

FATCA:

**Due Diligence for the Identification and Documentation of
Individual Account Holders**

February 1, 2013

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Agenda

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- **Introduction – Setting the scene**

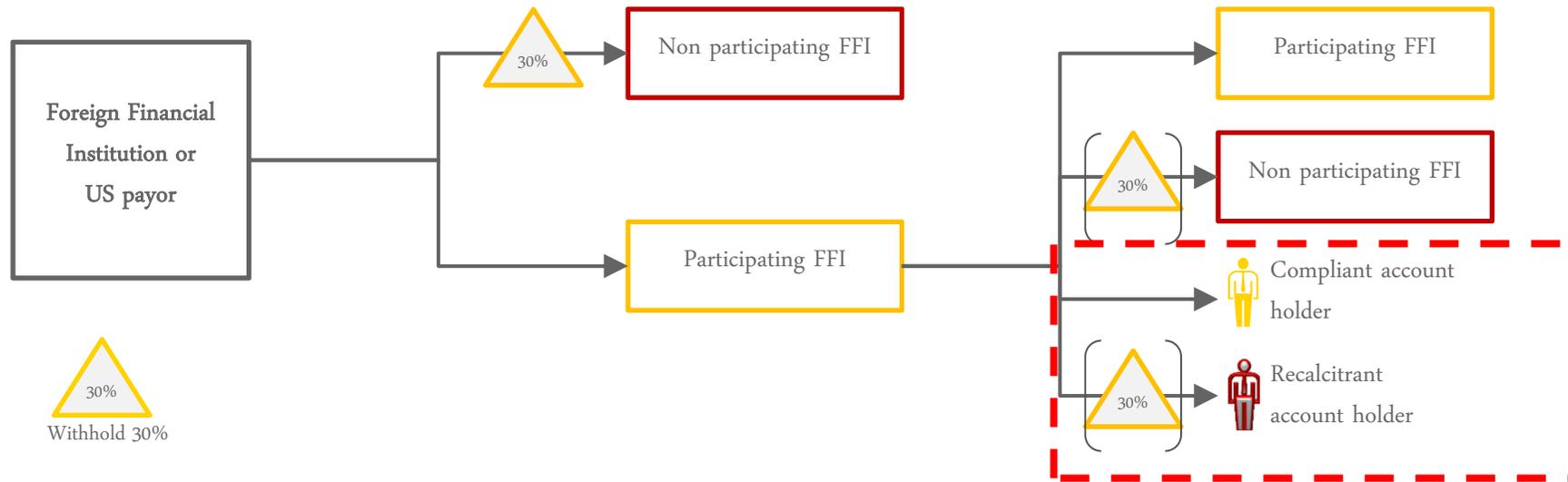
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- **Identification Requirements – Key diagnostic issues**

1. Introduction – Setting the scene

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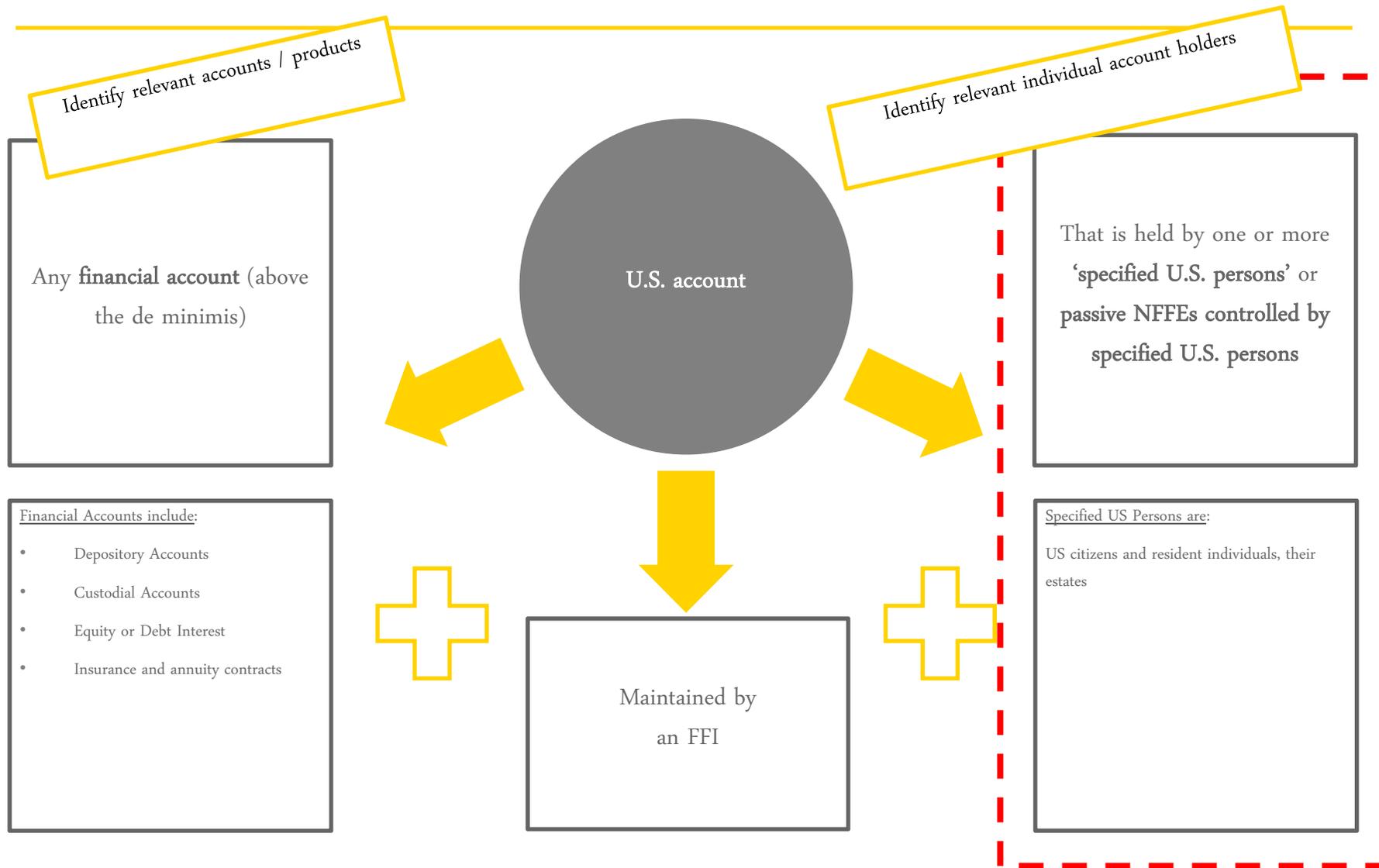
Identification of individuals – a part of the FATCA puzzle



