. Does UK legislation need to include provisions regarding a suitable period for repair of any errors where they are spotted by the financial institution or HMRC? Also we would welcome views on any potential difficulties with applying HMRC's existing penalty regimes to non-compliance with the Agreement.

The UK regulations should provide for flexibility in determining a period of repair. The complexity of the reporting requirements and the heavily intermediated and outsourced models that occur in the funds environment mean that it will not always be obvious how long a reasonable period of repair should be.

Regulation 108 of the Offshore Funds (Tax) Regulations (SI 2009/3001) provides a good example of a breaches regime that can be used in the context of FATCA for the following reasons:

- It distinguishes between serious breaches (which result in loss of status) and minor breaches.
- It allows breaches to be ignored if they are remedied "as soon as reasonably possible" and without HMRC intervention.
- It defines serious breaches only as a deliberate breach or a succession of minor breaches occurring over a number of years.

IMA believes that these characteristics accord with the principles in 3.50 of the consultation document and, therefore, this Regulation might be considered as a useful template for the FATCA regime.

In relation to minor and administrative breaches, the financial penalties regime associated with section 18 returns and the EU Savings Directive might be a suitable reference point.

Q.12. Would it be desirable to have examples of minor and significant non-compliance contained in guidance material?

Yes.

Q.13. We think there would be benefits in having a nominated individual undertaking certain compliance responsibilities and providing assurance that the financial institution's obligations have been met. We would welcome thoughts on such a role, and on its potential scope.

One of the key benefits of the IGA is the removal of the requirement to appoint a Responsible Officer. Outside the IGA, Financial Institutions have had serious concerns about the requirement to name an employee to discharge personal responsibility for FATCA compliance.

The attractiveness of the IGA approach to implementing FATCA could be undermined significantly if the UK replicates the more difficult parts of FATCA in its domestic legislation, and where there is no requirement to do so under the IGA. This includes the Responsible Officer role.

Furthermore, the UK has little precedent of adopting such an approach. Instead, signatories to, for example, corporation tax returns sign on behalf of companies. IMA strongly believes this is the approach that should be adopted for UK implementation of FATCA.

Q.14. Do you have any concerns regarding the implementation of Article 5 and if so how could they be addressed in UK legislation or guidance?

Regulation 17 of the Money Laundering Regulations 2007 (MLR) allow a UKFI to place reliance on AML checks being performed by a third party provided the UKFI remains liable for any failure to apply AML measures (para (1)(a)). Paragraph 3 of Article 5 follows the same approach. In practice, many UKFIs find it difficult to apply the reliance provisions of the MLR where there is no contractual relationship between the UKFI and, for example, the IFA. It would be helpful if UK regulations and guidance could limit responsibility for the actions of third party service providers to those directly contracted by the UKFI.

Q.16. We welcome comments on any circumstances where applying the US Regulations provide a less burdensome approach than applying the terms of the Agreement.

Under the current drafting, we are not aware of any circumstances in which the proposed US Regulations provide a less burdensome approach.

We note that the current proposed US Regulations have a different definition of Investment Entity. IMA believes the definition in the proposed US Regulations works better for funds and avoids the potential problems identified in our responses to Q3 and Q4.

Q.17. Comments are welcomed on whether the use of the term "value" in relation to specific financial products causes any difficulties for product providers.

In the context of UK-authorised funds the rules applicable to the valuation of assets within a fund and the valuation and pricing of fund interests are set out by the FSA in COLL.

For funds other than UK-authorised funds, the Alternative Investment Funds Managers Directive (AIFMD) requires that the rules applicable to the valuation of assets and the calculation of net asset value per unit shall be laid down in law and/or in the fund rules (e.g. its prospectus).

IMA believes that the COLL rules and (when implemented into UK law) AIFMD should give sufficient clarity on the application of the term 'value' for funds in FATCA. However, we recommend that HMRC consult with industry bodies representing private equity and real estate investment, where uncertainty around valuation of fund interests is likely to arise.

Q.19. We would welcome comments on the type of issues that should be taken into account when considering the format of a similar agreed form. For example with regard to the interaction between financial institutions and third party service providers undertaking the necessary AML or in relation to electronic accounts such as internet banking.

