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By Electronic Delivery

October 22, 2012

Manal S. Corwin
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U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service
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Washington, DC 20224

RE: FATCA Guidance and the IGAs

Dear Manal and Steve:

The Investment Company Institute ("ICI")[1] and ICI Global[2] appreciate greatly the time that you and your colleagues spent with us, after the first model Intergovernmental Agreement ("IGA") was released, discussing our comment letters and the benefits of an expansive and consistent IGA network. Funds and their investors, among other things, will benefit greatly from the IGA's innovative solution to otherwise-intractable difficulties of complying with both FATCA and home-country laws.

This letter first reiterates our strong support for FATCA's objectives and the IGA approach. Second, the letter expresses our strong support for the Treasury Department's and the Internal Revenue Service's ("IRS'") diligent attention to our concerns and the steps that you have taken already to address many of them. Third, the letter reemphasizes a few critical issues – to U.S. funds, to non-U.S. funds, and to both types of funds – and makes specific recommendations for addressing them. Finally, the letter raises our ever-increasing concern that the fund industry, like the financial services industry more broadly, will incur substantial additional costs and burdens – that otherwise would be avoided – unless final regulations are issued promptly and IGAs are signed soon with a substantial number of countries.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.5 trillion and serve over 90 million shareholders.

[2] ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICIG seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICIG manage total assets in excess of US $1 trillion.

I. Strong Support for FATCA's Objectives and the IGAs

We support strongly FATCA's tax compliance objectives and encourage the continued promulgation of administrable rules that implement, consistent with Congressional intent, the Chapter 4 reporting and withholding regime. Our support for your efforts is reflected in several ways. First, we have educated financial services industry professionals – both in the U.S. and abroad – about FATCA developments, including through conferences and webinars in which you and your colleagues have been active participants. Second, we have been traveling abroad – to Belgium, Brazil, France, Hong Kong, Italy, Japan, Korea, Luxembourg, Singapore, South Africa, and the United Kingdom – to help educate our colleagues in other countries about FATCA and the IGAs. We also have assisted several national and regional trade associations in their dialogue with you. Finally, we are supporting your initiatives through my role, pursuant to ICI Global's membership in the Business and Industry Advisory Committee ("BIAC") to the Organisation for Economic Co-operation and Development ("OECD"), as Chair of the FATCA Business Advisory Group.

II. Strong Support for Diligent Attention to Industry Issues and Steps Taken

The significant progress made toward developing such administrable rules – through the Proposed Regulations, the Model IGA released in July, the announcement of the second model IGA, and the signing of the IGA with the United Kingdom – is both commendable and encouraging. We appreciate these efforts and the progress that we understand is being made with other potential IGA partner countries to expand the IGA network. These agreements address many of the U.S. and global fund industries' concerns with the substantial compliance burdens placed by FATCA on funds, their distributors, and their investors.[3]

III. Critical FATCA Issues for the Fund Industry

A. <u>A RIC's Withholdable Payment Amount Should be Based Upon Its Underlying Assets</u>

The U.S. industry's only RIC-specific concern with FATCA involves the substantial competitive disadvantages placed by the sourcing rules on U.S. funds (such as exchange-traded funds) that are marketed abroad. These disadvantages include both (1) the treatment of all RIC payments as 100 percent U.S.-source and (2) FATCA withholding being applied sooner when an investor acquires a RIC than when the same investor instead acquires a foreign fund.

Specifically, as you know, our competitive concern is that participating foreign financial institutions ("PFFIs") that are distributing both U.S. and non-U.S. funds will encourage foreign investors to invest in non-U.S. funds to improve their customer experience by reducing the *possibility*

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[3] These concerns have been expressed, *inter alia,* in ICI's and ICI Global's comment letters on the Proposed Regulations that were submitted on April 30, 2012. These letters are Attachments B and C, respectively, to this letter.

that FATCA withholding will be imposed on them should documentation deficiencies develop.[4] This concern is exacerbated substantially by the many-year delay provided by the Proposed Regulations before any withholding is imposed on payments made by a foreign fund to a recalcitrant account holder.[5]

Our proposal, as described in detail in Attachment B to the ICI's April 30, 2012 submission, is for RICs to be provided with an election to treat the portion of any payment as withholdable based upon the portion of the RIC's underlying portfolio that consists of assets generating U.S.-source payments.[6] RICs with a significant foreign shareholder base and a portfolio with substantial non-U.S. investments would make this election because of the distinct competitive disadvantage otherwise imposed on them by a law not targeted at them.

