



Proposed Chapter 4 regulations describe verification and certification requirements

Closing the distance

The Treasury Department and IRS have released proposed regulations setting forth verification and certification requirements for certain entities under Chapter 4

On December 30, 2016, the US Treasury Department and Internal Revenue Service issued proposed regulations ([REG-103477-14](#)) describing: (1) verification requirements and events of default for Sponsoring Entities of Sponsored Investment Entities, Sponsored Controlled Foreign Corporations (“CFCs”), and Sponsored, Closely Held Investment Vehicles (“SCHIVs”); (2) verification requirements and events of default for Sponsoring Entities of Sponsored Direct Reporting Nonfinancial Foreign Entities (“NFFE’s”); (3) certification requirements and IRS review procedures of trustees of Trustee-Documented Trusts; (4) IRS review procedures of Registered Deemed-Compliant FFIs; (5) future modification of Participating FFIs’ certification requirements; and (6) certification requirements for consolidated compliance groups (“Proposed Regulations”). The Proposed Regulations became effective on January 6, 2017 when they were published in the Federal Register.

Background

Under the FATCA regulations, Sponsored FFIs include Sponsored Investment Entities and Sponsored CFCs, which are treated as Registered Deemed-Compliant FFIs, and SCHIVs, which are treated as certified deemed compliant (“CDC”) FFIs. A Sponsored FFI must enter into a sponsorship agreement under which a Sponsoring Entity agrees to perform, on behalf of the Sponsored FFI, all of the requirements the FFI would have been required to perform if it were a Participating FFI. Additionally, the Sponsoring Entity must register as such with the IRS and must register and obtain a GIIN for its Sponsored Investment Entities and Sponsored CFCs. A SCHIV does not need to be separately registered, or have its own GIIN.

The Model 1 and 2 IGAs treat Sponsored Investment Entities, Sponsored CFCs, and SCHIVs as Deemed-Compliant FFIs and, thus, Nonreporting FIs. Where a sponsored entity is subject to an IGA, the Sponsoring Entity must agree to perform, on behalf of the sponsored entity, all of the requirements the FFI would have been required to perform if it were a Reporting Model 1 or 2 FFI (as applicable). This includes reporting to the applicable jurisdiction on behalf of a

sponsored entity covered by a Model 1 IGA and to the IRS where the sponsored entity is covered by a Model 2 IGA. Further, the Model 2 IGA treats Sponsored Investment Entities and Sponsored CFCs as Registered Deemed-Compliant FFIs that must be registered with the IRS and have its responsible officer certify every three years to the IRS that all of the requirements for the deemed-compliant category claimed by the FFI have been satisfied since July 1, 2014.

Note that Annex II of the IGAs defines Nonreporting FI to include an entity that qualifies as a Deemed-Compliant FFI under the U.S. Treasury Regulations. As such, an FFI covered by a Model 1 or 2 IGA may instead choose to qualify as a Sponsored Investment Entity, Sponsored CFC, or SCHIV under the regulations, whereby it must satisfy any requirements applying under the regulations, including reporting directly to the IRS.

In addition to FFIs that are treated as sponsored, certain FFIs that are trusts are also treated as Deemed Compliant FFIs, and thus, Nonreporting FFIs under the Model 1 and Model 2 IGAs. Under both the Model 1 and Model 2 IGAs, a trust qualifies as a Trustee-Documented Trust if the trustee of the trust is a U.S. financial institution, reporting Model 1 FFI or Participating FFI that reports all information required under the IGAs. Further a trustee of a Trustee-Documented Trust should register with the IRS. A Trustee-Documented Trust subject to a Model 1 IGA reports to the applicable Model 1 IGA jurisdiction while one subject to a Model 2 IGA reports directly to the IRS.

A Sponsoring Entity may also act under a sponsorship agreement on behalf of a Sponsored Direct Reporting NFFE to perform all of the requirements the NFFE would have been required to perform if it were a Direct Reporting NFFE. In such cases, the Sponsoring Entity must register as such with the IRS and must register the Sponsored Direct Reporting NFFE.

These Proposed Regulations provide the verification and certification of compliance requirements for Sponsoring Entities and trustees of Trustee-Documented Trusts and describe events of default, IRS inquiries, and termination procedures.