The IGA sets out requirements for self-certification in two circumstances – where US indicia are found in pre-existing accounts, and for all new accounts. The UK regulations and guidance should be clear that these are separate processes and should set out clear procedures for obtaining the self-certification in either case.

Where US indicia has been found following an electronic review of information on **pre-existing** accounts, a UKFI can elect to obtain a self-certification, which may be on a W-8 or similar agreed form (Annex 1, B.1.4.). We agree with the approach outlined in the consultation document that governments of FATCA partner countries and others should agree the design and contents of such a form, and we believe that the OECD would be a good forum to have discussions, alongside business representatives.

It is critically important that multinational Financial Institutions should be able to use the same or substantially the same form in every country it operates in.

For self-certification for new accounts, see our response to Q22.

Q.20. We welcome comments with regard to the role of a relationship manager and on how to define this term appropriately for UK institutions.

IMA believes that the UK regulations and guidance should be clear that there is no requirement to appoint a relationship manager where none exists.

IMA requests that HMRC should provide clarity on what is meant by relationship manager. We are not aware of any definition of relationship manager that is applied consistently across the industry.

Q.22. We welcome comments on how respondents see this process impacting on differing operating procedures, particularly regarding any timing issues this will raise and how this process will work where third party service providers are used to carry out the AML process.

<u>Format and checking of self-certification</u>

UK guidance should set out clear procedures for obtaining self-certification on new account opening and should illustrate this with examples.

IMA has been in discussions with other industry bodies and agreed suggested guidance that might be used by HMRC. This is at Appendix 2.

<u>Definition of new account</u>

Whilst we expect each fund (sub-fund or umbrella) to have to register as a UKFI, the fund manager (of a UK authorised fund) will normally be responsible for discharging the FATCA obligations of the fund. The fund manager may act for a number of funds.

IMA believes that new accounts should be defined by reference to whether an account has been documented by the fund manager. Otherwise, a fund manager responsible for FATCA compliance may have to request multiple self-certifications from the same investor each time they make an investment into a separate fund managed by the same manager. Allowing a fund manager to treat an investor as a ‘documented’ accountholder where they already have documentation for them would be a practical and cost-effective way for fund managers to operate account identification procedures.

An example of how this can be provided for in guidance is set out in appendix 2.

Q.23. We welcome comments on whether institutions would favour the definition of a change of circumstances to be set out only in guidance or also defined in the legislation. What would be the pros and cons of either approach?

IMA generally favours the use of guidance, and in particular we believe that the definition of change in circumstance can be set out in guidance.

We also believe that guidance should be provided around accounts that inadvertently enter within the scope of FATCA after opening, such as voided ISAs or ISAs held by deceased persons. These would not have been subject to self-certification on opening and obtaining such a document at the point at which they come within scope may prove difficult and give rise to significant customer issues.

Q.24. Does this aggregation process cause any particular difficulties for businesses? For example where systems can link accounts together but don't go as far as totalling up separate balances. How would this affect an entity's ability to undertake the due diligence required?

Funds appear to be faced with various options on how they might aggregate accounts at the level of:

- the fund manager or
- the umbrella fund or
- the sub-fund

IMA believes that the best practical solution is for funds to aggregate at the same level at which they are reported (see response to Q.10) and where systems allow for aggregation. So, where a registration applies at umbrella level, a fund will need to aggregate interests in each of the sub-funds of the umbrella. Where a registration applies at sub-fund level, a fund will need to aggregate at the sub-fund level. (In practice no aggregation can occur at the sub-fund level. As equity interests in funds are fungible assets, an investor in a fund would only ever be deemed to have a single account for FATCA purposes.)

In addition, where a UKFI provides multiple accounts to customers, some of which might be excluded under Annex II (such as ISAs and SIPPs), the UKFI can elect to include in the aggregation process the value of those excluded accounts to accommodate systems that may already do this automatically. Again, we believe this option should be included in guidance to avoid issues around data protection as it may well result in a higher classification being given to a customer than would otherwise be the case.

Appendix 2

Extract of guidance

2A – Definition of Custodial Entity applying to fund intermediaries

- Scope of FATCA
  - Classification of entities
    - Custodial Institution

[...]

Such institutions could include [brokers, custodial banks, ...] fund intermediaries, fund platforms and entities acting as nominees for fund investments.