Importantly, the policy rationale for the sourcing rule – that it is too difficult to determine the source of a multinational operating company's income – does not apply to RICs that hold portfolio securities the U.S. or non-U.S. status of which is easy to determine. Moreover, FATCA should not be available for use by foreign distributors as a tool to encourage foreign investors seeking exposure to non-U.S. securities to purchase foreign, rather than U.S., funds holding comparable securities.

To address the industry's substantial competitive concerns, the inapplicability to funds of the sourcing rationale, and the potential use of FATCA by foreign distributors against U.S. funds, we urge the Treasury Department and the IRS to announce promptly that regulations will provide a RIC sourcing election.[7] By issuing a Notice promptly, the competitive and other concerns that are leading U.S. firms to create foreign, rather than U.S., funds will be addressed. We urge you to exercise your regulatory authority to provide this common sense answer to a substantial industry problem.

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[4] For example, if the PFFI offers two funds investing exclusively in Asia, the PFFI may advise foreign investors to invest in the non-U.S. fund (for which the foreign passthru payment percentage will be zero) rather than in the U.S. fund (for which the withholdable payment/passthru payment percentage will be 100 percent). Concerns about FATCA might lead to this recommendation even when the U.S. fund has lower fees and better performance.

[5] The Proposed Regulations, as you know, do not define the term "foreign passthru payment" and delay withholding on foreign passthru payments until at least 2017. Because of the delayed imposition of withholding on foreign passthru payments, an individual with documentation issues who invests in a foreign fund investing exclusively in U.S. securities will have no possibility of FATCA withholding while full U.S. withholding would apply if the individual invested instead in a U.S. fund. This competitive disadvantage will last at least until 2017. For a U.S. fund holding non-U.S. assets, the disadvantage is perpetual.

[6] Thus, for example, a RIC that invested only in non-U.S. securities and received income only from these non-U.S. securities would not make *any* withholdable payment and no payment attributable to this RIC (either a distribution made by this RIC or the proceeds from a disposition of an interest in this RIC) would be treated as a passthru payment.

[7] Attachment A to this letter contains our suggested language for the Notice.

B. Centralized Compliance Option

A significant issue for non-U.S. funds is the Proposed Regulations' failure to include the centralized compliance option discussed in Notice 2011-34. We strongly recommend, as we discussed at the meeting and for the reasons provided in ICI Global's April 2012 submission,[8] that this option be included in Final Regulations.

Because funds are investment pools without employees, the fund manager effectively will be responsible for ensuring that all funds it manages are FATCA compliant. Because tax compliance personnel with U.S. tax expertise[9] effectively will be held responsible for FATCA compliance, it would be far simpler for funds to be able to elect to make a single filing and place all FATCA compliance on one person or unit within the firm. If this option is not available, and filing requirements and compliance responsibilities are dispersed throughout the firm, the compliance people who understand FATCA still will be responsible, as a practical matter, for FATCA compliance. However, they also will be required to educate others, who would be less familiar with U.S. tax law generally and FATCA in particular, about the intricacies of FATCA compliance – including certifications that these other persons would be required to make. In effect, the centralized compliance option merely provides legal support for what will happen anyway – except without significant and unnecessary burdens being imposed.

C. Clarify Treatment of Umbrella Fund Structures and Qualified CIVs

Two fund-structure-specific issues, as we discussed, remain important to our members. First, Final Regulations should clarify that FATCA should be applied, in the case of an umbrella fund structure, at the sub-fund level. As discussed in ICI Global's April 30, 2012 submission,[10] the umbrella fund structure would create innumerable compliance concerns, with potential ramifications for the U.S. capital markets, if a sub-fund without U.S. investments were subject to the same FATCA rules as a sub-fund with U.S. investments. Because each sub-fund operates effectively as a distinct investment vehicle, each should be treated as a separate FFI.

The Final Regulations, as discussed in ICI Global's April 30, 2012 submission,[11] also should expand in two ways the Qualified CIV category of registered deemed compliant FFI. First, Qualified CIVs should be able to have as an eligible distributor any distributor that is a certified deemed compliant FFI. As the customers of these distributors effectively are viewed as low-risk investors when

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[8] *See* page 15 of ICI Global's submission.