These verification and certification requirements in these Proposed Regulations apply to FFIs that are sponsored and treated as deemed-compliant under the regulations or an applicable Model 2 IGA, and to Trustee-Documented Trusts under an applicable Model 2 IGA. They do not apply to FFIs that are sponsored, or Trustee-Documented Trusts that are treated as deemed-compliant under a Model 1 IGA.

Verification Requirements and Events of Default for Sponsoring Entities of Sponsored FFIs

Updated Definitions. Applicable definitions were expanded as follows:

- **Sponsored FFI.** As previously defined, "Sponsored FFI" was limited to a Sponsored Investment Entity, Sponsored CFC, or SCHIV under the regulations. Section 1.1471-1(b)(121) of the Proposed Regulations revise this definition to include a Sponsored Investment Entity, Sponsored CFC, or SCHIV treated as a Deemed-Compliant FFI under an applicable Model 2 IGA. Similarly, sections 1.1471-5(j) and (k) of the Proposed Regulations are modified to refer to a sponsored entity to which the regulations or an applicable Model 2 IGA apply.
- **Responsible Officer.** Language is added to the definition of "Responsible Officer" ("RO") under section 1.1471-1(b)(116) with respect to Sponsoring Entities. Specifically, the RO of a Sponsoring Entity is an officer of the Sponsoring Entity with sufficient authority to fulfill the duties of a RO, as described in section 1.1471-5(j) or 1.1472-1(f).

Compliance Program. In order for a sponsored entity to preserve its Deemed-Compliant FFI status under the regulations or an applicable Model 2 IGA, its Sponsoring Entity must maintain a compliance program to oversee compliance with respect to each such FFI. The Proposed Regulations consolidate a Sponsoring Entity's compliance program and certification requirements under section 1.1471-5(j). As such, sections 1.1471-5(f)(1)(i)(F)(3)(vi) and 1.1471-5(f)(2)(iii)(D)(4) are modified to only reference section 1.1471-5(f) with respect to a Sponsoring Entity's verification procedures.

- **Requirements.** Section 1.1471-5(j)(2) specifies a Sponsoring Entity's requirement to appoint a RO to (1) oversee compliance with respect to each Sponsored FFI, (2) establish a compliance program (including sufficient policies, procedures, and processes), and (3) perform a periodic review of such compliance program and the compliance of both the Sponsoring Entity and each Sponsored FFI.

- **Certifications Required.** Section 1.1471-5(j)(3)(i) requires the RO, by July 1 of the calendar year following the certification period and in the form and manner prescribed by the IRS, to make a preexisting account certification, a certification regarding Sponsoring Entity and Sponsored FFI requirements, and either a certification of effective internal controls or a qualified certification with respect to all of its Sponsored FFIs.
- **Single Certification.** A single compliance certification covering both the Sponsoring Entity and its Sponsored FFIs is sufficient, despite previous indications in the preamble to the 2014 temporary regulations that separate certifications would be required.
- **Certification Period.** Under section 1.1471-5(j)(3)(iii), the first certification period begins on the later of the date the Sponsoring Entity is issued a GIIN to act as such or June 30, 2014. The period ends on December 31 of the third full subsequent calendar year. After the first certification period, each following period is the three calendar year period after the previous period.
- **Late-Joining Sponsored FFIs.** Section 1.1471-5(j)(3)(ii) provides an exception from the certification requirement for Sponsored FFIs that first agree to be sponsored by the Sponsoring Entity during the six-month period before the end of the certification period. In such cases, a certification is not required if the Sponsoring Entity makes the required certifications in subsequent certification periods and the first such period also covers the portion of the prior period during which the FFI was sponsored by the Sponsoring Entity. This exception does not apply if the Sponsored FFI was a Participating FFI, Registered Deemed-Compliant FFI, or SCHIV immediately before agreeing to be sponsored by the Sponsoring Entity. For such entities, the Sponsoring Entity may make a certification for the portion of the certification period before the entity became its Sponsored FFI if it obtains from the FFI (or the former Sponsoring Entity) a written certification that the FFI has complied with all applicable FATCA requirements during such time.

Certification of Compliance. The previously reserved section 1.1471-5(j) provides the specific requirements with regard to a Sponsoring Entity's certifications and clarifies issues surrounding the certification period.

