



# MAPLES

## FATCA – Working under an IGA

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## FATCA – What is it?

- Overview

- A proponent of automatic tax information exchange – tip of the iceberg!
- US Regulations require certain foreign financial institutions (FFIs) to register and sign an agreement with the IRS, and report information on accounts held by “Specified US Persons” and foreign entities with one or more “Controlling Persons” as a “Specified US Person”
- Failure to register/report may result in 30% withholding tax penalty on all US source payments (income from July 2014 and gross proceeds from 2017)
- IRS Registration portal formally opens 1 January 2014 through 25 April 2014 (first phase)
- If not registered (or otherwise self certified) by 1 July 2014, withholding may be applied by US (and other) withholding agents
- IRS shall continue to review registrations and update list of “deemed-compliant”
- Option is to enter an Inter-Governmental Agreements (IGAs)
- 2 Model IGAs – Model 1 (reciprocal or non-reciprocal) and Model 2
- UK HMT intend CDs and OTs to enter FATCA-like arrangement with UK

## IGAs – Basic principles of Model 1 and 2

- Model 1
  - FI may register with IRS as “registered-deemed compliant” but no FFI Agreement with the IRS
  - FIs report information to local government body (“TIA”), which reports annually to IRS in accordance with a Tax Information Exchange Agreement (“TIEA”)
  - Eliminates (1) the closure of recalcitrant accounts (2) acting as a withholding agent; and (3) confidentiality concerns, subject to “non-compliance”
- Model 2
  - Still based on FATCA Regs and FFI Agreement to be executed (not yet published in final)
  - FFIs register with, and report directly to, the IRS
  - FFIs must seek consent of account holder to report to IRS, or report aggregate information, which may give rise to request by IRS to TIA for more information
  - Withholding eliminated, but subject to “non-compliance”; i.e. information response within 6 months

## IGA Implementation

- What are the other benefits of an IGA?
  - FI may be required to register with IRS for a global intermediary identification number (“GIIN”) between 1 January and 25 April 2014 (first phase)
  - However, Model 1 IGA FIs can self certify compliance (i.e. W8s etc.) up to 31 December 2014
  - Minimisation of withholding obligations (save for non-resident, nonparticipating FIs) and due diligence under Annex I
  - FIs can still be regarded as deemed compliant or Participating FIs, even when group members outside of Cayman are not; and
  - Has a favoured nations clause allowing amendment for favourable terms agreed with other jurisdictions subsequently
- Both Model 1 and 2
  - Requires enabling legislation, expansion of tax reporting infrastructure
  - Annex I contains due diligence requirements
  - Annex II contains exempted products and deemed compliant financial institutions

## What does FATCA (and the IGA) catch?

- A Financial Institution (“FI”) defined under the IGA includes:
  - Custodial Institution
    - An entity holding as a substantial portion of business (i.e. attributable gross income  $\geq$  20% of gross income during the shorter of the 3 years before, or the duration of existence) financial assets for the account of others
  - Depository Institution
    - An entity that accepts deposits in the ordinary course of banking or similar business
  - Investment Entity
    - An entity conducting (or managed by an entity conducting) for or on behalf of a customer;
      - Trading in money market instruments, FX, interest exchange/index instruments, transferable securities or commodities futures
      - Individual and collective portfolio management; or
      - Otherwise investing, administering, or managing funds or money on behalf of other persons(to be interpreted consistently with the FATF definition of a “financial institution”)
  - Specified Insurance Company
    - An insurance company (or insurance holdco) that issues or is obligated to make payments with respect to a Cash Value Insurance or Annuity Contract.

## What does FATCA (and the IGA) catch?

- Financial Institutions would include in practice
  - Custodial Institution
    - Trustees (or equivalent)/Custodians/Nominees and possibly Fund Administrators
  - Depository Institution
    - Banks, Credit Unions and Building Societies
  - Investment Entity
    - Investment Funds (hedge, private equity, pension)
    - Structured Finance Vehicles
    - Broker/Dealer/Prime Broker
    - Investment/Portfolio Manager
    - Fund Administrators
  - Specified Insurance Company
    - Life insurance companies

## IGA Annex II

- Annex II provides for exemptions
  - Contains entities that are regarded as low risk for being used by US Persons to evade taxes
  - Classifies entities as “exempt beneficial owners” and “deemed compliant FFIs” excluded from the definition of “financial accounts” and regarded as “Non-Reporting Cayman FIs”
  - This means they don’t have to report to the IRS via the Cayman authority, but they may need to certify their status to a withholding agent
  - Section § 1.1471-5(f)(2) of the Regulations provides

