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# Global Tax Alert

# US IRS and Treasury issue final FATCA regulations on compliance and verification requirements for sponsored entities, trustees of trustee-documented trusts and compliance FIs

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On 21 March 2019, the United States (US) Treasury and the Internal Revenue Service (IRS) issued final *Foreign Account Tax Compliance Act* (FATCA) regulations [TD 9852] addressing compliance requirements and verification procedures for the following:

- Sponsoring entities of foreign financial institutions (FFIs)
- Sponsored direct-reporting non-financial foreign entities (NFFEs)
- Trustees of trustee-documented trusts
- Registered deemed-compliant FFIs
- Financial institutions that implement consolidated compliance programs (compliance FIs)

The final regulations (under Internal Revenue Code[1] Sections 1471 through 1474) are effective as of 25 March 2019.

This Alert discusses the significant changes made by the final regulations to the proposed regulations. For a discussion of the proposed regulations, see EY Global Tax Alert, *US IRS issues proposed regulations with verification and certification rules for sponsoring entities, trustees of trustee-documented trusts and compliance FIs*, dated 12 January 2017.

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## Key takeaways

- The deadline to have a written sponsorship agreement between a sponsoring and a sponsored entity is 31 March 2019.
- The deadline to make sponsoring entity certifications is 31 March 2019.
- The IRS apparently expects sponsoring entities in Model 1 countries without sponsored entities identified as nonreporting financial institutions in Annex II of their intergovernmental agreements (IGAs) to certify their compliance with the regulations.
- For purposes of completing the certifications required for the certification period ending 31 December 2017, a sponsoring entity may rely on the rules provided in the proposed regulations.

## Written sponsorship agreement

The final regulations require a sponsoring entity to have the written sponsorship agreement in place by the later of 31 March 2019 or the date the sponsoring entity begins acting as a sponsoring entity for the sponsored entity or entities. Similar rules apply for a sponsoring entity of a sponsored direct-reporting NFFE.

The final regulations do not require a standalone agreement for FATCA. Instead, an existing agreement between a sponsoring entity and sponsored FFI can refer generally to the obligations of the parties under FATCA, but there must be a specific reference to satisfying the FATCA obligations of the sponsored FFI. For example, a provision in a fund manager agreement stating that the sponsoring entity agrees to satisfy the sponsored FFI's FATCA obligations would be sufficient.

The IRS did not delay the requirement, leaving little time for sponsored FFIs to amend their existing service-level agreements. It is clear, however, that a general reference to satisfying obligations is all that is required and can be made effective retroactively to the date that the sponsoring entity relationship began.

## Certifications for period ending 31 December 2017

The proposed regulations provide that a sponsoring entity of a sponsored FFI, a sponsored direct-reporting NFFE, or a trustee of a trustee-documented trust must make compliance certifications by 1 July of the calendar year following the end of the certification period. The same due date applied to preexisting account certifications. This would have made certifications for the period ending 31 December 2017 due 1 July 2018.

The final regulations require certifications by sponsoring entities and trustees of trustee-documented trusts on or before 31 March 2019, for certification periods ending 31 December 2017. This date is consistent with the previous guidance provided by the IRS.

The day before the release of the final regulations, frequently asked question (FAQ) 20 under the FATCA Certifications heading of the FATCA FAQs allows certifications to be based on the proposed regulations. Although the final regulations were released after the FAQ, the IRS did not intend the final regulations to render the FAQ obsolete. While the final regulations do not contain any obvious additional certification requirements, the intention appears to be not to impose any additional burdens.

## Sponsored entities located in a Model 1 IGA jurisdiction

The Preamble to the proposed regulations required a financial institution that is covered by a Model 1 IGA and chooses to qualify as a sponsored FFI to satisfy the regulations' requirements for that entity. Comments requested that the regulations permit a financial institution located in a jurisdiction with a Model 1 IGA that does not include a sponsored entity as a type of nonreporting financial institution in Annex II to comply with local guidance on sponsored entities rather than the regulations.