[9] In the case of a global fund company, these experts typically will be located in the U.S.

[10] *See* pages 13-14 of ICI Global's submission.

[11] *See* pages 5-7 of ICI Global's submission.

acquiring securities directly, they likewise should be viewed as low-risk investors when acquiring securities through CIVs. Second, eligible investors in a Qualified CIV should include any investor that is (1) a certified deemed compliant FFI, (2) required to do U.S. pass-through reporting, or (3) an active NFFE. As these investors may acquire securities directly without FATCA implications, they should be able to invest in a Qualified CIV as well.

D. Provide Simplifying Rules for Documentation Requirements

The ICI and ICI Global letters also made several important proposals for simplifying the customer documentation requirements. One issue, as we discussed during our meeting, is causing tremendous concern at the moment. Specifically, we urge that payors be able to apply the traditional "eyeball" test, that is used routinely in the Chapter 3 context, to treat a U.S. corporation as such for FATCA purposes. Financial services firms should not be required to secure Forms W-9 from thousands of payees that obviously are U.S. corporations to avoid having to treat them as foreign. Substantial unnecessary FATCA withholding may result if the Proposed Regulations' Form W-9 requirement is not modified.

An alternative "eyeball" test should be adopted if the traditional "eyeball" test is not. Specifically, a payor should be permitted to treat a corporation as domestic if a payor has sufficiently reliable information of its status – including information from trusted sources such as filings or registrations with a federal or state regulator, or documentation showing that such corporation's EIN does not begin with 98 – and the withholding agent does not have knowledge of any foreign indicia.

One other issue, as discussed in the ICI and ICI Global April 2012 submissions,[12] is of particular interest to funds. Specifically, we urge that the Final Regulations clarify that the "shared W-8 rule" provided for U.S. funds in the Section 1441 regulations[13] apply to all funds in the complex, regardless of whether the funds are organized in the same country.

IV. Ever-Increasing Concern about Guidance Timing and Need for Expansive IGA Network

ICI and ICI Global previously have expressed our concern that substantial unnecessary burdens will be placed on funds and their investors unless comprehensive guidance is issued sufficiently in advance of the relevant implementation dates. With each passing day, week, and month, we get closer to FATCA's January 1/July 1, 2013 effective dates without the necessary guidance.

The IGAs, which we support strongly, add an additional complication to the timing considerations. An expansive IGA network will resolve many of the industry's FATCA concerns – so

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[12] *See, e.g.,* page 7 of ICI's letter and pages 20-21 of ICI Global's letter.

[13] *See* Treas. Reg. § 1.1441-1(e)(4)(ix)(3).

long as it is in place before FATCA becomes effective.[14] To date, however, only one agreement has been signed.

Funds and their distributors are in the extraordinarily difficult position today of not having Final Regulations, an FFI Agreement, and/or applicable IGAs in the countries in which their shares are distributed. The compliance deadlines that the industry face cannot be met effectively in the time remaining.

Unless all of the necessary FATCA guidance is ready for imminent release and the number of signed IGAs increases quickly and substantially, we encourage you to announce promptly that FATCA's effective date will be postponed. This postponement could be achieved either explicitly or effectively (through substantial penalty relief). We recommend, as we have previously,[15] that FATCA's effective date be postponed until January 1 of the first calendar year after the year in which the regulations are finalized. The reasons for our request are discussed below.

Chairing the business advisory group during the recent meetings at the OECD has provided me with a somewhat unique perspective on FATCA implementation. Among other things, I have become even more keenly aware of the substantial challenges that you, your IGA partner countries, and the business community face in implementing FATCA in an administrable manner. These challenges arise, in somewhat different forms, whether FATCA is implemented directly or through IGAs.[16]

ICI and ICI Global repeatedly have commended the Treasury Department and the IRS for your willingness to meet with us and others as often as necessary to ensure a comprehensive understanding of our concerns. The ongoing consultative process has been more interactive than any other in which I have been involved. The steps you have taken so far, both in the Proposed Regulations and in the model IGA, are appreciated greatly.

Your constant dialogue with business – which we support strongly – has had one unfortunate side-effect. Specifically, because the more time spent meeting with business means less time available to write the guidance, announced dates for guidance-issuance have been missed. Missed deadlines, and last-minute announcements that effective dates are being delayed or otherwise modified, impose substantial and unnecessary costs on business.