“A certified deemed-compliant FFI also includes any non-reporting IGA FFI. A certified deemed-compliant FFI is not required to register with the IRS.”
  - Certain categories of exempted entity are still only included under the Regulations and have not been transposed into Annex II of the IGA
  - It is recommended to also transpose categories for “Qualified CIVs”, “Restricted Funds”, “Limited Life Debt Investment Entities” and “Owner Documented FFI” from the Regulations into Annex II



## Annex II categories

- Exempt Beneficial Owners include
  - Government entity/agency, including government pension fund and investment entities
  - International organization headquartered in jurisdiction (with no income benefit to private persons)
  - Central Bank
  - Retirement Funds (Broad and Narrow Participation)
    - Key condition for Broad RF is that no one single beneficiary has more than 5% of assets
    - Key conditions for Narrow RF are (i) less than 50 participants; and (ii) sponsoring employers cannot be investment entities or Passive NFFEs

## Annex II categories

- Deemed Compliant FIs include
  - Small or limited scope FIs
    - Includes banks with local client base (98% of account value held by residents), local bank with less than US\$175MM in assets (and less than US\$500MM assets in group) and no fixed place of business outside of Cayman
  - Low value FI
    - Includes non-Investment Entity FIs with accounts of less than US\$50k balance and no more than US\$50MM assets on balance sheet
  - Qualified credit card issuer (sole service)

## Annex II categories

- Investment Entities include
  - Trustee documented trust
    - If trustee is a Reporting US FI, Reporting Model 1 FI or Participating FFI
  - Investment Advisers and Managers
    - Established in the jurisdiction
    - Sole activity to provide investment advice to or to manage portfolios for a customer based on some investment authority issued by a Financial Account holder or similar instrument issued by a FI (other than a Non-participating FI), or on investment powers of a director

## Annex II categories

- Investment Entities include
  - Sponsored Investment Entity
    - Not a qualified intermediary, withholding foreign partnership or a withholding foreign trust; and
    - An entity has agreed to act as its sponsoring entity
  - Sponsored Controlled Foreign Corporation
    - More than 50% of voting stock or stock value is owned by US shareholders
    - Not a qualified intermediary, withholding foreign partnership or a withholding foreign trust;
    - Wholly owned (directly/indirectly) by a Reporting US Financial Institution agreeing to act as a sponsoring entity;
    - Shares a common electronic account system with the sponsoring entity (enabling access and identification of client data)
  - Conditions for the Sponsoring Entity
    - Authorised to act on behalf of the sponsored entity to fulfill registration requirements (if US Reportable Accounts identified) and to perform all due diligence, withholding, reporting requirements
    - Registered with the IRS as a sponsoring entity and identifies the sponsored entity with its ID number

## Annex II categories

- Investment Entities continued
  - Sponsored Closely Held Investment Vehicle
    - Not a qualified intermediary, withholding foreign partnership or a withholding foreign trust
    - Sponsoring Entity is a Reporting US FI, Reporting Model 1 FI or Participating FFI and is authorised and agrees to perform all due diligence, withholding, reporting requirements for the sponsored entity
    - Not held out as an investment vehicle for unrelated parties
    - 20 or less individuals own all of the debt or equity (except for debt owned by a Participating or Deemed Compliant FFI, and for equity owned by 100% by a FI that is itself a sponsored FI)
  - Conditions for the Sponsoring Entity
    - Agrees to perform all due diligence, withholding, reporting requirements for the sponsored entity and retains documentation for a period of 6 years
    - Registered with the IRS as a sponsoring entity and identifies the sponsored entity with its ID number

## Annex II categories

- Investment Entities continued
  - Collective Investment Vehicle (CIV)
    - Established and regulated in the jurisdiction
    - All interests (including debt interests over US\$50k) are held by or through one or more exempt beneficial owners, Active NFFEs, US Persons that are not Specified US Persons or FIs that are not Non-participating FIs
  - Special Rules (for regulated CIVs)
    - Includes reference to an Investment Entity, regarded as a qualified collective investment vehicle (under the Regulations), also being deemed to have its reporting obligations fulfilled
    - CIVs that do not meet the conditions above shall be deemed to have fulfilled their reporting obligations if information is reported by the CIV or another person (i.e. delegation of reporting etc. is permitted)
    - Restrictions on bearer share issuing CIVs
- Other categories of entity are described under the Regulations as excluded, but have not been transposed into the IGA; e.g. structured finance/securitization vehicles