- FFIs are responsible for identifying (i) individual account holders that are specified US persons and non-US entities that have controlling persons (owning more than 25%) that are specified US persons, subject to an optional de minimis threshold, pursuant to certain prescribed due diligence procedures. The procedures vary between pre-existing accounts and new accounts and between individuals and legal entities.
- Various procedures will need to be applied in order to establish whether financial accounts are to be treated as “US Reportable Accounts”. To the extent holders of accounts identified as US specified persons do not provide certain information or documentation, such account holders are deemed ‘recalcitrant’. Pursuant to the IGA, an FFI does not need to withhold 30% of a payment to a recalcitrant account if information with respect to such account is reported, under the final FATCA regulations the rules are more nuanced.

1. Introduction – Setting the scene

Identification of individuals – a part of the FATCA puzzle



1. Introduction – Setting the scene

Rules

Where can you find the rules for identification of individual account holders?

Final FATCA regulations

Final FATCA regulations released on January 17, 2013

Scattered throughout the final FATCA regulations:

(1) Definitions (e.g. “individual account”, “preexisting individual account”, and others)

(2) Identification requirements related to (i) payees and (ii) rules under “FFI agreement” section

IGA Model 1

IGA Model 1 issued on July, 26, 2012

IGA : (1) Definitions (“account holder” and “U.S. person”) and (2) Annex I

OR/AND

Final FATCA regulations: if the FFI elects to apply the cherry picking provision

IGA Model 2

IGA Model 2 issued on November, 14, 2012

IGA : (1) Definitions (“account holder” and “U.S. person”) and (2) Annex I

AND

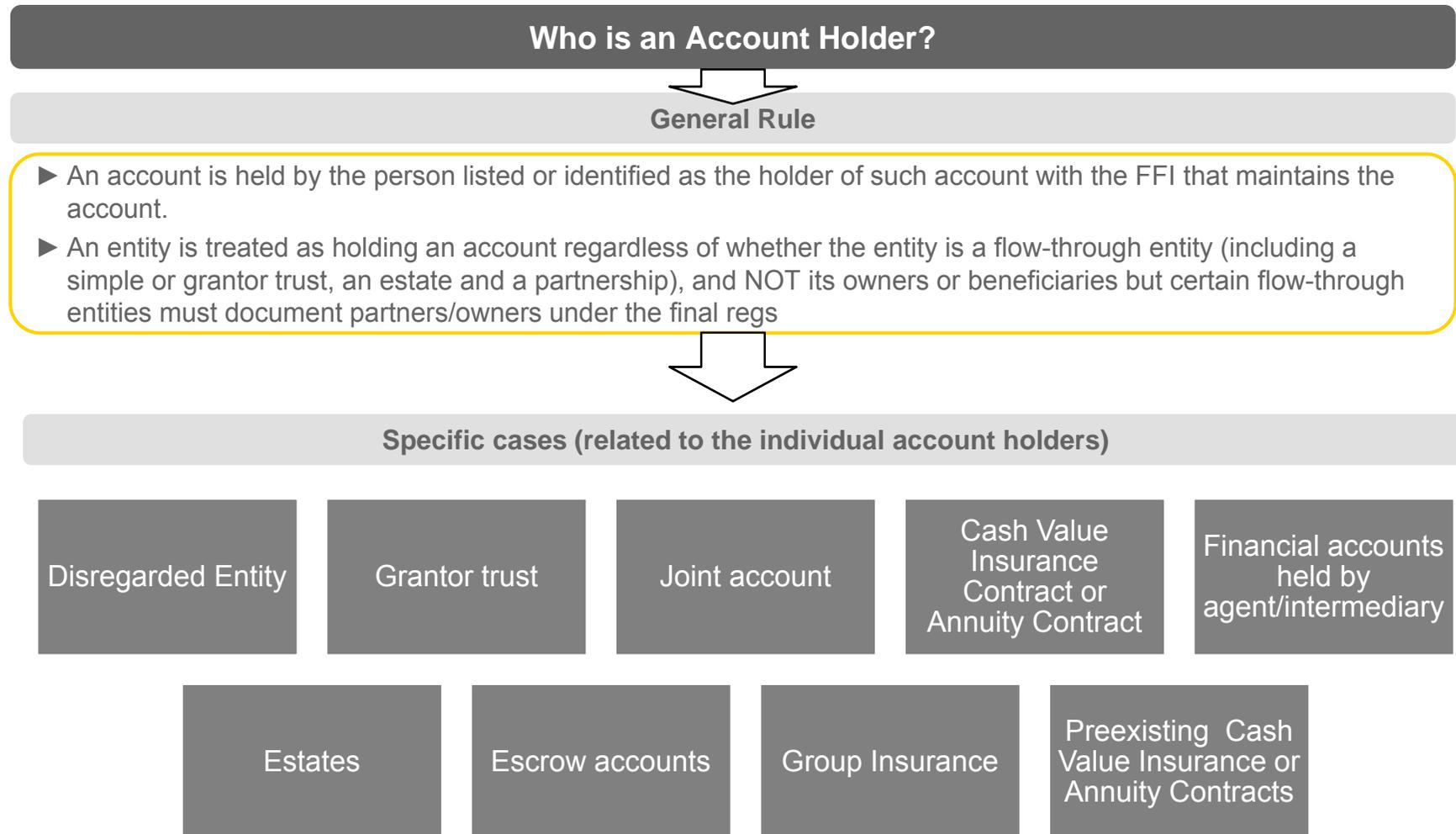
Final FATCA regulations: if the FFI elects to apply a cherry picking provision

Differences exist between Model 1 and Model 2

2. Identification Requirements – Key diagnostic issues

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Definition of an Individual Account Holder



2. Identification Requirements – Key diagnostic issues

Definition of an Individual Account Holder – Exceptions