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[14] The IGAs, for example, solve a very serious problem for retirement accounts that otherwise would not meet the tests for effective exemption from FATCA.

[15] *See, e.g.,* pages 12-13 of ICI's letter and pages 24-25 of ICI Global's letter.

[16] Some of these challenges were described in BIAC's letter, dated 19 October 2012, to the OECD's Pascal Saint-Amans.

The challenges to implementing FATCA in a manner that achieves the legislation's objectives without imposing undue burden on industry, as you know, are daunting. ICI and ICI Global continue to believe that it is more important to get FATCA right than to get it done quickly.

Our proposal for an announced delay in FATCA's implementation is not made lightly. We recognize and support fully FATCA's very worthwhile objectives. We also have sought, through ongoing discussions and meetings with you and your staffs, to advance reasonable proposals that address both your tax compliance concerns and our business needs. The impending time crunch is obvious. FATCA simply cannot be implemented both effectively and immediately.

* * *

Thank you again for your diligent attention to our concerns and the steps that you have taken already to address many of them. Please feel free to contact me (at 202/326-5832 or lawson@ici.org) at your convenience if we can provide you with any additional information.

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

Attachments

cc: Danielle Rolfes
Michael Plowgian
Ron Dabrowski

ATTACHMENT A to OCTOBER 22 2012 ICI/ICI GLOBAL LETTER

DRAFT

October [22], 2012

Part III – Administrative, Procedural, and Miscellaneous

Chapter 4 Notice [2012-XX] Regarding Election by a U.S. Mutual Fund to Designate Distribution and Gross Proceeds Amounts as Withholdable Payments

[IRS 'standard' introductory language]

Final Regulations under I.R.C. Sections 1471 through 1474 will allow a regulated investment company ("RIC") to elect passthru payment treatment, comparable to that to be provided under the foreign passthru payment regime, for determining the extent to which the amounts distributed by such RIC and the gross payments on the disposition of such RIC's shares have a U.S. source – and hence are Withholdable Payments. The Withholdable Payment of an Electing RIC, as defined below, will be based upon such Electing RIC's income or assets (in a manner comparable to that provided for foreign passthru payments) and will be expressed as a percentage to be applied to the amount distributed or paid.

An Electing RIC is any RIC that elects on its annual tax return (including extensions) to determine and publish its Withholdable Payment percentages (in a manner comparable to that provided for foreign passthru payments) as provided in Final Regulations.

No amounts attributable to the shares of any RIC making this election will be treated as Withholdable Payments until withholding is imposed on foreign passthru payments under Final Regulations.

ATTACHMENT B to OCTOBER 22 2012 ICI/ICI GLOBAL FATCA LETTER

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April 30, 2012

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Steven Musher
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RE: FATCA Proposed Regulations

Dear Ms. Corwin, Mr. Danilack, and Mr. Musher:

The Investment Company Institute[1] strongly supports administrable rules that implement, consistent with Congressional intent, the Chapter 4 reporting and withholding rules.[2] The progress made by the Proposed Regulations[3] in developing administrable rules is commendable. The proposals

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds ("ETFs"), and unit investment trusts ("UITs"). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.3 trillion and serve over 90 million shareholders.

[2] This letter refers to Chapter 4's rules as "FATCA reporting" and "FATCA withholding" rules because they first were included in legislation known as the Foreign Account Tax Compliance Act ("FATCA").

[3] http://www.irs.gov/pub/newsroom/reg-121647-10.pdf.

made in this letter, we submit, would enhance both the effectiveness and the administrability of the FATCA reporting regime.

I. Introduction

Our members – investment companies registered for sale in the U.S. under the Investment Company Act of 1940 (the "1940 Act") and the shareholders in 1940-Act registered funds[4] – are impacted both directly and indirectly by FATCA. The direct impact arises from those fund shareholders treated under FATCA as foreign financial institutions ("FFIs"), non-financial foreign entities ("NFFEs"), or foreign persons. The indirect impact arises primarily from concerns that foreign governments might adopt FATCA-like rules for U.S. funds investing in their markets. The Joint Statement issued on February 8 by the U.S., France, Italy, Germany, Spain, and the United Kingdom, while a positive development on many levels (and one we support strongly), arguably increases the likelihood of this result. For these reasons, and others, we have a strong interest in continuing to support your effort to develop administrable rules. The time that you already have spent with us and others on these issues is appreciated greatly.