## Excluded Accounts

- Excluded from definition of Financial Account and not a US Reportable Account
- Annex II excluded accounts include
  - Certain Savings Accounts
    - Retirement and Pension Accounts
    - Non-Retirement Savings Accounts (other than an insurance or annuity contract)
    - Conditions include (i) being regulated (ii) reporting to tax authorities (recommended to be removed) (iii) withdrawals only on meeting specific criteria or an event (e.g. retirement age), annual contributions less than \$50k and max lifetime contribution (for pensions) of US\$1MM
  - Certain Term Life Insurance Contracts
    - Insurance contract maintained in jurisdiction and coverage expires before insured reaches 90, provided
      - Periodic premiums are payable at least annually
      - No contract value that can be accessed without terminating the contract
      - Amount payable (other than death benefit) cannot exceed aggregate premiums; and
      - Not held by transferee for value
  - Escrow Accounts and Accounts held by an Estate

## Excluded Accounts

- Annex I excluded accounts include
  - Pre-existing Individual Accounts
    - Account (depository or otherwise) with less than US\$50k as of 30 June 2014
    - Cash Value Insurance Contract or Annuity Contract with a balance or value of less than US\$250k as of 31 July 2014, or where such Contracts are prevented from being sold (by law) to US residents
  - Pre-existing Entity Accounts
    - Account with less than US\$250,000 as of 30 June 2014 (until balance exceeds US\$1,000,000 thereafter)
  - New Individual Accounts (after 1 July 2014)
    - Depository Account with less than US\$50k balance at end of calendar year (or other reporting period)
    - Cash Value Insurance Contract unless the Cash Value exceeds US\$50k at end of calendar year (or other reporting period)
  - New Entity Accounts (after 1 July 2014)
    - Where account balance is prevented (by internal policy) from exceeding US\$50k



## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “U.S. Reportable Account” means
    - a Financial Account maintained by a Reporting FI and held by one or more Specified US Persons or by a Non-US Entity with one or more Controlling Persons that is a Specified US Person
    - Notwithstanding the foregoing, an account shall not be treated as a US Reportable Account if such account is not identified as a US Reportable Account, after application of the due diligence procedures in Annex I

## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “Financial Account” means
    - An account maintained by a Financial Institution, including;
      - in the case of an Investment Entity, any equity or debt interest (other than interests that are regularly traded on an established securities market) in the Financial Institution;
      - 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 US source withholdable payments, and
        - » the class of interests was established with a purpose of avoiding reporting in accordance with this Agreement;
      - any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a non-investment linked, non-transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of Financial Account in Annex II

## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “Equity Interest” means
    - For a partnership, either a capital or profits interest in the partnership.
    - For a trust, 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
    - A Specified U.S. Person shall be treated as being a beneficiary of a foreign trust if they have 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

## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “Specified U.S. Person” means a U.S. Person, other than;
    - A corporation regularly traded on one or more established securities markets, or a member of the same expanded affiliated group
    - The United States or any wholly owned agency, instrumentality, or any State of the United States, any U.S. Territory, or any wholly owned agency or instrumentality of any one or more of the foregoing; and
    - Any tax exempt organization, individual retirement plan, bank, real estate investment trust, regulated investment company, any common trust fund or exempt trust, 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, or a broker (All of which are defined under and subject to the U.S. Internal Revenue Code)
    - Any entity registered with the U.S. Securities and Exchange Commission

## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “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
    - a trust if ;
      - 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
      - one or more U.S. persons have the authority to control all substantial decisions of the trust

## What is a US Reportable Account?

- Key definitions (under the IGA)
  - “Controlling Persons” means
    - The natural persons who exercise control over an entity.
    - In the case of a trust, 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
    - In the case of a legal arrangement other than a trust, 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

## What is a US Reportable Account?

- FATF Recommendations

- INTERPRETIVE NOTE TO RECOMMENDATION 10 (CUSTOMER DUE DILIGENCE)
- Footnote 27 - Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such persons, through the following information:

(i) For **legal persons** (i.i) the identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest\* in a legal person; and...”

