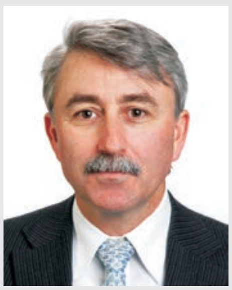
FATCA and Offshore Trusts: The First Nibble

By Peter A. Cotorceanu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In this report, Cotorceanu discusses a threshold question relevant to all trust companies planning their FATCA compliance: Are trustees foreign financial institutions or nonfinancial foreign entities for FATCA purposes?

The views in this report are the author's and do not necessarily reflect those of UBS.

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How do you eat an elephant? One bite at a time. The same is true of the Foreign Account Tax Compliance Act,[1] except that FATCA's no elephant. It's a leviathan. And it breathes fire.

Its size is monstrous: While the statute itself is relatively short, the final Treasury regulations are 544 pages long.[2] Moreover, they are painstakingly detailed and excruciatingly technical, a bewildering maze of rules, sub-rules, sub-sub-rules, cross-references, exceptions, exceptions to exceptions, and so on. They are daunting even to the most knowledgeable experts.

This regulatory behemoth is supplemented by two model intergovernmental agreements (IGAs) that impose different requirements on entities resident in the subject countries. The model I IGA, which comes in both reciprocal and nonreciprocal versions,[3] stands apart from the regs: An entity located in a model I IGA country will be governed by that IGA, but not by the regs.[4] An entity resident

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[1]The Foreign Account Tax Compliance Act was enacted as part of the Hiring Incentives to Restore Employment Act of 2010 (P.L. 111-147) on March 18, 2010. FATCA consists of five parts, only the first of which is relevant to this report. That part (Part I — Increased Disclosure of Beneficial Owners) is enacted as sections 1471-1474. As used in this report, FATCA refers to not only this legislation, but also to the final Treasury regulations under the statute, published on January 17 (T.D. 9610); additional IRS interpretive guidance; and the various model and country-specific intergovernmental agreements designed to further FATCA's ends.

[2]Technically, the regs themselves are ''only'' 428 pages long because they are preceded by a 116-page preamble. Moreover, 26 pages of the regs are a table of contents, and the final page is a citation of sorts, so the actual substantive regs are a ''mere'' 401 pages. Still, by any measure, they are vast.

[3]Under the reciprocal model I IGA, the United States and the other contracting country agree to a mutual exchange of information. Under the nonreciprocal version, the other country agrees to provide information to the United States but the United States does not reciprocate.

[4]Preamble to reg. section 1.1471-0 et seq., at 17. *See also* article 4.1. of the model I IGA (stating that, subject to some exceptions, financial institutions in the FATCA partner country that comply with their reporting obligations under the IGA will be treated as complying with their reporting obligations under the statute). Because there are no differences between the reciprocal and nonreciprocal model I IGAs that are material to this report, references in this report to the model I IGA apply to both versions of that document. A revised model I IGA template was published in November 2012; references in this report to the model I IGA are to that version. For simplicity's sake, citations in this report to specific provisions of the model I IGA use the numbering in the reciprocal version only.

The preamble to the regs also states that ''in certain cases prescribed in the Model I IGA, the laws of the partner jurisdiction may allow the resident FFI to elect to apply provisions of these regulations instead of the rules otherwise prescribed in the Model I IGA.'' Preamble to reg. section 1.1471-0 et seq., at 17-18. The only provision of the model I IGA that permits such an election is Annex I, art. I.C. That provision, which is not self-executing, permits the partner jurisdiction to allow its resident financial institutions to apply the due diligence procedures in the regs rather than those in Annex I to determine whether an account is a U.S. reportable account or an account

(Footnote continued on next page.)

in a model II IGA country, on the other hand, will be governed by both that IGA and, to the extent not inconsistent with that IGA, the regs.[5]

To complicate matters even further, it's possible that multiple FATCA regimes may apply to different parts of the same structure, for example, a trust resident in a non-IGA country with an underlying company in a model I reciprocal IGA country that has two bank accounts, one in a model I nonreciprocal IGA country and one in a model II IGA country. Moreover, while it is clear that many countries will ultimately sign IGAs, exactly if and when an individual country will enter into an IGA and, if so, the precise details of the IGA can't be known until the agreement has actually been concluded. Thus, many in the industry are eagerly waiting for their governments to announce that they will or will not enter into an IGA or, if they've already said that they will, to indicate the specific type of IGA.

Nevertheless, offshore[6] trust providers can't sit around wringing their hands and bemoaning the intimidating task ahead. They must roll up their sleeves and get down to business — now that the regs have been released, it's finally time to chart their FATCA compliance plans. And they must do so relatively quickly given that FATCA's implementation begins in earnest less than a year from now, on January 1, 2014.

This report is the first in a series aimed at explaining in simple, bite-size terms precisely what trust companies must do over the coming months to become FATCA compliant. After giving some background, this report addresses a fundamental question on which a trust company's FATCA compliance depends: Are foreign trustees foreign financial institutions (FFIs) or nonfinancial foreign entities (NFFEs)?[7] Subsequent articles will answer the same question for trusts and their underlying companies. Further articles will also address the various categories of FFIs and NFFEs for which those entities qualify; what an ''account'' is under FATCA; who's deemed to be the account holder; what constitutes a U.S. account; who qualifies as a substantial U.S. owner under the regs or as a controlling person under the IGAs; and the various onboarding, due diligence, reporting, and withholding obligations FATCA imposes depending on both the type of entity involved and the available compliance paths.

There is only one way to eat an elephant. . . .