Disregarded Entity (Regs. only)	Grantor trust	Joint account	Cash Value Insurance Contract or Annuity Contract	Financial accounts held by agent (not in Model 1 IGA!)
<ul style="list-style-type: none">The account holder is the person owning such entity	<ul style="list-style-type: none">A trust shall not be treated as holding an account if and to the extent a person is treated as the owner of the entire trust under sections 671 through 679 of the Internal Revenue Code. The said person will be treated as the account holder	<ul style="list-style-type: none">Each joint holder will be treated as holding the account and will be attributed the entire balance of the account. If any of the holders are specified U.S. persons (or a U.S. owned passive NFFE), the account is a U.S. account, unless an exception applies	<ul style="list-style-type: none">Account holder is any person that is entitled to access cash value or change the beneficiary of the contract – if no such person exists the account will be deemed held by the owner of the contract and any person with a vested entitlement to payment.Upon maturity each person entitled to receive a payment is treated as an account holder	<ul style="list-style-type: none">A person, other than a financial institution, holding a financial account for the benefit or account of another person as an agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for FATCA purposes, and such other person is treated as holding the account

(But see IGAs with Denmark, Mexico and Ireland)

2. Identification Requirements – Key diagnostic issues Definition of an Individual Account Holder

- Exceptions

Estates (Regs. Only)

- Account holder must not be identified if the account is solely held by an estate if the documentation for such account includes a copy of the deceased's will or death certificate

But see IGAs, including in the definition of the "US person" an estate of a decedent that is a citizen or resident of the U.S

Escrow accounts (Regs.Only)

- Holder must not be identified if the account is established in connection with (A) a court order or judgment; or (B) the sale, exchange, or lease of real or personal property, provided that the account meets certain conditions laid down in section §1.1471-5(b)(2)(iv)

This may address the issue of certain third party accounts of lawyers and notaries under the Regs. – in IGA Model 1 the issue is dealt with by the lack of agency clause!