In some cases there may be uncertainty over whether a fund nominee, fund intermediary or fund platform meets the condition requiring that 20% of the entity's gross income derives from holding financial assets and related financial services. This may be the case if, for example, the income derived from acting as nominee arises in another group company, or where income is derived from commission, discounts or other sources where it is not clear whether the gross income test is met. Fund nominees, fund intermediaries and fund platforms will nevertheless still be Financial Institutions because they would otherwise be within the definition of Investment Entity.

HMRC's view is that fund nominees, fund intermediaries and fund platforms should be classified as custodial institutions unless specific factors indicate that their businesses are better characterised as falling within the definition of Investment Entity. Normally, the primary business of a fund nominee, fund intermediary or fund platform will be to hold financial assets for the account of others.

2B – Practical application of the definition of Investment Entity in the context of funds

- Scope of FATCA
  - Classification of entities
    - Investment Entity

[...]

<u>Collective investment vehicles</u>

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

However, the only Financial Accounts that are relevant to collective investment vehicles are the equity and debt interests in the collective investment vehicle itself. No other entity otherwise within the definition of Investment Entity only by virtue of investing, administering or managing collective investment vehicles is considered to have Financial Accounts on which the identification and reporting requirements of [Article 4(1)(a) of the IGA] apply.

Therefore, provided the collective investment vehicle (or entity assigned by the collective investment vehicle) meets the requirements of [Article 4(1)(a) of the IGA] to identify and report its Financial Accounts, no further obligation to do so falls on any other UKFI.

2C – New individual accounts - Self-certification

- Account identification
  - New individual accounts
    - Obtaining a self-certification

The [IGA] requires a UKFI to obtain a self-certification that would enable it to determine whether the accountholder is resident in the US for tax purposes, or is a citizen of the US.

<u>Wording of self-certification</u>

In determining whether the accountholder is resident in the US for tax purposes, or is a citizen of the US, a UKFI can choose the form of wording. It is sufficient for an accountholder to confirm that they are not a resident in the US for tax purposes and they are not a US citizen.

The certification can be either:

- a **positive confirmation** made by the accountholder, such as requiring the accountholder to tick a box to make the confirmation, or
- a **negative confirmation** (i.e. where the account holder does not need to take any explicit action unless they disagree) such as text within the application form indicating by signing the application form they are confirming that they are not resident in the US for tax purposes and they are not a US citizen).

For FIs that do not allow US persons to invest, the negative confirmation may be preferable as it achieves the aim but does not require the investors to take any action.

For FIs which allow US citizens and/or tax residents to invest, the positive confirmation is likely to be favourable. The certification could offer two tick boxes - a box to confirm you are not a US resident or citizen, and a separate box to confirm that you are (and to supply the TIN).

A UKFI may want to know where the accountholder is resident for tax purposes as this may enable the UKFI to comply with other reporting requirements or to claim benefits under a double tax treaty on behalf of the accountholder. In such cases, where the individual has specified a country of tax residence that is not the US, [the individual will also need to include a confirmation that they are not a US citizen so that] the self-certification will be complete.

The box below illustrates the options available for wording of a self-certification on an account opening application form (but see below for further examples of wording and format of self-certification).

Option 1 – positive confirmation
By ticking this box, I confirm that I am not a US resident for tax purposes and/or a US citizen

Option 2 – alternative positive confirmation
Please tick the box which is applicable:

a) I am not a US resident for tax purposes and/or a US citizen
b) I am a US resident for tax purposes and/or a US citizen

If you have ticked box b, please tell us your US TIN:

Option 3 – negative confirmation
By signing this application form I confirm that I am neither a US resident for tax purposes nor a US citizen.

Option 4 – tax residency
Country/countries of tax residence for tax purposes:

Country of citizenship:

If you have responded "United States" to either question above then please provide your US TIN:

<u>Format of the self-certification</u>

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

Self-certifications can be obtained in any of these account opening formats. For example, if an account is opened by phone, the UKFI can request that the individual confirms during the phone call that they are not resident in the US and they are not a US citizen by reading a scripted declaration and asking the investor to confirm agreement.

Such oral self-certifications would need to be documented by the UKFI. Paperwork is usually sent out to accountholders following a phone application to open an account. When paperwork is sent, this should include their response to this self-certification question and require them to contact the FI in the event that it is not correct.