I. Background: FATCA's Goals and Obligations

FATCA has one overriding goal — to prevent U.S. taxpayers from evading tax by hiding their money in offshore accounts, whether directly or through offshore entities. To achieve this goal, FATCA divides the entire universe of foreign entities into two, and only two, mutually exclusive categories: FFIs and NFFEs. An FFI is a foreign entity that is a financial institution,[8] while an NFFE is a foreign entity that is *not* a financial institution.[9]

A. FFIs' Fundamental Obligations

FATCA requires FFIs to report to the IRS[10] the names, addresses, and taxpayer identification numbers of U.S. persons with an account at the FFI, and specific details about the account itself (account numbers; account balances or values; and gross receipts, payments, and withdrawals).[11] Also, to prevent U.S. taxpayers from avoiding detection by hiding behind non-U.S. entities, FATCA requires FFIs to identify and report the names, addresses, and TINs of any substantial U.S. owners (under the regs) or U.S. controlling persons (under the IGAs) of offshore entities that hold accounts at the FFI, and to provide the same information regarding those accounts as for directly held accounts (that is, account numbers, account balances, etc.).[12]

B. NFFEs' Obligations

In contrast, an NFFE's fundamental obligations are much more circumscribed. They are designed

held by a nonparticipating financial institution. Also, the Norway IGA, signed on April 15, allows Norway to use, and to permit its financial institutions to use, definitions in the regs in lieu of the definitions in the IGA, but only if doing so would not frustrate the purposes of the IGA. Norway IGA, art. 4.7. This provision will apply to all other model I IGAs that have a so-called ''most-favored-nation clause'' under which the contracting country automatically benefits from more favorable provisions of, *inter alia*, article 4 of other IGAs. *See* model 1 IGA, art. 7. Subject to the potential exceptions, however, a financial institution in a model I IGA jurisdiction will be governed exclusively by its home country's IGA and local law, not by the regs.

[5]Preamble to reg. section 1.1471-0 et seq., at 18.

[6]As used in this report, the terms ''offshore'' and ''foreign'' mean non-U.S.

[7]NFFEs are sometimes mistakenly referred to as non-foreign financial entities. As will be seen, however, NFFEs are, by definition, very much foreign entities; it is the fact that NFFEs are not *financial* entities that distinguishes them from FFIs.

[8]Section 1471(d)(4); reg. section 1.1471-5(d).

[9]Section 1472(d); reg. section 1.1471-(1)(b)(74). Compare the model IGAs, which define an NFFE as a non-U.S. entity that is not an FFI under the regs, including a non-U.S. entity that is not a financial institution under the IGA. Model I IGA, Annex I, art. VI.B.2; model II IGA, Annex I, art. IV.B.2.

[10]In a model I IGA country, the reporting is to the home country's government, which will then forward the information to the IRS.

[11]Section 1471(c); reg. section 1.1471-4(d)(3); model I IGA, art. 2.2; model II IGA, art. 2.1.

[12]*Id.*

merely to ensure that a withholding agent, including an FFI acting as such, can fulfill its own reporting obligations regarding substantial U.S. owners or U.S. controlling persons of foreign entities with accounts at an FFI. Thus, an NFFE's only obligation is to tell its withholding agents whether it has any substantial U.S. owners or U.S. controlling persons and, if so, the relevant details about those persons.[13]

C. Fire! Fire!

But how on earth does the U.S. motivate foreign entities to become "snitches" for the IRS? The "fire" FATCA breathes is a requirement that withholding agents withhold 30 percent on specified U.S.-source payments (including some gross sales proceeds) to FFIs and NFFEs that do not fulfill their reporting and other obligations under FATCA. Moreover, in the future, even some non-U.S.-source payments may be re-sourced for these purposes on a type of look-through basis.[14] FATCA's goal, however, is not to raise revenue through withholding taxes. Rather, FATCA uses the threat of withholding taxes to force the disclosure of U.S. persons with foreign accounts, whether held directly or through offshore entities.

Thus, as can be seen from the very different obligations of FFIs and NFFEs, a threshold question in understanding FATCA's effect on trusts and trustees is whether the entity in question is an FFI or an NFFE.

II. Offshore Trustees: FFIs or NFFEs?

Before considering trust companies, and for the sake of completeness, I will briefly address the status of individual trustees.

A. Individual Trustees

With one questionable exception discussed below, an individual trustee can never be an FFI or an NFFE.

Under both the statute and the regs, FFIs and NFFEs must be entities.[15] The statute does not define the term "entity," but the regs do: An entity is "any person other than an individual."[16]

The model IGAs also define financial institutions and NFFEs by reference to "entities."[17] Both IGAs define an entity as "a legal person or a legal arrangement such as a trust."[18] Although the IGAs don't define the term "legal person," that phrase is generally understood to exclude individuals. This reading finds support in the IGAs' use of "natural person" to refer to individuals.[19]

Indeed, the IGAs may well use the phrase "legal person" in the same sense it is used in the Financial Action Task Force's (FATF's) 2012 Recommendations on International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.[20] The FATF recommendations define legal persons as "any entities other than natural persons."

So far, so clear: Under the IGAs, financial institutions and NFFEs are entities, entities are legal as opposed to natural persons, and, consistent with both the FATF recommendations and common usage, the phrase "legal persons" doesn't include individuals.

The IGAs muddy the waters, however. As mentioned in the preceding footnote, they require that the phrase "investment entity," which is one type of financial institution, be interpreted consistently with the FATF recommendations' definition of a financial institution.[21] Those recommendations, unlike the statute, regs, and IGAs, don't limit their definition of financial institutions to entities. On the contrary, they define financial institutions as "any natural or legal person" who meets the specified requirements.[22] Thus, the IGAs say in one breath that financial institutions are entities while at the

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[13]A non-U.S. withholding agent will often be an FFI. Either way, the withholding agent must report the relevant information to the IRS or, in a model I IGA country, to its own government.

[14]These are so-called foreign passthrough payments, the definition of which has been reserved for future regulations. Reg. section 1.1471-4(b)(4). Withholding on foreign passthrough payments will not begin before January 1, 2017, at the earliest. *Id.* Withholding on gross sales proceeds will also not begin before January 1, 2017. However, no further regulations are required to make gross-proceeds withholding effective on that date.

[15]Sections 1471(d)(4) and (5) (FFIs and financial institutions) and 1472(d) (NFFEs); reg. section 1.1471-1(b)(74) (NFFEs) and 1.1471-5(d) (FFIs).

[16]Reg. section 1.1471-1(b)(35).

[17]Model I IGA, art. 1.1.(g)-(j) (financial institutions) and Annex I, art. VI.B.2 (NFFEs); model II IGA, art. 1.1.(g) and (i)-(k) (financial institutions) and Annex I, art. VI.B.2 (NFFEs). Note: The IGAs use "financial institution" rather than "foreign financial institution" because entities located in an IGA country are not "foreign" to that country.

[18]Model I IGA, art. 1.1.(hh); model II IGA, art. 1.1.(bb).

[19]Model I IGA, art. 1.1.(v) and (nn); model II IGA, art. 1.1.(ff).

