



## Wijziging van annex II van het FATCA-verdrag<sup>1</sup>

*Eind maart 2019 heeft de VS nieuwe regels gepubliceerd die zien op de zogenoemde 'sponsored entities' onder de FATCA. Sponsored entities zijn financiële instellingen (meestal investeringsfondsen) die, kort gezegd, de registratievereisten bij de IRS voor de FATCA over hebben gedragen aan een 'sponsoring entity'. De sponsoring entity (meestal een fondsmanager) is een entiteit die geautoriseerd is om ten behoeve van sponsored entities de registratie en de due diligenceverplichtingen te verzorgen van de te rapporteren rekeningen en fondsen bij de IRS.*

*Voor 25 maart 2019 was het zo dat een sponsored entity compliant was als de sponsoring entity alle FATCA-registraties voldeed, zonder dat de sponsored entity daarvoor zelf actie moest ondernemen en moest worden geregistreerd bij de IRS. Met de wijziging van de regelgeving van de VS was dat niet langer het geval. Sponsored entities moeten volgens nieuw recht van de VS alsnog (direct of via hun sponsoring entity) 'certifications' afgeven en dus worden geregistreerd bij de IRS. De nieuwe regels zijn op 25 maart 2019 van kracht geworden en certificering had moeten gebeuren voor 1 april 2019. Omdat Nederland in Annex II van de IGA de sponsored entities niet had aangemerkt als 'non reporting FI's' ontstond er een probleem voor de ruim 1.700 sponsored entities en de ruim 130 sponsoring entities in Nederland. Dit in tegenstelling tot andere landen die hierover wel al direct in hun IGA, of in een later stadium, afspraken hadden gemaakt met de VS. Er is met de VS onderhandeld over een nieuwe annex II van de IGA, naar het voorbeeld van die landen. Daarin is opgenomen dat bepaalde entiteiten beschouwd worden als 'non reporting Netherlands financial institutions' en daarmee geacht worden compliant te zijn aan sectie 1.471 van de International Revenue Code van de VS. Deze nieuwe annex is getekend door de bevoegde autoriteiten van Nederland op 13 juli 2020 te Den Haag en op 23 juli 2020 te Washington en heeft terugwerkende kracht tot 25 maart 2019 (DGBD nr. 28047).*

### ARRANGEMENT BETWEEN THE COMPETENT AUTHORITY OF THE UNITED STATES OF AMERICA AND THE COMPETENT AUTHORITY OF THE KINGDOM OF THE NETHERLANDS TO UPDATE ANNEX II OF THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS TO IMPROVE INTERNATIONAL TAX COMPLIANCE AND TO IMPLEMENT FATCA

Annex II of the Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands to Improve International Tax Compliance and to Implement FATCA, signed on December 18, 2013 (the 'IGA') provides: 'This Annex II may be modified by a mutual written decision entered into between the Competent Authorities of the Netherlands and the United States: (1) to include additional Entities, accounts and products that present a low risk of being used by U.S. Persons to evade U.S. tax and that have similar characteristics to the Entities, accounts, and products described in this Annex II as of the date of entry into force of the Agreement...'

The Competent Authority of the United States of America and the Competent Authority of the Kingdom of the Netherlands (the 'Competent Authorities') have reached the following arrangement (the 'Arrangement'). Terms used in this Arrangement that are not defined herein have the same meanings as in the IGA.

1. The Competent Authorities intend to update Annex II of the IGA by adding new subsections 'C' and 'D' to Section II (Deemed-Compliant Financial Institutions) of Annex II of the IGA to include additional entities as Non-Reporting Netherlands Financial Institutions that are treated as deemed-compliant FFIs for purposes of section 1.471 of the Internal Revenue Code.

"C. **Sponsored Investment Entity and Controlled Foreign Corporation.** A Financial Institution described in subparagraph C(1) or C(2) of this section having a sponsoring entity that complies with the requirements of subparagraph C(3) of this section.

1. A Financial Institution is a sponsored investment entity if (a) it is an Investment Entity established in the Netherlands that is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations; and (b) an Entity has agreed with the Financial Institution to act as a sponsoring entity for the Financial Institution.
2. A Financial Institution is a sponsored controlled foreign corporation if (a) the Financial

<sup>1</sup> Verdrag tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika tot verbetering van de internationale naleving van de belastingplicht en tenuitvoerlegging van de FATCA (IGA) (Trb. 2014, 128)



Institution is a controlled foreign corporation<sup>2</sup> organized under the laws of the Netherlands that is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations; (b) the Financial Institution is wholly owned, directly or indirectly, by a Reporting U.S. Financial Institution that agrees to act, or requires an affiliate of the Financial Institution to act, as a sponsoring entity for the Financial Institution; and (c) the Financial Institution shares a common electronic account system with the sponsoring entity that enables the sponsoring entity to identify all Account Holders and payees of the Financial Institution and to access all account and customer information maintained by the Financial Institution including, but not limited to, customer identification information, customer documentation, account balance, and all payments made to the Account Holder or payee.