Group Cash Value Insurance or Annuity contracts Regs. Only)

- In the case of a qualifying group cash value insurance or annuity contract, the account holder may be presumed to be non-US until the date on which an amount is payable to the employee/certificate holder or beneficiary if the PFFI obtains a certification from the employer that no employee/certificate holder is a US person. PFFI must not determine whether claim of foreign status is unreliable or incorrect

Preexisting Cash Value Insurance or Annuity Contracts (IGA only)

- Preexisting Cash Value Insurance or Annuity Contracts are not to be identified provided the local or U.S. law prevents the sale of such contracts to U.S. residents, e.g. if the relevant financial institution does not have the required authorisation under U.S. law, and the local law requires the FFI to report or withhold with respect to insurance products held by residents

2. Identification Requirements – Key diagnostic issues

Distinction between new and preexisting accounts

- ▶ The procedures distinguish between accounts outstanding on December 31, 2013 (“Preexisting accounts”) [*the regs. refer, in the case of PFFIs to the “effective date of the FFI agreement”, i.e. January 1, 2014 or later?*] and accounts opened as from January 1, 2014 (“New accounts”) rather than between preexisting and new customers
- ▶ This means that when preexisting customers open a new account, the identification procedures for new accounts must be applied even when the applicable AML rules do not require the FFI to re-document the customer
- ▶ This issue is addressed in the final regs. which allow new accounts opened by holders of preexisting accounts to be treated as a preexisting account provided:
 - ▶ (i) the account holder also holds with the FI or a member of the FI’s EAG or sponsored FFI group) a preexisting account;
 - ▶ (ii) the preexisting and new account are treated as a single account for the purposes of satisfying the standards of knowledge and for determining the balance or value of the account; and
 - ▶ (iii) the applicable AML due diligence rules permit the FI to rely on the AML due diligence performed for the preexisting account to satisfy the AML due diligence for the new account
- ▶ This is a significant change from the approach in the proposed regs. and the IGAs

2. Identification Requirements – Key diagnostic issues

Distinction between new and preexisting accounts

- ▶ Question: will FIs established in an IGA country benefit from the new definition of “preexisting accounts”?
 - ▶ Regs. state specifically that IGA is intended to provide for a simpler approach than the regs.
 - ▶ “Cherry picking” provision allows FIs in IGA countries, when allowed by the relevant IGA country, to opt for the procedures described in the regs. as an alternative to the procedures described in each section of Annex I of the IGA
 - ▶ But meaning and implications of the “cherry picking” provision are unclear:
 - ▶ The provision refers to substitution a section of Annex I by a procedure of the regs.: does this allow to simply rely on a definition of the regs. whilst continuing to apply the procedures laid down in the IGA?
 - ▶ If one had to pick the entire identification procedure for the regs., can one do so for preexisting accounts only or will it automatically extend to new accounts on the basis that both notions are mutually exclusive?
 - ▶ The definition applies to individuals and entities. Does cherry picking of the definition mean that both the procedures for individuals and entities must be applied by the IGA FI?
 - ▶ If cherry picking is the way to grant the benefit of the new definition to IGA FIs, FIs in countries where cherry picking will not be allowed will be put at a disadvantage
 - ▶ It is likely to take a while before the meaning of the cherry picking provision is clarified whilst FIs need this confirmation urgently
 - ▶ It is preferable to amend the definition of “preexisting account” in the IGA!

2. Identification Requirements – Key diagnostic issues

Key steps

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- ▶ Due diligence procedures involve a search for US indicia by way of an electronic search and/or a file review sometimes requiring the intervention of the relationship manager. Change of circumstances review required continuously
 - ▶ Preexisting accounts are further distinguished between high value accounts and others
 - ▶ Regs. provide more detail than the IGA but procedures are not fundamentally different. Some of the differences are proper to the difference between the two documents (such as the need for a waiver from US persons under the regs.) whilst others are generally on matters not dealt with in the IGAs
 - ▶ Key changes in the final regs. regarding due diligence procedures for individuals include the following:
 - ▶ Notation of documentary evidence examined (without name of person that did the examination) rather than retaining a copy of the documentary evidence itself for preexisting accounts without US indicia
 - ▶ Special rules for accounts acquired in a merger or bulk acquisition
 - ▶ The revised rules for documentation standards, validity periods of documentation, and reliance on valid documentation collected by other withholding agents, reason to know standards for validity of documentation as laid down in §1.1471-3 for withholding agents will apply under the FFI agreement regardless of whether the PFFI makes a payment to the account – presumption rules do not apply, however!

2. Identification Requirements – Key diagnostic issues

Key steps

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- ▶ Key changes in the final FATCA regs. regarding due diligence procedures for individuals include the following:
 - ▶ Due diligence applies on an account-by-account basis with exceptions for accounts treated as consolidated accounts
 - ▶ Alternative documentation options to U.S. tax forms
 - ▶ Special rules of group life insurance and annuity contracts
 - ▶ Responsible officer must provide certification that the FFI does not have practices or procedures in place to assist account holders in avoiding FATCA requirements, such as advising account holders to split up their accounts to avoid reporting as high-value accounts, advising clients to remove US indicia from its account information, advising customers to close account to avoid reporting
 - ▶ Certification must be made within 60 days following the date that is two years after the effective date of the FFI agreement