[20]For example, the IGAs borrow from those recommendations when they require that both "investment entity" and "controlling person" be interpreted in a manner consistent with that document. Model I IGA, art. 1.1.(j) and (nn); model II IGA, art. 1.1.(k) and (ff). The regs also defer to FATF insofar as they permit reliance on local anti-money-laundering requirements to satisfy FATCA's due diligence obligations in FATF-compliant jurisdictions. *See, e.g.*, reg. section 1.1471-3(d)(6)(vii)(A)(3), 1.1471-3(d)(11)(viii)(A)(3), 1.1471-3(d)(11)(viii)(C), and 1.1471-3(d)(12)(iii)(B). A FATF-compliant jurisdiction is defined in reg. section 1.1471-1(b)(41).

[21]Model I IGA, art. 1.1.(j); model II IGA, art. 1.1.(k).

[22]Financial Action Task Force recommendations, at 115.

same time requiring that one category of financial institution be interpreted consistently with a document that includes individuals as financial institutions. Very peculiar, to say the least.

All of this would be academic if the U.K. government — the first to sign an IGA — hadn't indicated its intention to include some individuals as financial institutions. The draft U.K. FATCA regulations state that trustees will be ''reporting financial institutions'' if they are ''independent legal professionals.''[23] This phrase appears to target individual lawyers who act as trustees. And, equally clearly in my view, it should be stricken from the final U.K. regulations. The IGAs' requirement that their definition of investment entity be read ''consistently'' with the FATF's definition of a financial institution cannot mean that substantive differences between the two definitions can simply be ignored. Indeed, the definitions are to be read consistently only ''unless the context otherwise requires.''[24] The IGAs explicitly require that all financial institutions, including investment entities, be entities — given this very specific requirement, an investment entity cannot fairly be interpreted in the IGAs as including individuals even though the FATF's definition of a financial institution includes those persons.

It remains to be seen whether the final U.K. regulations will retain this anomaly and whether other countries will follow suit. In the meantime, however, one must assume that in at least some IGA jurisdictions, lawyers who act as trustees will be (incorrectly, in my view) deemed to be financial institutions.

In sum, subject to this one potential exception, individual trustees cannot be FFIs or NFFEs.

B. Corporate Trustees

1. The statute and regs. Under the statute and regs, most offshore corporate trustees are likely to be Type A investment entity FFIs. This conclusion is not free from doubt and is based on a rather generous interpretation of the regs in the IRS's favor. Nevertheless, it will likely prevail, if only because the IRS believes that offshore corporate trustees are FFIs, and a Type A investment entity is the only type of FFI a typical offshore corporate trustee could be.

Although most trust companies will be FFIs, they don't have ''accounts'' as that phrase is defined for FATCA purposes. I will discuss in a future article what constitutes an account under FATCA and who the account holder is in the offshore trust context. For present purposes, however, it is sufficient to note that most of FATCA's more demanding obligations apply only to accounts and account holders and so won't apply to trust companies.

As mentioned previously, an FFI is simply a financial institution that is a foreign entity,[25] and the regs define an entity as ''any person other than an individual.''[26] They define a foreign entity as any entity that is not a U.S. person.[27] A U.S. person is defined in pertinent part by cross-reference to the Internal Revenue Code under which, as relevant to companies (''corporations'' in U.S. parlance), it means a company organized under U.S. law.[28] In sum, then, any non-U.S. company, including a corporate trustee, that meets the definition of a financial institution is an FFI under FATCA.

The statute creates three types of financial institutions, which the regs refer to as depository institutions, custodial institutions, and investment entities.[29] However, the statute permits Treasury to create other categories of FFIs,[30] and the regs have done so. They have added two further types of FFIs: (1) insurance companies and related holding companies, and (2) holding companies and treasury centers that meet specific requirements.[31] However, neither of those categories is relevant in the present context — trust companies fall well outside the relevant definitions.

a. Depository institution FFI. A typical foreign trust company doesn't qualify as a depository institution FFI.

[23]The draft International Tax Compliance (United States of America) Regulations 2013, section 7(1). *See also* the following documents, which were issued on the same date as the draft U.K. regulations: (1) Guidance Note to the Draft U.K. Regulations (a trustee will be a financial institution when it is a ''remunerated independent legal professional''), at 24; and (2) Summary of Responses to the 18 September U.K. FATCA Consultation Document (same), at 8. Curiously, unlike these two documents, the draft U.K. regulations don't contain a remuneration requirement for trustees who are legal professionals.

[24]Model I IGA, art. 1.1.(j); model II IGA, art. 1.1.(k).

[25]Reg. section 1.1471-5(d).

[26]Reg. section 1.1471-1(b)(35).

[27]Reg. section 1.1473-1(e).

[28]Reg. section 1.1471-1(b)(132); section 7701(a)(30) and (a)(4).

[29]*See* section 1471(d)(4) and (d)(5)(A)-(C) and reg. section 1.1471-5(d) and -5(e)(1)(i)-(iii).

[30]*See* section 1471(d)(5), which begins ''*except as otherwise provided by the Secretary*, the term 'financial institution' means'' (emphasis added). Attached as Appendix I to this report is a table designed to assist the reader in differentiating the various types of FFI/financial institutions relevant to this report, and the material differences between the regs' and IGAs' respective definitions of those terms. Appendix II summarizes my conclusions as to which types of FFI/financial institutions typical offshore trust companies are (and are not) under the regs and the IGAs.

[31]Reg. section 1.1471-5(e)(1)(iv) and (v).

A depository institution is one that "accepts deposits in the ordinary course of a banking or similar business."[32] The regs define banking or similar business to include providing "trust or fiduciary services."[33] Despite this expansive definition, the typical offshore corporate trustee won't be a depository institution because it doesn't accept deposits.

The regs don't define the phrase "accepts deposits" or even "deposits." However, they do define a depository account,[34] which presumably is what an institution would have to offer to be deemed to accept deposits. That definition is aimed squarely at the sorts of accounts that banks and other true financial intermediaries offer.[35]

The fact is that offshore trust companies, even those affiliated with banks, don't accept deposits as such. Rather, they deposit their bankable assets with one or more other institutions. For a bank-owned trust company, this will often include the parent bank. However, in either case, the bank itself — not the trust company — will be the entity that accepts deposits.

b. Custodial institution FFI. Traditional offshore trustees aren't custodial institution FFIs either.