Example 1

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

The telephone operator asks: "can you confirm that you are not resident in the US for tax purposes and that you are not a US citizen". The individual confirms this on the call and the operator records the confirmation on the UKFI's system and includes in any paperwork sent to the investor to confirm the account opening.

Example 2

An individual accesses the website of a UKFI to open an account in line with the UKFI's normal account opening procedures.

On the account opening web page, along with information about the individual, such as name and address, the individual is asked to tick a box against the following narrative: "Tick this box to confirm that you are not resident in the US for tax purposes and that you are not a US citizen. For more information please see the website: [link] www.fatcastatusinformation.net[1].

The link opens a pop-up box with information about the meaning of tax residence and US citizenship.

Alternative Example 2

An individual accesses the website of a UKFI to open an account in line with the UKFI's normal account opening procedures.

On the account opening web page, along with information about the individual, such as name and address, the individual is asked to tick one of two possible boxes with the following narrative: "Tick this box if you are resident in the US for tax purposes or if you are a US citizen"

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[1] The website may be an IRS website, HMRC website, or a website provided by the UKFI providing more information about the definition of US citizen and US tax residence. For consistency, our preference would be for the IRS to provide this information for all FFIs.

and “Tick this box if you are not resident in the US for tax purposes nor a US citizen. For more information please see the website: [link] www.fatcastatusinformation.net”.

Example 3

Where a UKFI operates in a market where no, or very few, US persons are likely to open accounts, it may be easier and more cost effective to include the self-certification in the terms and conditions of business on account opening. For example, on the web page the individual is asked to confirm before proceeding with the account opening that they have agreed with the terms and conditions of opening an account with the UKFI. The terms and conditions are accessed via a link which opens a pop-up box.

The terms and conditions include the following: “by proceeding you confirm that you are not resident in the US for tax purposes and that you are not a US citizen. For more information please see the website: [link] www.fatcastatusinformation.net”.

Example 4

An individual fills out an application form to open an account with a UKFI. Beside the signature box the application form includes the following wording: “by signing this form you confirm that you are not resident in the US for tax purposes and that you are not a US citizen. For more information please see the website: www.fatcastatusinformation.net”

Example 5

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

In one of the boxes on the application the individual is required to provide “Country of residence for tax purposes”. This is completed with a country that is not the US.

Where the application form is returned with the country of residence box incomplete the application is rejected.

Example 6

As per Example 5, but beside the signature box the application form includes the following wording: “by signing this form you confirm that you are not resident in the US for tax purposes and that you are not a US citizen. For more information please see the website: www.factastatusinformation.net”

Where the application form is returned with the country of residence box incomplete the application is approved because the individual has otherwise confirmed that they are not resident in the US.

- Confirming the reasonableness of the self-certification

The [IGA] requires a UKFI to confirm the reasonableness of the self-certification based on information obtained by the UKFI. This may include information obtained by the UKFI pursuant to its AML/KYC procedures.

A UKFI is not expected to make changes to its AML/KYC procedures in order to meet this requirement, but it is required to check the self-certification against other records of the individual it has obtained. For example, where an accountholder has provided a self-certification confirming they are not US resident for tax purposes, but then provides a US address to the UKFI, this would require the UKFI to make further enquiries [(see below)].

There is no requirement to adopt or make changes to AML procedures.

HMRC expects that all UKFIs will be within the scope of The Money Laundering Regulations 2007 ('MLR'). Some UKFIs will meet their MLR requirements by placing reliance on the AML procedures performed by other parties. In these cases, the UKFI will usually obtain a certification from the other parties on a case-by-case basis that they have performed AML procedures as required by regulation 17 of MLR, or a general assurance that they will always have done so before introducing any customer.

A UKFI may request that the party performing the AML procedures and on which it has placed reliance should obtain a self-certification for FATCA purposes, and should confirm the reasonableness of the self-certification based on information obtained by the third party. In these cases, the UKFI can meet the obligations of [IGA Annex 1 – III.B] by obtaining a certification from the third party that they have confirmed the reasonableness of the self-certification based on other documentation the third party has received.

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

Example 1

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

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

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

Example 2

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

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

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

Example 3

As per Example 1, but the self-certification is obtained by the introducing IFA. The UKFI can satisfy its requirements under the [IGA] by obtaining a certification from the IFA that it has confirmed the reasonableness of the self-certification against other information it has obtained from or on the individual, including information obtained pursuant to its AML procedures.