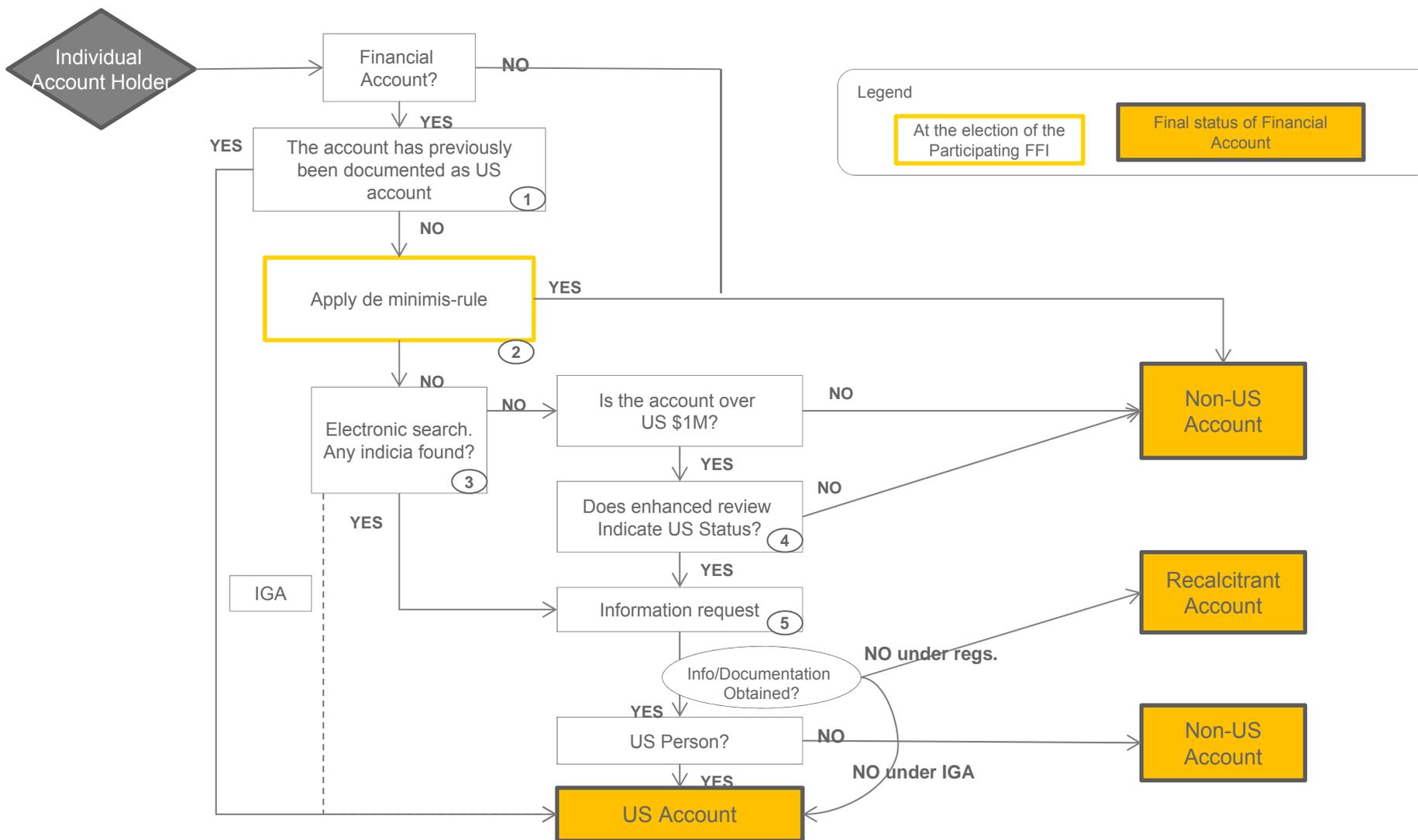
2. Identification Requirements – Key diagnostic issues

Timing

- ▶ New accounts – the procedures need to be in place as of January 1, 2014
- ▶ Preexisting accounts: Under IGAs:
 - ▶ Low value accounts – generally by December 31, 2015
 - ▶ High value accounts – generally by December 31, 2014
 - ▶ If, based on the identification procedures, the account is identified as a U.S. reportable account before these deadlines – account is to be treated as the U.S. reportable account as of the date it is identified as such
- ▶ Preexisting accounts under the regs.:
 - ▶ Preexisting low value accounts – generally by December 31, 2015
 - ▶ Preexisting high value accounts – generally by December 31, 2014
 - ▶ The preexisting account identification is linked to the effective date of the FFI agreement (identification needs to take place within one year for the high value accounts and two years for the lower value accounts) and assigning of the recalcitrant account status

2. Identification Requirements – Key diagnostic issues

Identification of preexisting accounts held by individuals – Final Regulations and Model 1 IGA



2. Identification Procedures

Identification of preexisting accounts held by individuals –

Remarks:

- ① ▶ Under regs. , the FFI, that has already a QI, WP or WT agreement with the IRS or has to fulfill reporting obligations as US payor under chapter 61, has previously documented the account holder as Specified US Person

- ▶ In the case of Depository account with an aggregated balance or value of US \$ 50,000 or less, and cash value insurance contracts and annuities with aggregate balance or value of \$250,000 or less FFI can directly treat such account as Non-US Account without following the described identification and documentation procedures
- ② ▶ FFI can rely on electronically searchable information regardless of information maintained in paper file

- ▶ Enhanced Review consists of
 - ③ ▶ A relationship manager inquiry for actual knowledge of US status
 - ▶ An additional review of non-electronic records (master file, other documents), unless FFI can search electronically the following criteria: nationality, address, telephone, standing instructions to pay amounts to another account, “in-care of” or “hold mail” address, power of attorney or signatory authority.