- **Preexisting Account Certification.** Section 1.1471-5(j)(5) requires the RO to make a certification described in section 1.1471-4(c)(7) with respect to each FFI that entered into a sponsorship agreement with the Sponsoring Entity during the certification period. A preexisting obligation in this context refers to an account, instrument, or contract maintained, executed, or issued by the Sponsored FFI that is outstanding on the earlier of the date a GIIN is issued or the date the FFI agrees to be sponsored by the Sponsoring Entity. Where a Sponsored FFI enters into a sponsorship agreement during the two-year period prior to the end of the certification period, the certification is not required until the following certification period. Also note that this certification is not required for a Sponsored FFI that, immediately before agreeing to be sponsored by the Sponsoring Entity, was a Participating FFI, Sponsored FFI, Local FFI, or Restricted Fund and the FFI (or its former Sponsoring Entity) provides a written certification to the Sponsoring Entity that the FFI has made the required certification.
- **Sponsoring Entity and Sponsored FFI Certification.** Section 1.1471-5(j)(3)(v) requires the RO to certify that (1) the Sponsoring Entity satisfies all requirements for such status under the regulations or an applicable Model 2 IGA, (2) there is a written sponsorship agreement in effect between the Sponsoring Entity and each Sponsored FFI, and (3) each Sponsored FFI satisfies the requirements of its respective status.
- **Certification of Effective Internal Controls.** Section 1.1471-5(j)(3)(vi)(A) requires the RO to certify that (1) a compliance program is in effect and has been subject to periodic review, (2) there are no material failures for the certification period or such failures were remediated and actions to prevent reoccurrence were taken, and (3) any failure to withhold, deposit, or report was corrected through proper payment of taxes and filing of a return.
- **Qualified Certification.** Section 1.1471-5(j)(3)(vi)(B) requires, where the RO has identified an event of default or an uncorrected material failure, the RO to certify that (1) a compliance program is in effect and has been subject to periodic review, (2) the RO has identified an event or default or determined there is a material failure(s) and that actions to prevent reoccurrence will be taken, (3) any failure to withhold, deposit, or report will be corrected through proper payment of taxes and filing of a return, and (4) the RO will respond to any notice of default or provide, upon IRS request, a description of each material failure and a written correction plan.

Modification of Certification Requirements. Pursuant to section 1.1471-5(j)(3)(iv), the Treasury Department and IRS may modify the certification of compliance requirements to include additional certifications or information. This may include quantitative or other factual information with regard to each Sponsored FFI's obligations. Any such modifications will be published at least 90 days before being made effective. Additionally, the Treasury Department and IRS intend to coordinate these revisions with any modification to the certification requirements for Participating FFIs.

IRS Inquiry. Section 1.1471-5(j)(4) allows the IRS to request additional information from a Sponsoring Entity to determine its compliance with the requirements under the regulations or an applicable Model 2 IGA and to review account holder compliance with tax reporting requirements. These inquiries may be based on information reporting performed (or the absence thereof), certifications made by the RO (or the absence thereof), or any other compliance-related information with respect to any Sponsored FFI. Requests may include a description or copy of the Sponsoring Entity's FATCA policies and procedures, periodic review procedures, sponsorship agreement, or written reports documenting periodic review findings. If the IRS determines that the Sponsoring Entity may not have substantially complied with its requirements with respect to any Sponsored FFI, it may make additional inquiries and may request the performance of specified review procedures (including by an external auditor or third-party consultant).

Events of Default and Termination Procedures. The regulations have been revised in recognition of the fact that an event of default relating only to a specific Sponsored FFI(s) should not compromise the statuses of the Sponsoring Entity or the other Sponsored FFIs for which it acts. Accordingly, sections 1.1471-5(f)(1)(i)(F)(4) and 1.1471-5(f)(2)(iii)(E) now specify that the IRS may revoke a Sponsoring Entity's status with respect to *one or more* Sponsored FFIs in the event of default. Previously, the regulations indicated that a Sponsoring Entity would lose its status with respect to *all* Sponsored Entities if there was a material failure to comply with respect to *any* Sponsored FFI.

In addition to these changes, sections 1.1471-5(j) and 1.1471-5(k) were added to describe events of default and the resulting notice and termination procedures.