This letter, unlike our detailed comments on Notice 2011-34,[5] focus on only a few issues. First, and most importantly, we urge that all amounts attributable to a U.S. fund be treated as having a U.S. source, at the fund's election, only to the extent of the fund's investments in U.S.-source assets. The substantial delay in imposing withholding on foreign passthru payments, while granted for sound policy reasons and appreciated greatly by foreign funds, exacerbates exponentially the competitive concerns that we raised previously.

Second, we suggest several changes to the customer documentation requirements. Our proposals will enhance administrability without diminishing compliance.

Third, we suggest an alternative approach for improving further on the many positive changes made by the Proposed Regulations in the treatment of retirement accounts. Specifically, the Final Regulations should state that, except to the extent provided by the Secretary, any retirement plan organized under a country's laws for the principal purpose of saving for retirement will be eligible for treatment as a certified deemed compliant FFI, will be treated as an exempt beneficial owner, and will be excluded from the definition of financial account

Finally, we suggest additional transition relief. Under our proposal, FATCA's requirements would begin to apply no sooner than one full calendar year after the FATCA regulations are finalized.

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[4] 15 U.S.C. §§ 80a-1 *et seq.*

[5] *See* ICI Letter on Notice 2011-34, dated June 6, 2011.

II. RIC Withholdable Payments

A. Background

The ICI's June 6, 2011 comment letter on Notice 2011-34 discussed in detail the organization and operation of U.S. funds that are registered under the 1940 Act and are treated for U.S. tax purposes as regulated investment companies ("RICs").[6] Rather than repeat those details here, that portion of the June 6 letter is included for your reference as Attachment A.

B. A RIC's Withholdable Payment Amount Should be Based Upon Its Underlying Assets

1. *The Regulations Place U.S. Funds at a Substantial Competitive Disadvantage*

The U.S. industry has only one RIC-specific concern with FATCA. This concern, however, involves a significant competitive disadvantage – and one that is exacerbated substantially by the Proposed Regulations – for those U.S. funds (such as exchange-traded funds) that are marketed abroad. Specifically, the U.S. industry is concerned that all amounts attributable to a U.S. fund apparently[7] are treated as generating 100 percent U.S.-source payments irrespective of the fund's underlying portfolio investments.

Our competitive concern is that participating FFIs ("PFFIs") that are distributing both U.S. and non-U.S. funds will encourage foreign investors to invest in non-U.S. funds to improve their customer experience by reducing the *possibility* that FATCA withholding will be imposed on them should documentation deficiencies develop. For example, if the PFFI offers two funds investing exclusively in Asia, the PFFI may advise foreign investors to invest in the non-U.S. fund (for which the foreign passthru payment percentage will be zero) rather than in the U.S. fund (for which the withholdable payment/passthru payment percentage will be 100 percent). Concerns about FATCA might lead to this recommendation even when the U.S. fund has lower fees and better performance.

This concern is exacerbated substantially by the many-year delay provided by the Proposed Regulations before any withholding is imposed on payments made by a foreign fund to a recalcitrant account holder. The Proposed Regulations, as you know, do not define the term "foreign passthru payment" and delay withholding on foreign passthru payments until at least 2017.

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[6] Subchapter M of the Internal Revenue Code (26 U.S.C. §§ 851 *et seq.*) provides the general tax regime for RICs.

[7] In one limited respect, the Proposed Regulations could be read to provide a "look-through" approach for determining the extent to which a RIC's payment is treated as having a U.S. source. Specifically, in determining the extent to which a RIC distribution would constitute "gross proceeds," Prop. Treas. Reg. § 1.1473-1(a)((3)(ii)(C) refers to Prop. Treas. Reg. § 1.1473-1(a)((3)(ii)(A); this latter provision states in part that "stock issued by a domestic corporation is property of a type that can produce dividends from sources within the United States *if* a dividend from such corporation would be from sources within the United States (emphasis added)."