A custodial institution FFI is an entity that "holds, as a substantial portion of its business, . . . financial assets for the benefit of one or more other persons."[36] At first blush, corporate trustees that hold bankable assets in their trusts would appear to fall squarely within this definition. Indeed, before publication of the final regs, the general consensus was that corporate trustees would be custodial FFIs. In Notice 2010-60,[37] the IRS took the same view.[38] However, the definition of a custodial FFI in the final regs differs in one very important respect from that in the proposed regs. The change makes clear that corporate trustees will not be custodial FFIs if they are not in fact money managers themselves.

Under the final regs, an entity "holds financial assets for the account of others as a substantial portion of its business" only if the entity's gross income "attributable to holding financial assets and related financial services" is 20 percent or more of its gross income over a stated period.[39] Income attributable to holding financial assets and related financial services is narrowly defined as the sorts of income only true money managers earn, for example, custody, account maintenance, and transfer fees; commissions and fees from executing and pricing securities transactions; and income earned on bid-ask spread of financial assets.[40]

Offshore corporate trustees that do not themselves hold and manage assets don't earn the sorts of fees described above. Rather, their income consists of fees for providing fiduciary services. It is the banks or other true financial intermediaries that hold offshore trusts' assets that earn the fees described in reg. section 1.1471-(5)(e)(3)(ii).

c. Investment entity FFI. The only remaining type of FFI relevant in the present context, then, is an investment entity FFI. There are three types of investment entity FFIs: (1) one that "primarily conducts as a business" specified activities "for or on behalf of a customer" (a Type A investment entity)[41]; (2) one whose gross income is "primarily attributable" to specified investment activities and that is "managed by" a depository institution FFI, a custodial institution FFI, a specified insurance company FFI, or a Type A investment entity (a Type B investment entity)[42]; and (3) a collective investment vehicle or one of several different types of fund (a Type C investment entity).[43]

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[32]Section 1471(d)(5)(A) and reg. section 1.1471-5(e)(1)(i).

[33]Reg. section 1.1471-5(e)(2)(i)(E).

[34]Reg. section 1.1471-5(b)(3)(i).

[35]*Id.* The definition provides that a depository account "means any account that is . . . [a] commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, passbook, certificate of indebtedness, or any other instrument for placing money in the custody of an entity engaged in a banking or similar business for which such institution is obligated to give credit."

[36]Reg. section 1.1471-5(e)(1)(ii). The definition in the statute is substantively identical, although the wording itself is slightly different. Under the statute, a custodial institution FFI is one that "as a substantial portion of its business, holds financial assets for the account of others." Section 1471(d)(5)(B).

[37]2010-37 IRB 329.

[38]*Id.* at 330.

[39]Reg. section 1.1471-5(e)(3)(i)(A). The relevant period is the shorter of (1) the three-year period ending on December 31 of the year preceding the year of determination, or (2) the period during which the entity has been in existence before the determination is made. *Id.* Because the testing period is not static and an entity's income varies over time, an entity could be a custodial institution FFI one year but not the next and vice versa. The same issue arises with other types of FFIs whose status is determined in part by the types of income they earn over a floating period. *See, e.g.*, reg. section 1.1471-5(e)(4)(iii) (testing period for Type A investment entities, discussed later in this report). This raises practical concerns. For example, it's unclear how an entity that registers with the IRS as a participating FFI under FATCA will be able to later de-register. Further guidance is needed on this point.

[40]Reg. section 1.1471-(5)(e)(3)(ii).

[41]Reg. section 1.1471-5(e)(4)(i)(A). The designations "Type A," "Type B," and "Type C" investment entity do not appear in the regs; they are used in this report as shorthand.

[42]Reg. section 1.1471-5(e)(4)(i)(B). "Managed by" means performing any of the activities of a Type A investment entity on the entity's behalf. *Id.*

[43]Reg. section 1.1471-5(e)(4)(i)(C).

Type C investment entities can be eliminated at the outset — the trustees of the sorts of trusts addressed in this report are not collective investment vehicles or funds.

Type B investment entities also can be eliminated. A typical corporate trustee's income is not primarily attributable to investing. As mentioned earlier, a corporate trustee's income is earned by providing fiduciary services. Certainly, the income of the trusts those trustees manage is in many cases primarily attributable to the sorts of investment activities listed in the regs, a point to which I will return in a later article when I discuss FATCA's classification of trusts. However, that income belongs to the trusts, not to the trust company as such.

As discussed above, a Type A investment entity ''primarily conducts as a business'' specified activities ''for or on behalf of a customer.'' The first two types of activities in the regs are some financial trading and portfolio management activities, respectively.[44] Again, unless the trustee is a true investment manager, it won't conduct that business itself but will delegate investment management to third parties, including, when applicable, a parent bank. The fact is that offshore trustees rarely, if ever, have in-house investment expertise and therefore, out of necessity, delegate investment management to others.

The third type of activity a Type A investment entity conducts is ''otherwise investing, administering, or managing funds, money, or financial assets on behalf of other persons.''[45] This provision should be read in the context of the two that precede it — in other words, that ''investing, administering, or managing funds, money, or financial assets on behalf of other persons'' is limited to financial and investment activities. This would be the preferred reading under those hoary canons of construction *noscitur a sociis* and *ejusdem generis*.[46]

However, read literally and in isolation, this provision is broad enough to capture what offshore trustees do: ''administer and manage'' funds, money, or financial assets on behalf of others — that is, the trusts and beneficiaries they serve. Thus, including offshore trust companies under this provision is a plausible interpretation of the language, even if it's not the best reading.

One must also bear in mind that if this provision is not broad enough to cover trustees, offshore trust companies aren't FFIs at all; as previously shown, they're not Type B or Type C investment entities, they're not depository or custodial FFIs, they're not insurance companies or their related holding companies under reg. section 1.1471-5(e)(1)(iv), and they're not treasury centers or holding companies under reg. section 1.1471-5(e)(1)(v). Thus, reg. section 1.1471-5(e)(4)(i)(A)(3) is the IRS's only hope of including most foreign trust companies as FFIs.

The IRS still very much believes that traditional offshore trust companies are FFIs. This is apparent from Example 6 in reg. section 1.1471-5(e)(4)(v), which posits a trust company as an FFI. The IRS takes this view even though its former view — that trust companies were custodial institution FFIs[47] — is now precluded by the regs' narrow definition of the types of income custodial FFIs must earn to be classified as such.