- **Definition.** Section 1.1471-5(k)(1) defines "Event of Default" as a Sponsoring Entity's failure to (1) perform material due diligence, withholding, or reporting obligations under the regulations or an applicable Model 2 IGA with respect to a Sponsored FFI, (2) establish or maintain a compliance program, or (3) perform a periodic review. The Proposed Regulations also provide ten specific occurrences that constitute events of default, such as failure to obtain waivers when required, failure to have a written sponsorship agreement in effect with each Sponsored FFI, and failure to make a timely preexisting account certification or periodic certification for any Sponsored FFI.
- **Notice of Default.** Pursuant to section 1.1471-5(k)(2), the IRS will send a Sponsoring Entity a notice of default identifying the specific event of default as well as each Sponsored FFI to which the notice relates. The IRS will request remediation by the Sponsoring Entity within 45 days, and the Sponsoring Entity must respond by providing any information requested or stating why it does not agree that an event of default has occurred.
- **Remediation.** Section 1.1471-5(k)(3) specifies that, in order to remediate an event of default, a Sponsoring Entity must agree with the IRS on a remediation plan. This plan may involve providing additional information to the IRS, taking remedial actions, or performing specified review procedures.
- **Termination.** Under section 1.1471-5(k)(4), if a Sponsoring Entity does not timely respond to a notice of default or remediate the event of default, the IRS may send a notice of termination. The IRS may terminate the status of the Sponsoring Entity, one or more Sponsored FFIs (as Deemed-Compliant FFIs), or both. However, a Sponsoring Entity or Sponsored FFI may, within 90 days of such notice, request reconsideration by written request to the IRS.
 - Where the Sponsoring Entity's status is terminated, the Sponsoring Entity must, within 30 days of termination, send a notice of the termination to each of its Sponsored FFIs and each withholding agent from which it receives payments and FI with which it holds an account for which a withholding certificate was provided with respect to each Sponsored FFI. A terminated Sponsoring Entity may not re-register with the IRS to act as a Sponsoring Entity unless it receives written approval from the IRS to do so. Similarly, a Sponsored FFI, the status of which has not been terminated, may not register or represent itself as a Sponsored FFI of the terminated Sponsoring Entity (or a related entity described in section 267(b)) unless it receives written approval from the IRS to do so. Instead, it can register as a Participating FFI or Registered Deemed-Compliant FFI.
 - Where only a Sponsored FFI's status is terminated, the Sponsoring Entity must (1) remove the Sponsored FFI from the Sponsoring Entity's registration account on the FATCA registration website and (2) within 30 days of termination, send a notice of the termination to each withholding agent from which it receives payments and FI with which it holds an account for which a withholding certificate was provided with respect to such Sponsored FFI. A terminated Sponsored FFI, the Sponsoring Entity of which has not been terminated, may not register with the IRS as a Participating FFI or Registered Deemed-Compliant FFI unless it receives written approval from the IRS to do so.
- **Material Failures.** Section 1.1471-5(j)(3)(vii) defines "Material Failure" as a Sponsoring Entity's failure to satisfy the FATCA requirements (under the regulations or an applicable Model 2 IGA) with respect to each Sponsored FFI if such failure resulted from deliberate action by an employee(s) of the Sponsoring Entity or from the Sponsoring Entity's failure to implement sufficient internal controls. The Proposed Regulations specify that a material failure will

only constitute an event of default where substantial noncompliance occurs in more than limited circumstances. Five specific material failures are also provided (e.g., deliberate or systematic failure to report U.S. accounts, withhold on pass-thru payments, deposit taxes withheld, or accurately report recalcitrant account holders or Nonparticipating FFIs).

- **Sponsored Entities Under Model 1 IGAs.** Although the above verification requirements and events of default do not apply to a Sponsoring Entity of a sponsored entity covered by a Model 1 IGA, the IRS may treat such sponsored entity as a Nonparticipating FFI under certain circumstances. Further, where a Sponsoring Entity's status is revoked following an event of default, the entity would be prohibited from sponsoring an FFI subject to a Model 1 IGA and the IRS may notify the Model 1 IGA jurisdiction of the revocation. In this situation, a sponsored entity under a Model 1 IGA must become a Reporting Model 1 FFI, obtain a new sponsor, or satisfy the requirements of another Deemed-Compliant status.
- **Sponsored FFIs Under Model 2 IGAs.** A Sponsoring Entity of a Sponsored FFI treated as a Deemed-Compliant FFI under a Model 2 IGA is subject to the verification requirements, events of default, and IRS review procedures in the Proposed Regulations (except as provided otherwise in an applicable Model 2 IGA). Note that although Annex II of the Model 2 IGA allows the IRS to revoke a Sponsoring Entity's status upon a material failure, section 1.1471-5(k)(4)(v) clarifies that the IRS may only revoke such status if there is an event of default and following the termination procedures discussed above.