Under the approach advocated by the commenters, compliance certifications for sponsored FFIs in Model I IGA jurisdictions and reporting US reportable accounts directly to the IRS would not be required. Rather than directly addressing the issues, the Preamble to the final regulations merely states that Treasury and the IRS "are open to discussing the issue with the competent authorities of affected jurisdictions."

The affected countries are Denmark, France, Germany, Italy, Mexico, the Netherlands, Norway, and Spain. Ireland and the United Kingdom (UK) originally did not have sponsored-entity provisions in their Model 1 IGAs, but they have since entered competent authority agreements that added sponsored investment entities, sponsored controlled foreign corporations, and sponsored closely held investment vehicles to Annex II of their agreements. In addition, the

US competent authority will treat UK and Irish entities as complying with the IGA if they meet the requirements of a sponsored investment entity, sponsored controlled foreign corporation, or sponsored closely held investment vehicle described in UK and Irish guidance at all relevant times before the date of the competent authority agreement.

The IRS has informally stated that it expects certifications from affected Model 1 IGA FFIs and direct reporting of US reportable accounts to the IRS, which could violate local privacy and data protection laws. Moreover, Treasury and the IRS have not provided any specific guidance on the content of certifications or acknowledged the difficulties of direct reporting of accounts to the IRS, the inconsistency of such reporting with the IGAs and the duplicative reporting for the same US accounts. It is difficult to see why Treasury and IRS have taken the approach they have, particularly given their response to Ireland and the UK. Nevertheless, sponsoring entities in the affected jurisdictions should timely make the RO certifications and meanwhile encourage their governments to enter negotiations.

## Expansion of the definition of responsible officer

The proposed regulations required a sponsoring entity of a sponsored FFI to appoint a responsible officer. The proposed regulations defined the term *responsible officer* as an officer of the sponsoring entity with sufficient authority to fulfill the duties of a responsible officer as described in the regulations. The final regulations broaden the definition of responsible officer. First, they define a responsible officer for a sponsoring entity to include any officer of any entity in an expanded affiliated group that establishes and maintains policies and procedures for, and has general oversight over, the sponsoring entity. Second, for an investment entity, a responsible officer includes, in addition to an officer of the investment entity, an individual who is a director, managing member, or general partner of the investment entity, or, if the general partner or managing member of the investment entity is itself an entity, an individual who is an officer, director or managing member of that entity.

The change expands the definition of responsible officer to incorporate what the industry practice has already been.

## Coordination of certification requirements

The final regulations clarify that, to the extent a compliance FI or sponsoring entity satisfies the certification requirements on behalf of an electing FFI, sponsored FFI, or sponsored direct-reporting NFFE, then the electing FFI, sponsored FFI or sponsored direct-reporting NFFE will not have a separate certification requirement.

## Registration by a sponsored FFI or sponsored direct-reporting NFFE after termination of the sponsoring entity by the IRS

The proposed regulations provided that, if the IRS terminates a sponsoring entity, then a sponsored FFI or a sponsored direct reporting NFFE may not register as a sponsored entity of another entity that has a relationship described in Section 267(b) with the terminated sponsoring entity. For a sponsored FFI, the prohibition does not apply if the sponsored FFI obtains permission from the IRS, but this exception does not apply to a sponsored direct-reporting NFFE.

Section 267(b) does not apply to relationships among partnerships. To correct this, the final regulations provide that the rules generally prohibit registration by a sponsored FFI or sponsored direct-reporting NFFE under a sponsoring entity that has a relationship described in Section 267(b) or Section 707(b) to the terminated sponsoring entity. Thus, for example, a sponsored FFI of a terminated sponsoring entity that is a partnership may not register under another sponsoring entity that is a partnership if the same person owns, directly or indirectly, more than 50% of both sponsoring entities. Additionally, the final regulations conform the rule for sponsored direct-reporting NFFEs with the rule for sponsored FFIs by allowing a sponsored direct-reporting NFFE to register under a sponsoring entity, notwithstanding that there is an impermissible relationship if the IRS approves.

## Endnote

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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