Example 6 does not say what category of FFI the trust company in the example is. However, presumably the IRS had a Type A investment entity in mind because the trust company in the example ''manages and administers'' the trust's assets, language most relevant to that type of FFI.

In sum, given FATCA's broad remedial purposes, the IRS's conviction that offshore trust companies are generally FFIs, and the language of Example 6, those companies are likely to be treated as FFIs under reg. section 1.1471-5(e)(4)(i)(A)(3) — that is, Type A investment entities. This is so despite more convincing arguments to the contrary based on standard canons of construction.

However, to be a Type A investment entity, it is not enough that a corporate trustee engage in the activities listed in reg. section 1.1471-5(e)(4)(i)(A)(3). The trustee must also ''primarily conduct as a business'' those activities ''for or on behalf of a customer.'' One can quibble with whether the trusts of which a commercial trust company serves as trustee, or the beneficiaries of those trusts, are customers. Again, however, given FATCA's broad

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[44]Reg. section 1.1471-5(e)(4)(i)(A)(1) and (2).

[45]Reg. section 1.1471-5(e)(4)(i)(A)(3).

[46]Loosely translated, *noscitur a sociis* means that a word should be interpreted in light of the context in which it is used or, more informally, a word is known by the company it keeps. *Ejusdem generis* is Latin for ''of the same kind.'' It means that when a law lists specific types of things followed by a more general description, the general description is limited to the same kinds of things specifically listed. In the present context, the first two kinds of Type A investment entities conduct only traditional investment activities: (1) trading in, for example, financial instruments, foreign exchanges, securities, etc. (reg. section 1.1471-5(e)(4)(i)(A)(1)); and (2) managing portfolios (reg. section 1.1471-5(e)(4)(i)(A)(2)). The third type of Type A investment entity is one that is engaged in ''otherwise investing, administering, or managing assets'' for others. Reg. section 1.1471-5(e)(4)(i)(A)(3). Given the entire context and the principles of *noscitur a sociis* and *ejusdem generis*, the fairest reading

(Footnote continued in next column.)

would be to limit ''administering or managing'' in reg. section 1.1471-5(e)(4)(i)(A)(3) to investment-type activities.

[47]*See* Notice 2010-60, at 330.

remedial purposes, it's fair to assume that they are, or at least will be so treated.

But what about the requirement that the entity ''primarily conduct'' those activities ''as a business''? Under reg. section 1.1471-5(e)(4)(iii), that test is met if the entity's gross income attributable to those activities is at least 50 percent of its total gross income over a stated period.[48] In the present context, the activities in question are administering or managing financial assets on behalf of trusts and their beneficiaries. If the phrase ''administering or managing'' is broad enough to include providing trustee services, which it must be if this provision is to apply in the first place, presumably all (or at least most) of a trustee's income (that is, fiduciary fees) will be attributable to those activities. A trust company might have some other income as well, for example, income from investing its own funds, but rarely will that other income be at least 50 percent of a trust company's gross income.

One exception may be private trust companies (PTCs), which are typically companies formed to serve as the trustee of one or only a few trusts for a single family. Unless the PTC charges for its services, it won't have any income at all. Pedantically speaking, zero gross income attributable to managing and administering assets is at least 50 percent (indeed, it is 100 percent) of zero gross income from all sources, so the requisite income threshold would arguably be met. But a test based on a percentage of income surely implies that some income is required for the test to be satisfied. In any event, if a PTC isn't charging for its services, it's hard to see how it conducts a ''business'' or has a ''customer,'' which is also required for a Type A investment entity. Thus, a PTC that doesn't charge for its services shouldn't be a Type A investment entity and, for the reasons discussed above, won't be any other type of FFI either.[49]

Another situation in which a trust company might not be a Type A investment entity is when all or the bulk of the assets it holds are nonfinancial assets, for example, real estate, art, wine, or other collectibles. Financial assets include securities (for example, shares and bonds), partnership interests, commodities, and insurance or annuity contracts, or any interests in any of the foregoing.[50] However, apart from non-publicly traded shares, typical non-bankable assets are not financial assets for those purposes. Therefore, a trust company, the majority of whose fees do not come from administering bankable assets or closely held shares, would not be a Type A investment entity. Bear in mind, however, that it's the trust company's income as a whole — not the income of individual trusts — that is the focus here. Therefore, the fact that a trust company might have some trusts that hold primarily non-bankable assets will not prevent the company from being an investment entity if most of its income comes from administering bankable assets or other financial assets.

What if, as is usually the case, an offshore trust company holds the assets of its trusts not directly but through wholly owned subsidiaries (underlying companies (UCs) in industry argot)?[51] It might then be argued that the UCs (or the directors of the UCs), not the trustee, administer and manage the trust assets. This argument is not without merit. Indeed, there is a very pragmatic reason to support it.

Remember, a trust company that earns most of its income from holding non-bankable assets directly isn't an FFI. The result shouldn't be different merely because the trustee chooses to hold those assets through the standard offshore trust structure — that is, in a UC rather than directly. Further, if a typical offshore corporate trustee of trusts with UCs is *ipso facto* a Type A investment entity because the UCs' shares are ''financial assets''[52] and the trust company is deemed to administer and manage those shares, the trusts themselves might also be deemed *ipso facto* to be FFIs even though they wouldn't be if the trustee held the non-bankable assets directly. I will return to this point in more detail in my next article when I discuss FATCA's classification of trusts as such. The important point for present

[48]The relevant period is the same as that for determining a putative custodial FFI's status under reg. section 1.1471-5(e)(3)(i)(A), *i.e.*, the shorter of (1) the three-year period ending on December 31 of the year preceding the year of determination, or (2) the period the entity has been in existence.

[49]The situation might be different if, as is often the case, one or more of the PTC's directors are charged for their services. It would arguably be elevating substance over form to allow a PTC whose directors were being compensated to escape FFI status merely because it wasn't itself charging fees.

[50]Reg. section 1.1471-5(e)(4)(ii) and section 475(c)(2).

[51]The following discussion assumes that the UC in question has not elected to be disregarded for U.S. tax purposes as an entity separate from its owner under section 7701(a)(1) and the related regulations or, if it has, that it is not wholly owned by the trust in question. A wholly owned company that has elected to be disregarded is not a person for FATCA purposes (reg. section 1.1471-1(b)(94)) and is ignored for U.S. tax purposes.