3. The sponsoring entity complies with the following requirements:
  - a) The sponsoring entity is authorized to act on behalf of the Financial Institution (such as a fund manager, trustee, corporate director, or managing partner) to fulfill applicable registration requirements on the IRS FATCA registration website;
  - b) The sponsoring entity has registered as a sponsoring entity with the IRS on the IRS FATCA registration website;
  - c) If the sponsoring entity identifies any U.S. Reportable Accounts with respect to the Financial Institution, the sponsoring entity registers the Financial Institution pursuant to applicable registration requirements on the IRS FATCA registration website on or before the date that is 90 days after such a U.S. Reportable Account is first identified;
  - d) The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting Netherlands Financial Institution;
  - e) The sponsoring entity identifies the Financial Institution and includes the identifying number of the Financial Institution (obtained by following applicable registration requirements on the IRS FATCA registration website) in all reporting completed on the Financial Institution's behalf; and
  - f) The sponsoring entity has not had its status as a sponsor revoked.
- D. **Sponsored, Closely Held Investment Vehicle.** A Netherlands Financial Institution satisfying the following requirements:
  1. The Financial Institution is a Financial Institution solely because it is an Investment Entity and is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations;
  2. The sponsoring entity is a Reporting U.S. Financial Institution, Reporting Model 1 FFI<sup>3</sup>, or Participating FFI<sup>4</sup>, is authorized to act on behalf of the Financial Institution (such as a professional manager, trustee, or managing partner), and agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting Netherlands Financial Institution;
  3. The Financial Institution does not hold itself out as an investment vehicle for unrelated parties;
  4. Twenty or fewer individuals own all of the debt interests and Equity Interests in the Financial Institution (disregarding debt interests owned by Participating FFIs and deemed-compliant FFIs and Equity Interests owned by an Entity if that Entity owns 100 percent of

<sup>2</sup> A 'controlled foreign corporation' means any foreign corporation if more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, or the total value of the stock of such corporation, is owned, or is considered as owned, by 'United States shareholders' on any day during the taxable year of such foreign corporation. The term a 'United States shareholder' means, with respect to any foreign corporation, a United States person who owns, or is considered as owning, 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation, or 10 percent or more of the total value of shares of all classes of stock of such foreign corporation.

<sup>3</sup> The term Reporting Model 1 FFI means a Financial Institution with respect to which a non-U.S. government or agency thereof agrees to obtain and exchange information pursuant to a Model 1 IGA, other than a Financial Institution treated as a Nonparticipating Financial Institution under the Model 1 IGA. For purposes of this definition, the term Model 1 IGA means an arrangement between the United States or the Treasury Department and a non-U.S. government or one or more agencies thereof to implement FATCA through reporting by Financial Institutions to such non-U.S. government or agency thereof, followed by automatic exchange of such reported information with the IRS.

<sup>4</sup> The term Participating FFI means a Financial Institution that has agreed to comply with the requirements of an FFI Agreement, including a Financial Institution described in a Model 2 IGA that has agreed to comply with the requirements of an FFI Agreement. The term Participating FFI also includes a qualified intermediary branch of a Reporting U.S. Financial Institution, unless such branch is a Reporting Model 1 FFI. For purposes of this definition, the term FFI Agreement means an agreement that sets forth the requirements for a Financial Institution to be treated as complying with the requirements of section 1471(b) of the U.S. Internal Revenue Code. In addition, for purposes of this definition, the term Model 2 IGA means an arrangement between the United States or the Treasury Department and a non-U.S. government or one or more agencies thereof to facilitate the implementation of FATCA through reporting by Financial Institutions directly to the IRS in accordance with the requirements of an FFI Agreement, supplemented by the exchange of information between such non-U.S. government or agency thereof and the IRS.



- the Equity Interests in the Financial Institution and is itself a sponsored Financial Institution described in this paragraph D); and
5. The sponsoring entity complies with the following requirements:
    - a) The sponsoring entity has registered as a sponsoring entity with the IRS on the IRS FATCA registration website;
    - b) The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting Netherlands Financial Institution and retains documentation collected with respect to the Financial Institution for a period of six years;
    - c) The sponsoring entity identifies the Financial Institution in all reporting completed on the Financial Institution's behalf; and
    - d) The sponsoring entity has not had its status as a sponsor revoked.'
  2. The Competent Authority of the Kingdom of the Netherlands shall update the guidance issued by the Dutch Tax and Customs Administration regarding Sponsored Investment Entities and Controlled Foreign Corporations and Sponsored, Closely Held Investment Vehicles to incorporate the requirements for such entities described in paragraph 1 of this Arrangement.
  3. If an entity has met the requirements of an entity in a 'sponsoring regime' under the Dutch Tax and Customs Administration guidance, including the requirements in the U.S. Treasury regulations, incorporated into such guidance, at all relevant times prior to the date of this Arrangement, the Competent Authority of the United States of America shall not determine that such entity is a Reporting Netherlands Financial Institution that is in significant non-compliance with the IGA. For the avoidance of doubt, an entity has met the requirements described in the preceding sentence if, at all relevant times prior to the date of this Arrangement, it is an entity that is eligible to be a sponsored investment entity, sponsored controlled foreign corporation, or sponsored, closely held investment vehicle under the U.S. Treasury regulations; the sponsoring entity performed, on behalf of the sponsored entity, all the due diligence, reporting, and other obligations that the sponsored entity would have been required to perform if it were a Reporting Netherlands Financial Institution; and the sponsored entity (if applicable) and the sponsoring entity registered with the IRS.