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2. Identification Requirements – Key diagnostic issues

Identification of preexisting accounts held by individuals – Final Regulations

US Indicia found	Obtain
1. Designation of US resident or citizen.	<ol style="list-style-type: none"> 1. Withholding certificate and government issued evidence of non-US citizenship; or 2. Form W-9 plus waiver
2. Unambiguous indication of a US place of birth.	<ol style="list-style-type: none"> 1. Government issued evidence of non-US citizenship and Certificate of Loss of Nationality of the US; or 2. Withholding certificate and government issued evidence of non-US citizenship, plus evidence of renunciation of US citizenship; or 3. Form W-9 plus waiver
<ol style="list-style-type: none"> 3. Current US residential address or US mailing address; or 4. Only US telephone number(s); or 5. US telephone number(s) and non-US telephone number(s); or 6. Standing instructions to transfer funds to an account maintained in the US; or 7. Currently effective power of attorney or signatory authority granted to a person with a U.S. address; or 8. An “in-care-of” or “hold mail” address that is the sole address the Reporting [FATCA Partner] Financial Institution has on file for the account holder 	<ol style="list-style-type: none"> 1. Withholding certificate plus certificate of residence, government issued evidence of non-US citizenship or QI documentation other than a form W-8 or W-9; or 2. Form W-9 plus waiver

2. Identification Requirements – Key diagnostic issues

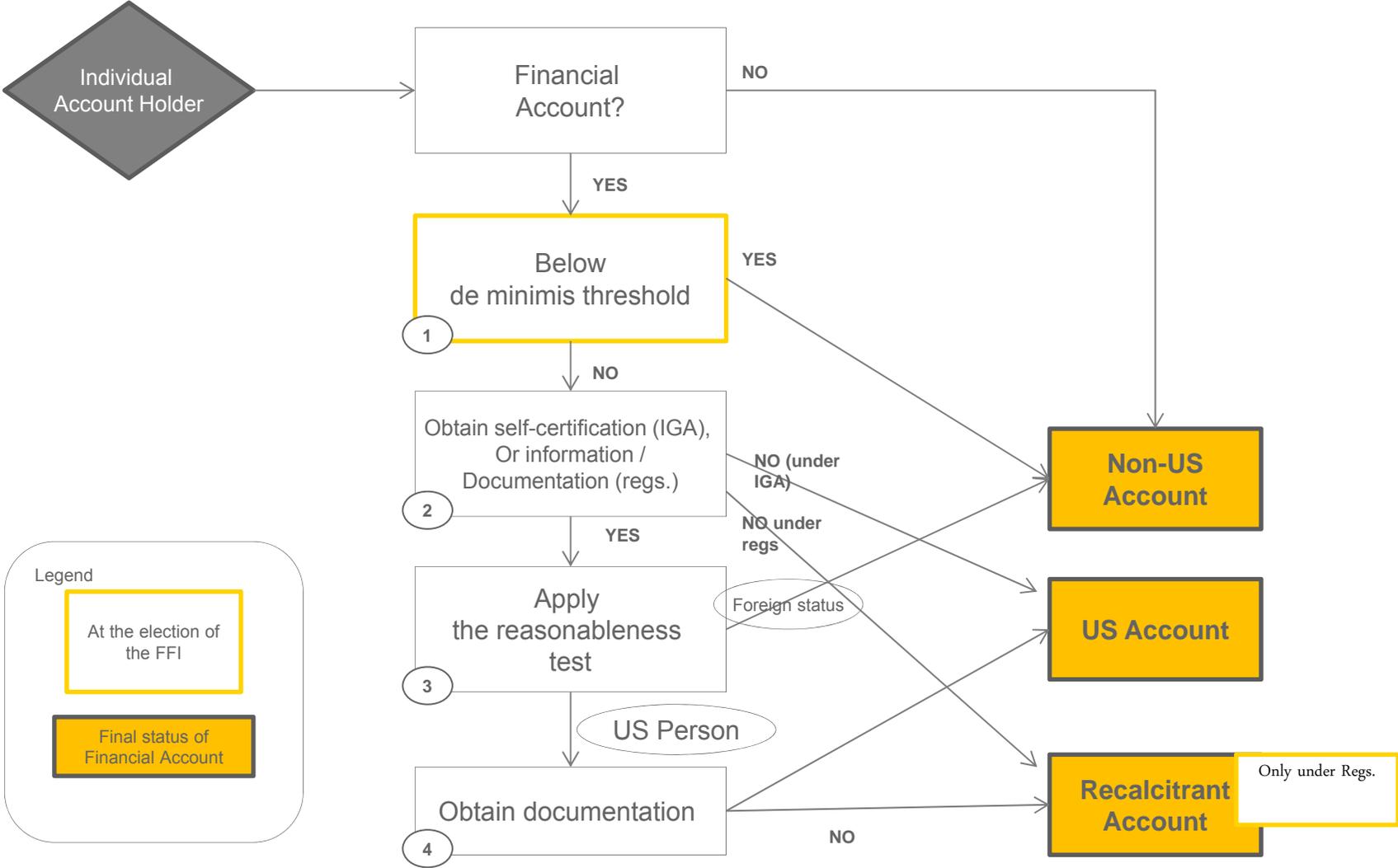
Identification of preexisting accounts held by individuals –