Verification Requirements and Events of Default for Sponsoring Entities of Sponsored Direct Reporting NFFEs

Sponsorship Agreement. A Sponsoring Entity must have a written sponsorship agreement in effect with each Sponsored Direct Reporting NFFE. Section 1.1472-1(f)(4) specifies the requirements for this agreement: (1) the NFFE agrees to provide the Sponsoring Entity access to its books and records for each of its owners and other information necessary to determine its Substantial U.S. Owners, (2) the NFFE obtains reporting waivers, (3) the NFFE authorizes the Sponsoring Entity to act on its behalf with respect to its obligations as a Sponsored Direct Reporting NFFE, (4) the NFFE agrees to identify to the Sponsoring Entity, on request, each withholding agent and financial institution to which it reports its status as a Sponsored Direct Reporting NFFE and agrees to provide to the Sponsoring Entity a copy of the withholding certificate provided to each withholding agent or financial institution, (5) the NFFE represents that it does not have any practices or procedures to assist its Substantial U.S. Owners in avoiding FATCA obligations, (6) the NFFE agrees to cooperate with the Sponsoring Entity in responding to any IRS inquiries, and (7) the Sponsoring Entity retains records for the longer of six years or the sponsor's normal business retention period.

Certification of Compliance. The previously reserved section 1.1471-1(f) describes the certification requirements and clarifies issues surrounding the certification period with respect to a Sponsoring Entity of a Sponsored Direct Reporting NFFE.

- **Requirements.** Section 1.1472-1(f)(2)(i) specifies a Sponsoring Entity's requirement to appoint a RO to oversee compliance with respect to each Sponsored Direct Reporting NFFE and make a periodic certification of compliance, with respect to all Sponsored Direct Reporting NFFEs for which the entity acts as sponsor.
- **Certification.** Section 1.1472-1(f)(2)(iv) requires the RO, by July 1 of the calendar year following the certification period and in the form and manner prescribed by the IRS, to make a certification of compliance with respect to all of its Sponsored Direct Reporting NFFEs. Specifically, the Sponsoring Entity must certify that (1) it meets all requirements of a Sponsoring Entity under the regulations, (2) there is a written sponsorship agreement in effect with each Sponsored Direct Reporting NFFE, (3) there were no events of default or any events of default were remediated and actions to prevent reoccurrence were taken, and (4) any failure to report with respect to one or more Sponsored Direct Reporting NFFEs was corrected by filing the proper returns.
- **Certification Period.** Under section 1.1472-1(f)(2)(iii), the first certification period begins on the later of the date the Sponsoring Entity is issued a GIIN to act as such or June 30, 2014. The period ends on December 31 of the third full subsequent calendar year. After the first certification period, each following period is the three calendar year period after the previous period.
- **Late-Joining Sponsored Direct Reporting NFFEs.** Section 1.1472-1(f)(2)(ii) provides an exception from the certification requirement for Sponsored Direct Reporting NFFEs that first agree to be sponsored by the Sponsoring Entity during the six-month period before the end of the certification period. In such cases, a certification is not required if the Sponsoring Entity makes the required certifications in subsequent certification periods and the first such period also covers the portion of the prior period during which the NFFE was sponsored by the Sponsoring Entity. This exception does not apply if the NFFE was a Direct Reporting NFFE or Sponsored Direct Reporting NFFE

of another Sponsoring Entity immediately before agreeing to be sponsored by the Sponsoring Entity. For such entities, the Sponsoring Entity may make a certification for the portion of the certification period before the entity became its Sponsored Direct Reporting NFFE if it obtains from the NFFE (or the former Sponsoring Entity) a written certification that the NFFE has complied with all applicable FATCA requirements during such time.