\*A controlling ownership interest depends on the ownership structure of the company. It may be based on a threshold, e.g. any person owning more than a certain percentage of the company (e.g. 25%) **BUT**

(ii) For **legal arrangements**: (ii.i) Trusts – the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries\*, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);

\* For beneficiary(ies) of trusts that are designated by characteristics or by class, financial institutions should obtain sufficient information concerning the beneficiary to satisfy the financial institution that it will be able to establish the identity of the beneficiary at the time of the payout ,or when the beneficiary intends to exercise vested rights

## Reportable Information and Due Diligence

- IGA Article 2(2)
  - Requires the following information to be obtained for reporting by (Sept) 2015 (for the 2014 tax year)
    - Name, address, US tax identification number (“TIN”) and account number of US Account Holder
    - Name and identifying number of Reporting FI
    - For all accounts, account balance or value (as at end of calendar year or other reportable period)
    - For custody accounts, total gross proceeds from sale or redemption of property paid/credited to US Account Holder
    - For depository accounts, gross amounts of interest/dividends/other income paid/credited to US Account Holder (as at end of calendar year or other reportable period)



## Reportable Information and Due Diligence

- Annex I
  - Provides for the due diligence process on pre-existing and new accounts
  - Can usually leverage existing AML procedures and systems
  - Individual Accounts
    - Pre-existing (to 30 June 2014)
      - Lower value individual account (i.e. over US\$50k & under US\$1MM) use electronic record search for US indicia
      - Higher value individual accounts (i.e. US\$1M) unless electronic records include specified fields (e.g. for nationality, addresses, contact numbers, POAs etc.) conduct paper record search
    - New (Post 30 June 2014)
      - Self certification by account holder and reasonableness test

## Reportable Information and Due Diligence

- Annex I
  - Entity Accounts
    - Pre-existing
      - Determine if held by a Specified US Person, Passive NFFE with US Controlling Person, or Nonparticipating FFI
      - Review accounts over US\$250k as of 30 June 2014
      - Determine whether the Account Holder (i.e. entity) is a US Person by reviewing KYC information
      - If Account Holder is Non-US Entity, determine if an FI by reviewing KYC information (non-reportable, if Yes)
      - Determine if FI is a Nonparticipating FI (for payments subject to aggregate reporting)
      - If a NFFE determine if (i) has Controlling Person (ii) if Passive NFFE and (iii) if Controlling Person is US citizen/resident – using KYC information and self certification for Passive NFFE confirmation
    - New
      - Determine if entity is (i) Specified US Person (ii) IGA FI (iii) Participating FFI or Deemed Compliant/Exempt Beneficial Owner; or (iv) Active/Passive NFFE

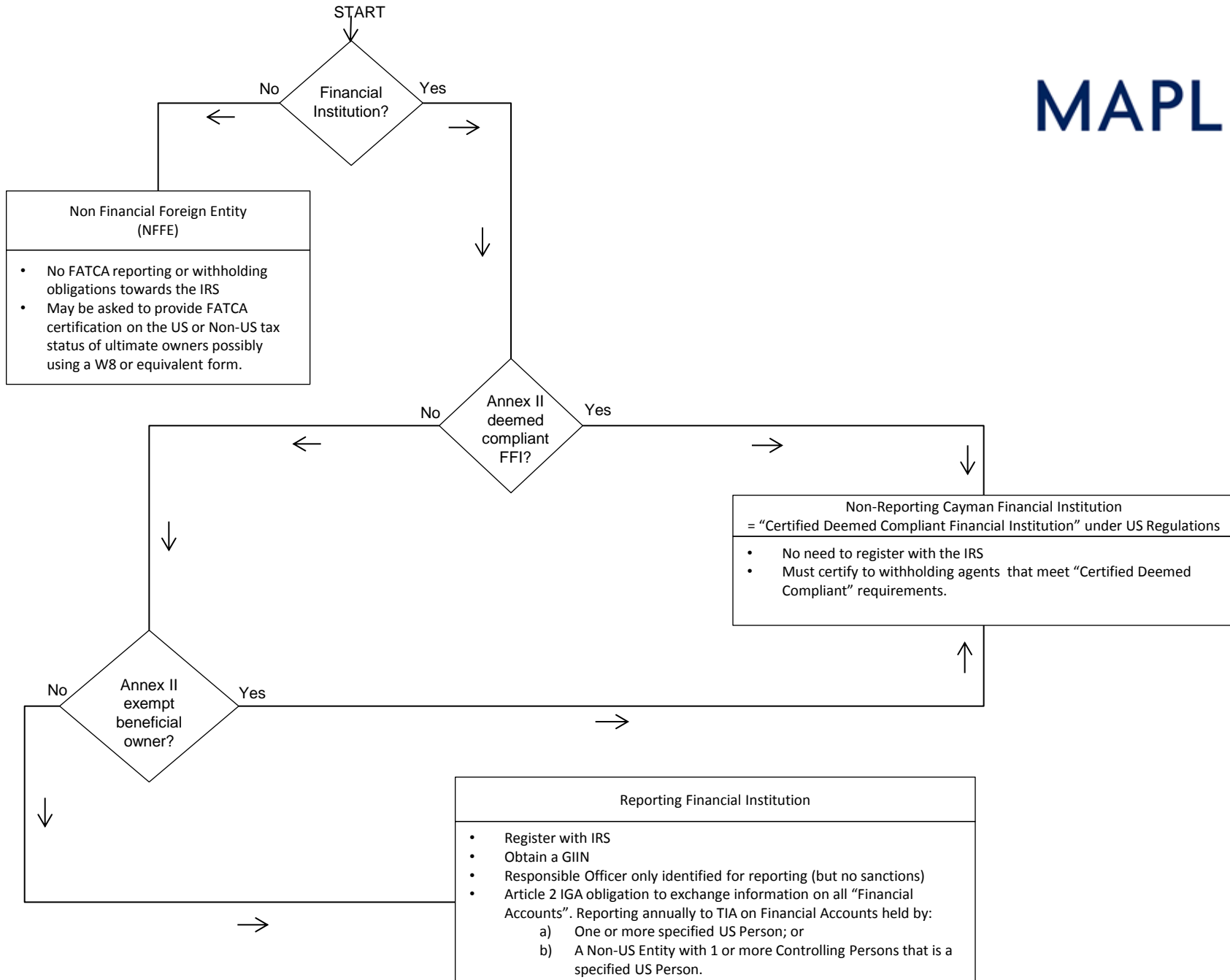
## What should I be doing now?