The ICI, to be clear, does not object to the relief provided to foreign funds by the Proposed Regulations. We are quite concerned, however, that the competitive disadvantage discussed above has been exacerbated substantially by this delay. For example, because of the delayed imposition of withholding on foreign passthru payments, an individual with documentation issues who invests in a foreign fund investing exclusively in U.S. securities will have no possibility of FATCA withholding while full U.S. withholding would apply if the individual invested instead in a U.S. fund. This competitive disadvantage will last at least until 2017. For a U.S. fund holding non-U.S. assets, the disadvantage is perpetual.

C. Proposal

1. *In General*

To address these concerns, we request that RICs be provided with an election to treat the portion of any payment as withholdable based upon the portion of the RIC's underlying portfolio that consists of assets generating U.S.-source payments. Thus, for example, a RIC that invested only in non-U.S. securities and received income only from these non-U.S. securities would not make *any* withholdable payment and no payment attributable to this RIC (either a distribution made by this RIC or the proceeds from a disposition of an interest in this RIC) would be treated as a passthru payment.

RICs would *not* be required to make this election. Indeed, unless a RIC has both a significant foreign shareholder base and a portfolio with substantial non-U.S. investments, this election almost surely would not be made. For those RICs concerned about the competitive disadvantage, however, the election is quite important. FATCA should not be available for use by foreign distributors as a tool to encourage foreign investors seeking exposure to non-U.S. securities to purchase foreign, rather than U.S., funds holding comparable securities.

We submit that this proposal will not encourage tax evasion by U.S. persons. In all cases, RICs and PFFIs will be required to obtain information necessary to determine whether an accountholder is a U.S. person and to report fully on such persons. Moreover, the responsible officer of a PFFI will be required to certify that the FFI's management personnel do not encourage or assist U.S. persons in hiding their identities.

2. *Detailed Proposal*

As the Proposed Regulations did not discuss the calculation of a passthru payment percentage, our detailed proposal – provided in Attachment B to this letter – references Notice 2011-34's discussion of how a non-U.S. fund might calculate such a percentage. Because foreign funds will not be required to calculate a foreign passthru payment for several years, if ever, our suggestions are limited to U.S. funds.

III. Customer Documentation Issues

A. Introduction

Financial institutions expend considerable effort ensuring their compliance with all applicable customer identification requirements. This effort is compounded when information must be collected to satisfy different legal requirements,[8] when different types of information must be collected or reviewed,[9] when information collected may be relied upon (*i.e.,* is valid) for different time periods,[10] and when information must be retained for different time periods.[11]

Our comments below focus on three broad areas. First, we encourage efforts to maximize global harmonization of tax compliance and treaty relief measures and government-to-government information-sharing arrangements. Second, we support steps taken in the Proposed Regulations to reduce some of the more burdensome and novel customer identification requirements that were contained in the IRS Notices that preceded the Proposed Regulations. Third, we suggest several additional modifications to these rules to reduce further the burdens imposed on financial institutions without reducing FATCA's tax compliance objectives.

B. Maximizing Global Harmonization of Tax Compliance and Treaty Relief Measures

Financial institutions with a global focus – because they have cross-border activities or investments and/or a client base that is not purely domestic – have a very keen interest in customer identification rules and government-to-government information-sharing protocols that are as harmonized as possible across jurisdictions. The Organization for Economic Cooperation and Development ("OECD") for several years has brought together tax compliance experts from governments and financial institutions from around the globe to address these issues. Through the so-called TRACE project,[12] considerable progress has been made in developing a framework for harmonizing customer identification procedures (including a standardized investor self declaration

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[8] Customer information might be collected to comply with know-your-customer ("KYC") rules, anti-money-laundering ("AML") rules, domestic tax-reporting requirements, and/or requirements to establish eligibility for reduced withholding under an income tax treaty.

[9] For some purposes, one simple form of identification may be adequate. In other cases, detailed forms requiring certification of various attributes or qualifications for specific treatment may be required.

[10] Countries providing for investor self declarations ("ISDs") allow reliance upon the certifications for different periods. In some countries, reliance is permitted indefinitely for some types of certifications while other types of certifications must be renewed every few years.

[11] Because different countries have different statutes of limitations, it is inevitable that record retention periods will vary across jurisdictions.

[12] TRACE is an acronym for Tax Relief and Compliance Enhancement.

("ISD") that could be used on a reciprocal basis) and simplifying procedures for verifying to governments the status (*e.g.,* residence) of a financial institution's customers. The United States, as you know, has taken a leading role in this effort.