[52]A UC's shares are financial assets because shares of corporate stock qualify as such regardless of whether they are closely held or publicly traded. *See* reg. section 1.1471-5(e)(4)(ii), which cross-references section 475(c)(2). Section 475(c)(2) refers to ''any'' share of stock in a corporation. Compare section 475(c)(2)'s reference to partnership interest, which is limited to interests in a ''widely held or publicly traded partnership'' (but note that partnership interests in general, *i.e.*, even those not captured by section 475(c)(2)'s definition of a security, are expressly included in reg. section 1.1471-5(e)(4)(ii) in any event).

purposes is simply this: The status of a trust company and a trust as an FFI or an NFFE shouldn't be determined by something as formalistic as whether the trustee holds the trust's assets directly or through a UC. Rather, FFI versus NFFE status should turn on the types of assets that the trust, including the UC if there is one, invests in. In other words, for these purposes, one should be able to look through the UC to the underlying assets themselves.

On the other hand, the IRS could certainly take the view that given that a UC's shares are unquestionably financial assets, holding those shares and appointing, and in effect controlling, the UC's directors are administering or managing financial assets. One can only hope that pragmatics will prevail over formalism in this context.

2. The IGAs. The above analysis covers trust companies in non-IGA countries. As mentioned previously, an entity in a model I IGA country is generally governed exclusively by the IGA, whereas an entity in a model II IGA country is governed by the regs except to the extent that they are inconsistent with the IGA. However, when it comes to whether an entity is a financial institution versus an NFFE, both IGAs trump the regs.[53]

As explained in more detail below, offshore trust companies are likely custodial financial institutions under the IGAs. Whether they are also investment entity financial institutions under those documents is a much closer call. The better argument is that they are not. Of course, better arguments don't always prevail. For example, the U.K. revenue authorities have taken the opposite view in their draft FATCA regulations.

This raises an interesting point: To which entities does the U.K. IGA apply? Indeed, to which entities does any given IGA apply?

There is a rather curious difference between the model I and II IGAs in this respect. The model I IGA defines a financial institution to which it applies (known as a FATCA partner financial institution) as a financial institution ''resident in'' the FATCA partner country.[54] That IGA uses the same language to define a partner jurisdiction financial institution — that is, a financial institution resident in another country that has an IGA with the United States.[55] In contrast, the model II IGA allows the contracting states to choose between ''resident in'' and ''organized under the laws of'' the relevant country as the appropriate test.[56]

[53]Reg. section 1.1471-(5)(d).
[54]Model I IGA, art. 1.1(l).
[55]*Id.* at art. 1.1(m).
[56]Model II IGA, art. 1.1(m) and (n).

This would be a distinction without a difference if all countries applied the same test for corporate residence as the United States — that is, country of organization.[57] But they don't.

For example, the U.K. IGA, the first model I IGA, uses (as it must) ''resident in''[58] as the test for determining the entities it covers. Because corporate residence is not defined in the IGAs, its meaning is determined under local law, with tax law prevailing over nontax law.[59] One of the tests for corporate tax residence in the United Kingdom is ''central management and control.'' Thus, under U.K. law, a company incorporated under the laws of another country is resident in the United Kingdom if it is centrally managed and controlled from the United Kingdom. Which IGA would govern if that company were a financial institution and were incorporated in a model II IGA country that chose the ''organized under the laws of'' standard, as Switzerland has done in its IGA?[60] The answer is that the U.K. IGA would govern the U.K. operations and the Swiss IGA would govern the Swiss operations.

The IGAs apply on a branch level, thus avoiding the ''dueling IGAs'' problem that would otherwise arise because of the different tests for corporate residency. More specifically, the IGAs exclude from their coverage any branches of a domestic financial institution that are located abroad, and they include branches of other countries' financial institutions that operate domestically.[61]

This has significant ramifications for the offshore trust industry. A number of trust providers have headquarters in their home country that control minimally staffed, so-called white-label trust companies incorporated in offshore trust jurisdictions. In those setups, the head office would be governed by its country's IGA and the offshore operations would be governed by its country's IGA. If either country did not have an IGA, the regs would govern the local operations.

a. Depository institution financial institutions. For present purposes, the definition of a depository institution financial institution in the IGAs conforms in all material respects to the corresponding definition in the regs. Thus, foreign trust companies generally won't be depository financial institutions under the IGAs for the same reason they won't be under the regs — they don't accept deposits.

[57]Section 7701(a)(30)(C), (a)(4), and (a)(5).
[58]U.K. IGA, art. 1.1(l) and (m).
[59]Model I IGA, art. 1.2; model II IGA, art. 1.2.
[60]Swiss IGA, art. 2.1(13) and (14).
[61]Model I IGA, art. 1.1(l) and (m); model II IGA, art. 1.1(m) and (n). *See also* U.K. IGA, art. 1.1(l) and (m); Swiss IGA, art. 2.1(13) and (14).

b. Custodial institution financial institutions. The basic definition of a custodial institution financial institution in the IGAs is also identical in all material respects to the corresponding definition in the regs: an entity that holds, as a substantial portion of its business, financial assets for the accounts of others.[62] Further, the IGAs' basic test for determining whether this requirement is met tracks almost verbatim the corresponding language in the regs. The test is whether, over the requisite period, which is identical in both documents, the entity's ''gross income attributable to the holding of financial assets'' equals or exceeds 20 percent of the entity's gross income.[63] However, the two documents differ dramatically in one key respect: Unlike the regs, the IGAs do not define the phrase ''income attributable to the holding of financial assets.''

As noted earlier, the regs define that phrase narrowly to mean the sorts of fees only true financial intermediaries earn, for example, fees for custody, account maintenance, and transfers, as well as commissions from executing securities transactions. It is this narrow definition that prevents most offshore trust companies from being custodial institution FFIs under the regs. However, this definition surfaced for the first time in the final regs. In its absence, and as mentioned previously, the IRS had taken the position that foreign trust companies were likely to be custodial institution FFIs.[64] And that position made sense: After all, what do most trustees do if they don't hold financial assets for others as a substantial portion of their business?[65] Thus, offshore trust companies, at least those whose trusts hold significant financial assets, are likely to be custodial institution financial institutions under the IGAs.

c. Investment entity financial institutions. The IGAs' definition of an investment entity differs markedly from the corresponding definition in the regs. As mentioned earlier, there are three types of investment entities under the regs: (1) one that ''primarily conducts as a business'' specified activities ''for or on behalf of a customer'' (a Type A investment entity)[66]; (2) one whose gross income is ''primarily attributable'' to specified investment activities and that is ''managed by'' a depository institution FFI, a custodial institution FFI, a specified insurance company FFI, or a Type A investment entity (a Type B investment entity)[67]; and (3) a collective investment vehicle or one of several different types of funds (a Type C investment entity).[68] In contrast, the IGAs contain one, and only one, type of investment entity, which is defined as follows:

> 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[69];
>
> (2) individual and collective portfolio management; or
>
> (3) otherwise investing, administering, or managing funds or money on behalf of other persons.