IRS Inquiry. Section 1.1472-1(f)(3) allows the IRS to request additional information from a Sponsoring Entity to determine its compliance with the requirements and to review Substantial U.S. Owners' compliance with tax reporting requirements. These inquiries may be based on information reporting performed (or the absence thereof), certifications made by the RO (or the absence thereof), or any other compliance-related information with respect to any Sponsored Direct Reporting NFFE. If the IRS determines that the Sponsoring Entity may not have substantially complied with its requirements with respect to any Sponsored Direct Reporting NFFE, it may make additional inquiries and may request the performance of specified review procedures (including by an external auditor or third-party consultant)

Events of Default and Termination Procedures. The Proposed Regulations under section 1.1472-1(g) describe events of default and the resulting notice and termination procedures for a Sponsoring Entity of a Sponsored Direct Reporting NFFE. Further, section 1.1472-1(c)(5)(iii) is revised to clarify that a Sponsoring Entity's status may be revoked if there is an event of default (instead of a material failure) with respect to any Sponsored Direct Reporting NFFE.

- **Definition.** Section 1.1472-1(g)(1) defines "Event of Default" to refer to (1) failure to have a written sponsorship agreement in effect with each Sponsored Direct Reporting NFFE, (2) failure to satisfy the Direct Reporting NFFE requirements with respect to each Sponsored Direct Reporting NFFE, (3) failure to timely and properly report on Form 8966, (4) failure to make a certification of compliance, (5) failure to cooperate with IRS requests, (6) making fraudulent statements or misrepresentations of material fact to the IRS or representing to the IRS or a withholding agent its status as a Sponsoring Entity for an entity for which it does not act as such, and (7) failure to obtain information required to be reported on Form 8966 from each Sponsored Direct Reporting NFFE.
- **Notice of Default.** Pursuant to section 1.1472-1(g)(2), the IRS will send a Sponsoring Entity a notice of default identifying the specific event of default as well as each Sponsored Direct Reporting NFFE to which the notice relates. The IRS will request remediation by the Sponsoring Entity within 45 days, and the Sponsoring Entity must respond by providing any information requested or stating why it does not agree that an event of default has occurred.
- **Remediation.** Section 1.1472-1(g)(3) specifies that, in order to remediate an event of default, a Sponsoring Entity must agree with the IRS on a remediation plan. This plan may involve providing additional information to the IRS, taking remedial actions, or performing specified review procedures.
- **Termination.** Under section 1.1472-1(g)(4), if a Sponsoring Entity does not timely respond to a notice of default or remediate the event of default, the IRS may send a notice of termination. The IRS may terminate the status of the Sponsoring Entity, one or more Sponsored Direct Reporting NFFEs (as Direct Reporting NFFEs), or both. However, a Sponsoring Entity or Sponsored Direct Reporting NFFE may, within 90 days of such notice, request reconsideration by written request to the IRS.
 - Where the Sponsoring Entity's status is terminated, the Sponsoring Entity must, within 30 days of termination, send a notice of the termination to each of its Sponsored Direct Reporting NFFEs and each withholding agent from which it receives payments and FI with which it holds an account for which a withholding certificate was provided with respect to each Sponsored Direct Reporting NFFE. A terminated Sponsoring Entity may not re-register with the IRS to act as a Sponsoring Entity unless it receives written approval from the IRS to do so. Similarly, a Sponsored Direct Reporting NFFE, the status of which has not been terminated, may not register or represent itself as a Sponsored Direct Reporting NFFE of the terminated Sponsoring Entity (or a related entity described in section 267(b)) unless it receives written approval from the IRS to do so. Instead, it can register as a Direct Reporting NFFE or a Sponsored Direct Reporting NFFE of another sponsor that is not related to the terminated Sponsoring Entity.
 - Where only a Sponsored Direct Reporting NFFE's status is terminated, the Sponsoring Entity must (1) remove the NFFE from the Sponsoring Entity's registration account on the FATCA registration website and (2) within 30 days of termination, send a notice of the termination to each withholding agent from which it receives payments and FI with which it holds an account for which a withholding certificate was provided with respect to such Sponsored Direct Reporting NFFE. A terminated Sponsored Direct Reporting NFFE, the Sponsoring Entity of which has not been terminated, may not register with the IRS as a Direct Reporting NFFE or Sponsored Direct Reporting NFFE of another Sponsoring Entity unless it receives written approval from the IRS to do so.

Certification Requirements and IRS Review Procedures for Trustees of Trustee-Documented Trusts

Compliance Program. In order for a Trustee-Documented Trust to preserve its Certified Deemed-Compliant FFI status under an applicable Model 2 IGA, its trustee must maintain a compliance program to oversee compliance with respect to the trust.