Model 1 IGA

3 US indicia found	5 Documents required to confirm or rebutt the status
1. US Place of Birth	<ol style="list-style-type: none"> 1. A self-certification that the account holder is neither a U.S. citizen nor a U.S. resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); 2. A non-U.S. passport or other government-issued identification evidencing the account holder's citizenship or nationality in a country other than the United States; and 3. A copy of the individual's Certificate of Loss of Nationality of the United States or a reasonable explanation of: (a) the reason the individual does not have such a certificate despite renouncing U.S. citizenship; or (b) the reason the account holder did not obtain U.S. citizenship at birth.
2. Current U.S. mailing or residence address, or one or more U.S. telephone numbers that are the only telephone numbers associated with the account	<ol style="list-style-type: none"> 1. A self-certification that the account holder is not a U.S. citizen or resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); and 2. A non-U.S. passport or other government-issued identification evidencing the account holder's citizenship in a country other than the United States.
3. Standing instructions to transfer funds to an account maintained in the United States	<ol style="list-style-type: none"> 1. A self-certification that the account holder is not a U.S. citizen or resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); and 2. Documentary evidence, as defined in paragraph VI.D of this Annex I, establishing the account holder's non-U.S. status.
4. A currently effective power of attorney or signatory authority granted to a person with a U.S. address, has an "in care of" address or "hold mail" address that is the sole address identified for the account holder, or has one or more U.S. telephone numbers	<ol style="list-style-type: none"> 1. A self-certification that the account holder is not a U.S. citizen or resident for tax purposes (which may be on an IRS Form W-8 or other similar agreed form); or 2. Documentary evidence establishing the account holder's non-U.S. status.

2. Identification Procedures

Identification of new accounts held by individuals –
Final Regulations and Model 1 IGA



2. Identification Requirements – Key diagnostic issues

Reasonableness test

Reasonableness test – issues for the account holders with preexisting accounts opening a new account

- IGA wording:
 - “B. Other New Individual Accounts. With respect to New Individual Accounts not described in paragraph A of this section, upon account opening, the Reporting [FATCA Partner] Financial Institution must obtain a self-certification which may be part of the account opening documentation, that allows the Reporting [FATCA Partner] Financial Institution to determine whether the account holder is resident in the United States for tax purposes (for this purpose, a U.S. citizen is considered to be resident in the United States for tax purposes, even if the account holder is also a tax resident of another country) and **confirm the reasonableness of such self-certification based on the information obtained by the Reporting [FATCA Partner] Financial Institution in connection with the opening of the account, including any documentation collected pursuant to AML/KYC Procedures**“
- Regulations
 - Clients with preexisting accounts opening a new account - new account can be treated as a preexisting account if treated as "one obligation" for purposes of applying AML due diligence, aggregating balances, and applying standards of knowledge

2. Identification Requirements – Key diagnostic issues

Identification of new accounts held by individuals – Final Regulations and Model 1 IGA

	Final Regulations	Model 1 IGA
	Defined as “Individual Accounts other than Preexisting Account”	Defined as “New Individual Accounts”
①	<ul style="list-style-type: none"> ▶ Depository account with an aggregated balance or value of US \$ 50,000 or less, and certain cash value insurance contracts with aggregate cash value of US \$50,000 or less 	<ul style="list-style-type: none"> ▶ Depository account with an aggregated balance or value that does not exceed US \$ 50,000 ▶ Cash Value Insurance Contract with an aggregated balance or value that does not exceed US \$ 50,000
②	<ul style="list-style-type: none"> ▶ FFI must obtain: <ul style="list-style-type: none"> ▶ A certificate of residence; or ▶ An individual government identification; or ▶ A third party credit report under conditions that the address provided is outside the US, the third-party credit agency verified the residency and the information meets the AML due diligence requirements; or ▶ In the case of a group cash-value insurance contracts or group annuity contract: a certification that no employee/certificate holder is a US person; or ▶ A withholding certificate 	<ul style="list-style-type: none"> ▶ FFI must obtain: <ul style="list-style-type: none"> ▶ A self-certification which may be part of the account opening documentation <div style="border: 2px solid yellow; padding: 5px; transform: rotate(-5deg); display: inline-block;"> Phrasing the golden question (positive or negative) </div>
③	<ul style="list-style-type: none"> ▶ Determine if the status claimed by the accountholder is unreliable or incorrect based on the following documentation: <ul style="list-style-type: none"> ▶ Information collected in connection with the opening of the account, including any documentation collected pursuant to AML/KYC Procedures 	
④	<ul style="list-style-type: none"> ▶ Obtain: <ul style="list-style-type: none"> ▶ Form W-9 or US TIN (in any manner); and ▶ A waiver if necessary ▶ Documentation has to be obtained in the 90 days after opening date otherwise the account holder is treated as recalcitrant 	<ul style="list-style-type: none"> ▶ Obtain: <ul style="list-style-type: none"> ▶ Self-certification that includes the account holder’s TIN (may be a Form W-9 or any other agreed form)