This definition tracks fairly closely the definition of a Type A investment entity under the regs.[70] However, there are several differences. First, the parenthetical ''or is managed by an entity that conducts as a business,'' a phrase to which I will return in a moment, doesn't appear in the regs' definition of a Type A investment entity. Second, the regs require that the entity ''primarily'' conduct the listed activities as a business, but ''primarily'' is not in the IGAs. Third, there is no percentage of income test in the IGAs by which to measure whether an entity conducts the relevant activities as a business.

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[62]Model I IGA, art. 1.1(h); model II IGA, art. 1.1(i).

[63]*See supra* note 39 for the relevant testing period.

[64]Notice 2010-60, at 330.

[65]The ''substantial portion of its business'' requirement will be met easily for trustees of trusts that hold mostly bankable assets; those trustees will earn well over the required 20 percent of their income (*i.e.*, fiduciary fees) from holding financial assets for others.

[66]Reg. section 1.1471-5(e)(4)(i)(A).

[67]Reg. section 1.1471-5(e)(4)(i)(B).

[68]Reg. section 1.1471-5(e)(4)(i)(C).

[69]The word ''trading'' appears here in the model I IGA, but not in the model II IGA. The model IGAs' definition of investment entity is based on the FATF recommendations' definition of financial institutions. *See* FATF recommendations at 115-116. This is why the IGAs require that the term ''investment entity'' as used therein be interpreted in a manner consistent with the FATF's definition of financial institution. Model I IGA, art. 1.1(j); model II IGA, art. 1.1(k). The FATF recommendations' definition includes the word ''trading'' here, and the drafters of the model I IGA followed suit. However, the word does not belong here — the relevant subparagraph begins with the word ''trading,'' so repeating that word at the end makes the subparagraph say ''trading in . . . commodity futures trading,'' a clear drafting error. That error was corrected in both the model II IGA and the regs. *See* reg. section 1.1471-5(e)(4)(i)(A)(1).

[70]It also tracks closely the FATF definition of a financial institution, from which it is drawn. However, the FATF definition lists 13 types of activities that can make an entity a financial institution. Of those, only the three activities listed above made it into the IGAs.

Finally, the phrase ''financial assets'' appears in the regs but is absent from subparagraph (3) above, leaving just ''funds or money'' as the type of assets an entity must administer or manage to qualify as an investment entity under this provision.

The failure to include ''financial assets'' in subparagraph (3) could affect a trust company's status as an investment entity under the IGAs. A UC's shares are financial assets but are they ''funds or money''? Certainly not intuitively, and not under the most natural reading of that phrase. If they're not, a trust company that uses UCs wouldn't qualify as an investment entity under the IGAs unless one were to look through the UCs to the underlying assets. As mentioned earlier, this look-through approach makes sense, but it is not clear whether the IRS will adopt it.

The UC issue aside, and despite the other wording differences, one would expect that the basic analysis of whether a trust company is an investment entity under the IGAs would be similar to the inquiry as to whether it is a Type A FFI under the regs. Applying the same logic as under the regs, a typical offshore trust company that is reimbursed for its services and holds mostly bankable assets should be an investment entity under the IGAs because it ''conducts as a business . . . for or on behalf of a customer . . . administering, or managing funds or money on behalf of other persons.''

But what of the requirement that the definition of an investment entity in the IGAs be interpreted consistently with the definition of a financial institution under the FATF recommendations? Are trust companies financial institutions under the latter document? The answer is not totally clear but it appears to be no. Rather, trust companies are generally designated nonfinancial businesses and professions (DNFBPs) under the recommendations.

The recommendations include within the definition of DNFBPs trust companies ''that are not covered elsewhere under [the] Recommendations'' if the companies act as trustees of express trusts as a business.[71] The recommendations contain several provisions detailing the obligations of DNFBPs, including, for example, due diligence and record keeping,[72] internal controls,[73] and reporting of suspicious transactions.[74] Although the ''not covered elsewhere'' language leaves some wiggle room for a trust company nevertheless to be a financial institution under the recommendations in a given case, the recommendations' working assumption seems to be that trust companies wouldn't typically fall within that category.

Although the IGAs say the definition of an investment entity should be interpreted consistently with the meaning of a financial institution under the FATF recommendations, and even though trust companies don't appear to be financial institutions under those recommendations, the U.K. revenue authorities nevertheless believe that a trustee will be an investment entity under the U.K. IGA when it is a trust or company service provider as defined in the U.K. Money Laundering Regulations 2007.[75] This conclusion is questionable in light of the U.K. IGA's requirement that the IGA be interpreted consistently with the FATF recommendations in this regard. Still, until further clarification, the most that can be said is that it is not entirely clear whether trust companies are investment entities under the IGAs.

As a practical matter, it won't make any difference in most cases. As long as a trust company is a custodial financial institution in any event, and it usually will be, it will still be a financial institution. While the specific type of financial institution an entity is can be critical under FATCA in some circumstances,[76] nothing turns on whether a financial FFI institution in an IGA country is only a FFI custodial financial institution or both a custodial financial institution and an investment entity.

However, if a trust company isn't a custodial financial institution under an IGA, and it's not an investment entity either, it likely won't be a financial institution at all (and thus would be an NFFE). This is because, for the reasons given earlier, offshore trust companies generally aren't depository

[71]FATF recommendations at 112-113.

[72]FATF recommendation 22 at 19-20, cross-referencing recommendations 10, 11, 12, 15, and 17.

[73]FATF recommendation 23 at 20-21, cross-referencing recommendations 18-21.

[74]*Id.*

[75]The draft International Tax Compliance (United States of America) Regulations 2013, section 7(1); ''Guidance Note to the Draft U.K. Regulations,'' at 24; Summary of Responses to the 18 September U.K. FATCA Consultation Document, at 8.