- **Requirements.** Section 1.1471-5(l)(1) specifies a trustee's requirements to (1) establish and implement a compliance program to satisfy the requirements of an applicable Model 2 IGA with respect to each trust, (2) appoint a RO to establish sufficient policies, procedures, and processes for implementing the program, and (3) perform a periodic review of such compliance program and the compliance of the trustee with respect to each trust.
- **Certification of Compliance.** Section 1.1471-5(l)(2)(i) requires the RO, by July 1 of the calendar year following the certification period and in the form and manner prescribed by the IRS, to make a certification of compliance with respect to all Trustee-Documented Trusts. Pursuant to section 1.1471-5(l)(2)(iv), the RO of the trustee must certify that (1) a compliance program is in effect and a periodic review has been performed and (2) the trustee has timely reported to the IRS on Form 8966 all information required under an applicable Model 2 IGA.
- **Certification Period.** Under section 1.1471-5(l)(2)(iii), the first certification period begins on the later of the date the trustee is issued a GIIN to act as such or June 30, 2014. The period ends on December 31 of the third full subsequent calendar year. After the first certification period, each following period is the three calendar year period after the previous period.
- **Late-Joining Trustee-Documented Trusts.** Section 1.1471-5(l)(2)(ii) provides an exception from the certification requirement for Trustee-Documented Trusts for which the trustee first agreed to act as trustee for purposes of qualifying as a Trustee-Documented Trust during the six-month period before the end of the certification period. In such cases, a certification is not required if the trustee makes the required certifications in subsequent certification periods and the first such period also covers the portion of the prior period during which the trustee acted as trustee of the Trustee-Documented Trust. This exception does not apply if the Trustee-Documented Trust was a Trustee-Documented Trust of another trustee immediately before the trustee agrees to act as the trustee for purposes of the trust's status as a Trustee-Documented Trust. For such entities, the trustee may make a certification for the portion of the certification period before the trustee became trustee of the Trustee-Documented Trust if it obtains from the trust (or the former trustee) a written certification that the trust has complied with all applicable FATCA requirements during such time.

IRS Inquiry. Section 1.1471-5(l)(3) allows the IRS to request additional information from a trustee to determine its compliance with the requirements under an applicable Model 2 IGA with respect to a Trustee-Documented Trust and to review account holder compliance with tax reporting requirements. These inquiries may be based on information reporting performed (or the absence thereof), certifications made by the RO (or the absence thereof), or any other compliance-related information with respect to a Trustee-Documented Trust. If the IRS determines that the trustee may not have substantially complied with its requirements with respect to a Trustee-Documented Trust, it may make additional inquiries and may request the performance of specified review procedures (including by an external auditor or third-party consultant). Additionally, the IRS may notify the applicable Model 2 IGA jurisdiction of any non-compliance of the trustee identified with respect to the Trustee-Documented Trust.

IRS Review Procedures for Registered Deemed-Compliant FFIs

An FFI satisfying the requirements of section 1.1471-5(f)(1) may qualify as a Registered Deemed-Compliant FFI required to make a periodic certification that it meets the requirements of its applicable Deemed-Compliant FFI status, including compliance with any obligations under the regulations. Whereas the current regulations do not speak to whether IRS inquiries are applicable to certifications made by Registered Deemed-Compliant FFIs, the Proposed Regulations explicitly provide for this.

Section 1.1471-5(f)(1)(iv) is added to allow the IRS to request additional information from a Registered Deemed-Compliant FFI to determine its compliance with the requirements under the regulations and to review account holder compliance with tax reporting requirements. These inquiries may be based on information reporting performed (or the absence thereof), certifications made by the RO (or the absence thereof), or any other compliance-related information with respect to compliance with the requirements of the Deemed-Compliant FFI status claimed. If the IRS determines that the FFI may not have substantially complied with its requirements as a Deemed-Compliant FFI, it may make

additional inquiries and may request the performance of specified review procedures (including by an external auditor or third-party consultant).

Where the IRS determines that the FFI has not complied with the requirements of the status claimed, it may terminate the FFI's deemed-compliant status. In such cases, the FFI must, within 30 days of termination, send a notice of the termination to each withholding agent from which it receives payments and FI with which it holds an account for which a withholding certificate was provided. A terminated Deemed-Compliant FFI may not register with the IRS as a Registered Deemed-Compliant FFI or Participating FFI unless it receives written approval from the IRS to do so. However, a Registered Deemed-Compliant FFI may, within 90 days of such notice, request reconsideration by written request to the IRS.