2. Identification Requirements – Key diagnostic issues

De minimis – strategic options

- Not identify
- Not report
- Identify and report
- New accounts – predicting the possibility of exceeding the threshold
- Trigger events for review

Policy decision regarding acceptance of the U.S. customers

- Optional for participating FFIs, required for certain deemed-compliant FFIs
- Issue: change of circumstances resulting in the U.S. status

Pre-documented U.S. persons

- IGA – de minimis rule for depository accounts below \$50,000 can be applied
- Final FATCA Regulations – no de minimis

Contact Information



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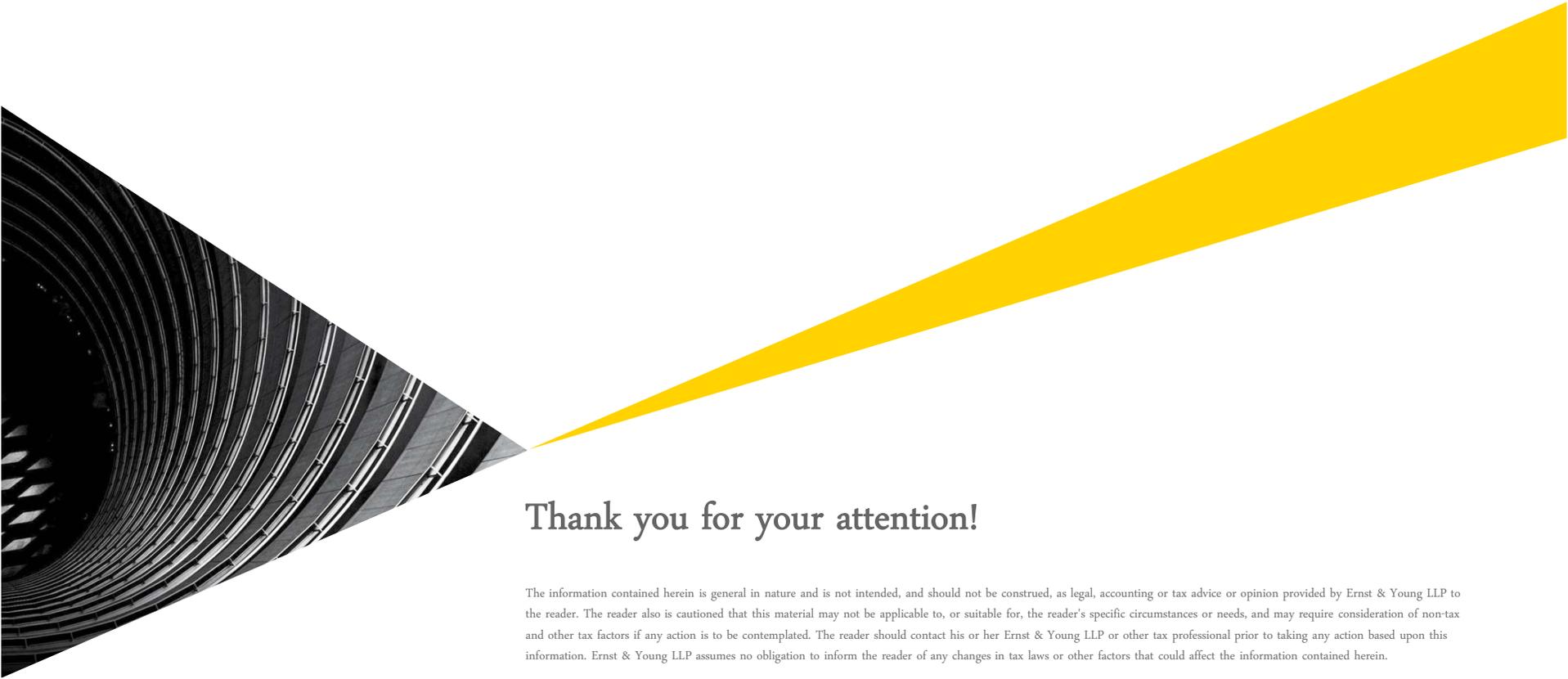
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