[76]For example, the definition of a financial account under the model I IGA partly depends on whether the financial institution in question is a financial institution *solely* because it is an investment entity. Model I IGA, art. 1.1(q). In those cases, ''financial account'' includes some ''equity or debt interests.'' *Id.* The term ''equity interests'' has a specific meaning under the model I IGA for trusts. *Id.* at art. 1.1(t). Under the model II IGA, a financial account is defined in part by reference to the regs' definition of that term. Model II IGA, art. 1.1.(v). The regs' definition, specifically the ''equity or debt interest'' prong, also depends on the type of FFI an entity is. Reg. section 1.1471-5(b)(1)(iii). Again, however, whether an entity is both a custodial FFI/financial institution and an investment entity or only a custodial FFI/financial institution is irrelevant for this purpose. *Id.*

financial institutions. The only other type of financial institution under the IGAs is a specified insurance company, and trust companies aren't those either.

But what types of trust companies aren't custodial financial institutions under the IGAs? One example would be a trust company that holds almost exclusively non-bankable assets — remember, a custodial financial institution must hold as a substantial portion of its business ''financial assets'' for others.[77] Most, perhaps all, commercial trust companies would meet this test. Even if they have some trusts that hold mostly non-bankable assets, most trust companies likely will hold significant financial assets as well. However, many PTCs wouldn't be custodial financial institutions under this test, at least if the look-through approach to UCs advocated earlier is used. This is because PTCs are often specifically set up to hold non-bankable assets.

What of the parenthetical ''or is managed by an entity that conducts as a business'' in the definition of an investment entity under the IGAs? It has the effect of making entities investment entities even though they don't themselves conduct the types of activities listed, don't conduct a business, and don't have customers, as long as they are managed by other entities that do. It thus bootstraps a rough equivalent of a Type B investment entity under the regs into the definition of an investment entity under the IGAs. As mentioned earlier, a Type B investment entity under the regs is one whose gross income is ''primarily attributable'' to specified investment activities *and* that is ''managed by'' a depository institution FFI, a custodial institution FFI, a specified insurance company FFI, or a Type A investment entity.[78] However, the entities that are made investment entities under the IGAs through the ''managed by'' language are both broader in some respects and narrower in others than Type B investment entities under the regs.

They are broader in that a certain percentage of the income of Type B investment entities under the regs must be attributable to specific investment activities,[79] whereas there is no corresponding requirement for investment entities under the IGAs. They are narrower in that the regs permit the managing entity to be a depository institution FFI, a custodial institution FFI, a specified insurance company FFI, or a Type A investment entity,[80] whereas under the IGAs only the functional equivalent of a Type A investment entity under the regs will make the managed entity an investment entity.

Even so, the managed-entity parenthetical doesn't affect whether typical offshore trust companies are financial institutions under the IGAs because, as discussed above, they generally are at least custodial financial institutions and may be investment entities as well. However, the parenthetical has a dramatic effect on whether trusts themselves are investment entities under the IGAs. I will return to this point in my next article, which will discuss FATCA's classification of trusts.

In sum, most offshore trust companies are custodial institution financial institutions under the IGAs. The jury is still out as to whether they are investment entity financial institutions as well, though the more convincing view is that they are not.

III. Conclusion

As can be seen, even a simple, threshold question such as whether an offshore trustee is an FFI or NFFE under the regs and IGAs requires a complicated and detailed analysis. And even after a thorough analysis, open questions remain. FATCA is a massive and intricate beast! That's why it takes many bites to sort through FATCA's application to offshore trustees, trusts, and UCs.

In my next article, I will discuss whether offshore trusts themselves are FFIs or NFFEs. The stakes that question raises are high — unlike trust companies, trusts actually have ''accounts'' and ''account holders'' as defined for FATCA purposes, so FATCA's most onerous obligations fall on trusts if they are FFIs.

The fun has only just begun.

(Appendices appear on the following page.)

[77]Model I IGA, art. 1.1(h); model II IGA, art. 1.1(i). Unlike the regs, the IGAs don't define financial assets. Therefore, the phrase would be given meaning, if any, under local law; otherwise, it would presumably be interpreted consistently with the regs' definition of the term.

[78]Reg. section 1.1471-5(e)(4)(i)(B).

[79]*Id.*

[80]*Id.*

Appendix I

Types of FI/FFI	Regs	IGAs
Depository	(i) Accepts deposits in course of (ii) Banking or similar business (includes trust or fiduciary services)	Same, except no definition of banking or similar business
Custodial	Holds as substantial portion of business (20 percent of income) financial assets for benefit of others — narrow definition of such income (''means'' custody and account fees, securities transactions fees, etc.)	Same, except no definition of types of income required
Investment Entity		Use FATF Recommendations definition of ''financial institution'' to interpret
	(i) Type A: ''primarily conducts'' (50 percent of income test) as a business for or on behalf of customers . . . ''administering, or managing funds, money, or financial assets on behalf of others''	(i) Type A only but: (a) ''primarily'' not required (thus, no percent income test) (b) also includes entities ''managed by an entity that conducts as a business'' the listed activities — pulls in ''quasi'' Type B IEs but: (i) no income test; (ii) managing entity must be Type A IE equivalent, not Depository, Custodial, or Insurance Co. FI); and (c) only ''funds or money'' (not ''financial assets'') included in the types of assets administered or managed
	(ii) Type B: Income ''primarily attributable'' (50 percent test) to investment activities and managed by Type A IE or Depository, Custodial, or Insurance Co. FI	(ii) No Type B (except as quasi pulled in above)
	(iii) Type C: Collective investment vehicles, funds, etc.	(iii) No Type C

Appendix II

Are Typical Offshore Trust Companies FIs/FFIs?		
Types of FI/FFI	**Regs**	**IGAs**
Depository	No, because trust companies don't accept deposits.	No, because trust companies don't accept deposits.
Custodial	No, because trust companies don't earn the required type of income.	Likely, because the IGAs don't narrowly define required income.
Investment Entity	See below for specific types.	Not if one takes seriously the IGAs' requirement that their definition of investment entity be read consistently with the definition of financial institution under the FATF recommendations. The United Kingdom takes a different view.
Type A	Likely, but only because the IRS seems to take this view and only under a strained reading of the regs.	N/A
Type B	No.	N/A
Type C	No.	N/A