Future Modifications to the Certification Requirements for Participating FFIs

Similar to section 1.1471-5(j)(3)(iv), discussed above with respect to Sponsoring Entities, section 1.1471-4(f)(3)(i) is revised to describe modification of the certification requirements for Participating FFIs. The Treasury Department and IRS may modify the requirements for a Participating FFI's certification of compliance through an amendment to the FFI Agreement. Future modifications may require additional certifications of information, including quantitative or factual information related to compliance with the FFI Agreement. Any such modifications must be published at least 90 days before being added to the FFI Agreement.

Certification Requirements for Consolidated Compliance Groups

A Participating FFI that is a member of an Expanded Affiliated Group ("EAG") may elect to be part of a consolidated compliance program under the authority of a Compliance FI (i.e., another member of the EAG that is a Participating FFI, Reporting Model 1 FFI, or U.S. Financial Institution). The regulations require the Compliance FI to establish and maintain the consolidated compliance program and perform a periodic review on behalf of each Electing FI that has elected to be part of the program. The Proposed Regulations clarify the certification requirements of a Compliance FI and specify timeframes with respect to the termination procedures.

Certification Requirements

- **Model 1 Branches.** Section 1.1471-4(f)(2)(ii)(A) is revised to clarify that an Electing FFI's branch that is located in a Model 1 IGA jurisdiction is excluded from the consolidated compliance program's periodic review.
- **Form and Manner.** Section 1.1471-4(f)(3)(i) adds language to clarify that the RO certification must be made on the form and in the manner prescribed by the IRS.
- **Qualified Certification.** Sections 1.1471-4(f)(3)(i) now clarifies that a qualified certification must be made if an event of default or material failure has been identified and not corrected as of the date of the certification.
- **Certification Period.** Section 1.1471-4(f)(2)(ii)(B)(1) reiterates the certification requirements discussed above and provides that the certification must be made on behalf of all Electing FFIs that are in the compliance group during the certification period. The section also specifies that the first certification period begins on the later of the date the Compliance FI is issued a GIIN or June 30, 2014 and ends on December 31 of the third full subsequent calendar year. After the first certification period, each following period is the three calendar year period after the previous period.
- **Late-Joining Electing FFIs.** Section 1.1471-4(f)(2)(ii)(B)(1) provides an exception from the certification requirement for Electing FFIs that first elect to be part of the Compliance FI's consolidated compliance program during the six-month period before the end of the certification period. In such cases, a certification is not required if the Compliance FI makes the required certifications in subsequent certification periods and the first such period also covers the portion of the prior period during which the FFI was an Electing FFI in the Compliance FI's program. This exception does not apply if the Electing FFI was a Participating FFI or Registered Deemed-Compliant FFI immediately before electing to be part of the consolidated compliance program. For such entities, the Compliance FI may make a certification for the portion of the certification period before the Electing FFI elected to be part of the consolidated compliance program if it obtains from the FFI (or the former Compliance FFI) a written certification that the FFI has complied with all applicable FATCA requirements during such time.
- **Preexisting Account Certification.** Section 1.1471-4(f)(2)(ii)(B)(2) provides that a preexisting account certification must be made with respect to each Electing FFI by the due date of the FFI's certification of compliance on the form and in the manner prescribed by the IRS. Where an Electing FFI elects to be part of the Compliance FI's consolidated compliance program during the two-year period prior to the end of the certification period, the

certification is not required until the following certification period. Additionally, a preexisting account certification is not required for an Electing FFI that, immediately before making its election, was a Participating FFI, Local FFI, or Restricted Fund if the FFI (or former Compliance FI) provides a written certification to the Compliance FI that the FFI has made the required certification.

Termination Timeframes

Section 1.1471-4(g)(2) is revised to specify certain time periods and additional termination procedures.

- A Participating FFI must generally remediate an event of default within 45 days.
- A Participating FFI has 90 days from the date of a notice of default or a notice of termination to request reconsideration of such notice.
- A Participating FFI must, within 30 days of termination, send notice of the termination to each withholding agent from which it receives payments and financial institution with which it holds an account for which a withholding certificate was provided.
- A terminated Participating FFI may not re-register with the IRS as a Participating FFI or Registered Deemed-Compliant FFI unless it receives written approval from the IRS to do so.

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