- Next Steps (once IGA finalised)
  1. Determine whether you are a FI
  2. If part of a group structure, determine whether other related entities are deemed compliant, Participating FIs, or Nonparticipating FIs
  3. If a FI, are you carved out of registration and reporting under Annex II?
  4. If a NFFE, are you a Passive or Active (or otherwise Excepted). If a Passive NFFE, or a Non-Reporting Cayman FI, self certify to a withholding agent...

## What should I be doing now?

- Next Steps continued (once IGA finalised)
  6. If a FI that is a Reporting FI, attend to the following;
    - (a) Register with the IRS (or have a sponsoring entity, or delegate, register for you) and obtain a GIIN
    - (b) Undertake due diligence on pre-existing accounts to identify Excluded Accounts or US Reportable Accounts for
      - (i) Specified US Persons ; or
      - (ii) Non-US Entities with one or more Controlling Persons as a Specified US Person
    - (c) Adopt due diligence procedures for new accounts as at 1 July 2014
    - (d) Adjust wording in service terms, constitutional or offering documentation to address (i) disclosure of confidential information (for foreign tax authorities), (ii) provision of information by account holder for compliance with FATCA type obligations (iii) ability of FI to withhold, suspend or redeem/terminate relationship

# MAPLES



## Future FATCA timetable

- [Hopefully] November 2013, Cayman finalises US IGA and UK IGA
- 1 January 2014 to 25 April 2014 – First phase of IRS registration portal for GIIN (but see below for extension for Model 1 IGA Reporting FI's)
- 1 July 2014 - Implementation of enhanced due diligence procedures for new accounts
- 31 July 2014 - Withholding on US source (FDAP) income (unless IRS registered or a Non-Reporting FI or NFFE that self certifies compliance)
- 31 December 2014 – Extension for registration expires for IGA Reporting FI's
- 30 September 2015 – US Account reporting for calendar years 2013 and 2014
- 31 December 2015 – Finalisation of due diligence on pre-existing accounts
- 1 January 2017 – Withholding duties on gross proceeds from sale of US assets

## EU and Global FATCA Developments

- US has executed a Model 1 IGA with EU members including UK, Denmark, Ireland, Norway, Spain and Germany, as well as Mexico
- US has executed a Model 2 IGA with Switzerland and Japan (Statement)
- Total executed IGAs' = 9 to date
- April 2013 – UK, with France, Germany, Italy and Spain, announce pilot multilateral tax information exchange based on the UK IGA (“G5 pilot”)
- May 2013 – EU Taxation Commissioner announces G5 pilot should be EU-wide
- June 2013 – Push to sign OECD Convention on Mutual Administrative Assistance in Tax Matters which has 55 current signatories and involves automatic exchange of tax information among members

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