Example 4

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

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

2D – Definition of new accounts in relation to funds

- Financial accounts
  - New accounts
    - Definition of new account

Where a fund manager performs simplified reporting of a range of funds it manages pursuant to [Regulation [...]], new accounts should be defined by reference to whether an account has been documented by the fund manager.

A fund manager responsible for FATCA compliance should not have to request multiple self-certifications from the same investor each time they make an investment into a separate fund managed by the fund manager, even though technically they are investments into different UKFIs.

Appendix 3

IMA paper of September 2012 on the impact of Article 4(1)(b) (Q.10)

PAYMENTS TO NPFFIs, WHERE NOT RELATED TO FINANCIAL ACCOUNTS - *Impact on UK financial institutions*

1. Analysis of provisions

1.1 HIRE Act A PFFI is obliged, per Sec 1471(b)(1)(D)(i), to withhold on 'Passthru Payments' to NPFFIs and Recalcitrant Accounts. There is no limitation of this requirement to payments made in respect of a Financial Account, but the requirement is limited to payments underlain by US Source 'FDAP' or 'gross proceeds'.

1.2 FATCA Proposed Regs The basic obligation to withhold, at 1471-2(a), is associated with the Withholdable Payment definition but not to the concept of a Financial Account. The requirement on brokers is further elaborated at 1471-2(a)(2)(v). Section 1471-4(b) extends the requirement from USWAs to PFFIs. There is an explicit exclusion of ordinary course of business payments (but only for nonfinancial services, and goods), at 1473-1(a)(4)(iii).

1.3 IGAs Article 4(1)(b) replicates the position in the FATCA Proposed Regs, to the extent that payments to NPFFIs are reportable without limitation to payments in respect of Financial Accounts. This is in regard to 2015 and 2016; it is assumed that this requirement would be extended indefinitely, as opposed to any onward move to Passthru withholding. However, what is missing is any limitation of the requirement to withholdable payments, and likewise there is no 'ordinary course of business payments' exclusion, as noted above in the Proposed Regs.

2. Identified impacts

2.1 Share register of FIs Any FPFI would need to report dividend (or interest) payments on its shares (or obligations) to NPFFIs, even where those shares (or notes) are publically listed and thus do not constitute Financial Accounts of the FPFI. This is problematic, inasmuch as a listed company has little or no control or visibility over who buys into its shares; it would be acutely difficult in company law to make registration of a share transfer contingent on providing a W-8 equivalent. Large companies with multiple listings in the US, PFFI (non-IGAs) and IGA jurisdictions would face further complexity.

It is not clear the US Treasury intend this policy outcome, even though it is implicit in the FATCA Proposed Regs – which retain the concept of Passthru – that all listed FPFIs with any US source component to their business would be caught. Thus, this problem is not entirely generated by the drafting of the IGA.

The problem is particularly acute in the UK because CREST rules allow private investors to be entered direct on to a company's share register, if they are so sponsored by their broker. In other European countries we understand that more of the share register will be entered in the name of a depositary service such as Clearstream.

2.2 Brokers. Partnerzone brokers would be required to report gross proceeds over *all* trades in *all* securities where made to NPFFIs. Under the FATCA Proposed Regs, brokers would withhold, but only in respect of trades in US stocks (or non-US stocks with a US passthru percentage) . It is entirely unclear what the policy intent of the US and G5 governments is in this regard.

2.3 Publically traded funds ('PTFs' – being ETFs, ITCs etc) This is a variant of the issue at 2.1. There are differences of detail, such as the possibility that an Authorised Participant of an ETF might receive (capital) redemption proceeds, but the industry's concern does not substantially relate to these differences. Rather, the concern is that all the same difficulties arise as at they do 'for 'regular' listed companies, the core of which is that the listed entity has no real control over transactions in its stock, and that trades are conducted by parties (brokers) over whom they have no commercial influence over. However, whereas the US policy intent re listed corporations is unclear (at least to the fund management industry), it is by contrast clear there is a perceived policy need in the US to prevent PTFs being used as an investment outlet by NPFFIs. This makes complete waiver of the requirements in relation to NPFFIs a more difficult lobbying objective to achieve

2.4 Ordinary course of business payments The current IGA wording is so broad that it would catch payments of a non-financial nature. So, for instance, standard payments made by a UK financial institution, for example:

2.4.1 Trustee and fund administration services in relation to a Mauritian fund subsidiary to a service provider in Mauritius
2.4.2 Retrocession payments to IFA and other distributors
2.4.3 Rent for office space sublet from other financial institutions

would all be reportable. We also believe more analysis would be needed re the administration of international pension arrangements.

Even the 'routine' accounts payable process would need functionality to exclude the rare case that services were being purchased from an NPFFI. The FATCA Proposed Regs were crafted to eliminate this issue; so this issue is entirely created by the IGA drafting. As the US policy intent is clear, it is presumed to be entirely feasible to get drafting changes to the IGA agreed.

3. Conversations to date

3.1 In essence, as far as is known, conversations by the private sector with public authorities have related to PTFs:

- *US Treasury and IRS* EFAMA have raised the position of ETFs, *inter alia* in a written submission of 19 April 2012 and most recently in a conversation with John Sweeney/Danielle Nishida on 17 August. BlackRock, operator of iShares ETFs, has made similar points in a number of IRS and UST meetings, at varying levels of seniority, and notably at the 15 May public hearing on the Proposed Regs. The IRS is beginning to gain a good level of understanding of the issue, but is constrained by the concern that NPFFIs may seek out PTFs as an investment conduit back into US stocks. Thus, it is entirely intentional that PTFs retain residual responsibilities. It is unknown whether Treasury is in same position as to the public share registers of FPFIs.

- *HMRC and Irish Revenue* At least one other fund manager has expressed the same concerns re PTFs to HMRC and the Irish Revenue.

- *CREST* Informal discussions have been had as to their likely approach.

3.2 Potential solutions (re share registers):

3.2.1 Section IV.D.3 of Annex 1 to the IGA sets out procedures for identifying NPFFIs which are subject to reporting under Article 4(1)(b). The procedures are to be applied to accountholders only, and this raises the question of whether the wording in Article 4(1)(b) is deliberate, or whether it should actually refer to "...payments made *by [FATCA Partner] Financial Institution to accountholders* in 2015 and 2016 to each Non participating Financial Institution". The simplest and preferred solution would be to amend the wording in Article 4(1)(b) to include the words in italics above. However we believe that this may not be acceptable to the US Treasury, because it would provide a broad exemption from FATCA reporting to Investment Trusts in the UK (and ETFs in other countries that might adopt Model 1) because they do not otherwise have accountholders.

3.2.2 The simplest solution would be to amend the drafting of the IGA to make it explicit that (unless and until the concept of Passthru withholding is reintroduced), gross stock sale proceeds and dividends/coupons of FPFIs are only reportable in the rare case that they represent US source income/proceeds. This would seem only to apply where the FPFI is categorized as a US flow through (transparent) entity. Other than as highlighted in 3.2.1, this is the alternative solution that is preferable to the industry and (we presume) partner governments. It would however reduce the effective reach of the FATCA system quite considerably, so again, acceptance by the US Treasury cannot be guaranteed.

3.2.3 As a first alternative, CREST may be willing to require that exchange members must ensure that any direct participants they sponsor on CREST perform FATCA due diligence, and do not sponsor as direct participants any NPFFIs. In addition, the sponsoring CREST exchange member will affirm to the publicly-traded entity (and its agents, if any) that it has performed FATCA due diligence such that the publicly-traded entity (and its agents, if any) can 'reasonably rely' on such affirmation. Beyond CREST, other like clearing organizations, globally, would need to agree to do same.

3.2.4 The second alternative is that such sponsoring members may agree to identify NPFFIs to the fund or company (and its agents, if any) whose shares are being transacted in. This would be in addition to reporting gross proceeds where, as would be typical, the sponsoring member is also the executing broker. When a direct register holder has been identified as an NPFFI to the publicly-traded entity, the latter would then need to report dividend payments made to that NPFFI.

To make this approach work, clarity would have to be reintroduced as to whether gross stock sale proceeds and dividends/coupons of non-US listed entities are – in the absence of any Passthru concept in the IGAs – reportable in their entirety, or in relation to some US fraction only.