We strongly support the work of the TRACE project as a vehicle for providing enhanced tax relief and for improving tax compliance in an administrable manner that benefits both governments and business. We also recognize that the FATCA legislation imposes deadlines that prevent global harmonization in the near term. Consequently, our comments below recommend a number of ways in which the FATCA regulations should be modified to improve harmonization without reducing compliance.

The Joint Statement issued on February 8 by the United States, France, Germany, Italy, Spain, and the United Kingdom regarding an intergovernmental approach to FATCA implementation is an encouraging start. More work needs to be done. First, the dialogue between these six governments should be expanded promptly to include business representatives who have been working with these governments for several years on compliance enhancement. FATCA's requirements are so extensive, and affect financial institutions in so many different ways, that governments cannot possibly develop administrable rules without substantial business input. Second, as soon as feasible, the dialogue should be expanded further to include other governments and business representatives from these additional jurisdictions. A global solution requires a global dialogue. This dialogue should commence expeditiously.

C. Support for Progress Made in Proposed Regulations

The Proposed Regulations addressed in several significant ways the general business concern that the compliance burdens placed on business by the stringent due diligence requirements outweighed any associated compliance benefits by an overwhelming margin. One such example was elimination in the Proposed Regulations of the enhanced requirements that the IRS Notice would have imposed on "private banking accounts." We also support the new rules that impose substantial additional due diligence (in the absence of clear indicia of U.S. ownership) only on "high-balance" accounts (*e.g.,* $1 million, in many situations).

Two clarifications are needed. First, the Final Regulations should make absolutely clear that the $50,000 threshold below which an account need not be treated as a U.S. account applies to all accounts. The preamble to the Proposed Regulations states that preexisting individual accounts "with a balance or value that does not exceed $50,000 are exempt from review."[13] Several government officials, speaking on their own behalf at industry meetings, have restated the position taken in the

[13] Proposed Regulations, page 22.

preamble. The $50,000 exception to U.S. account status,[14] however, is limited to accounts that meet conditions A, B, and C – where condition A is that the account be "a depository account."[15]

Second, the Final Regulations should make absolutely clear that the $50,000 threshold applies for all FATCA purposes. As drafted, the Proposed Regulations provide that the $50,000 threshold is an exception to U.S. account status only for certain individual accounts of participating FFIs.[16] As the term U.S. account is used throughout the Proposed Regulations, including in the rules for restricted funds,[17] and as the term is defined only once, the definition surely was meant to apply for all purposes.

These drafting ambiguities should be corrected. As the preamble and several government officials effectively have acknowledged, accounts with small balances are of insufficient concern to warrant the due diligence requirements that FATCA otherwise would impose. It would be absurd if a depository account with a $50,000 balance was deemed to be of no concern while a securities account with a balance of $500 was of concern. The dollar threshold exception from U.S. account status should apply equally to all types of financial accounts and for all FATCA purposes.

D. <u>Additional Specific Recommendations</u>

1. *Reliance By Multiple Funds on a Single Form W-8*

We appreciate that all funds with a common manager (*e.g.,* funds that are part of the same "fund complex") may rely upon a W-8 provided to any fund in that complex.[18] To eliminate ambiguity, it would be helpful for the Final Regulations to note that this "shared W-8" rule – which already is provided for information reporting by U.S. funds[19] – applies to all funds in a complex regardless of whether the funds are organized in the same country.

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[14] *See* Prop. Treas. Reg. § 1.1471-5(a)(4)(i).

[15] The definition of depository account in Prop. Treas. Reg. § 1.1471-5(b)(3)(i) appears too narrow to include a securities account.

[16] Prop. Treas. Reg. § 1.1471-5(a)(4)(i)(B).

[17] Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(D)(5).

[18] Prop. Treas. Reg. § 1.1471-3(c)(6)(vi).

[19] Treas. Reg. § 1.1441-1(e)(4)(ix)(3).

2. *Documentary Evidence Burdens for Certified Deemed Compliant FFIs*

We are very concerned about various FATCA requirements that effectively require financial institution employees to make tax compliance determinations based upon subjective requirements that may require specialized legal or financial training. The final FATCA regulations should limit a financial institution's due diligence obligations to making judgments based upon objective standards – such as verifying that a form has been signed or that appropriate boxes for claiming status have been checked.

The Proposed Regulations impose upon financial institutions the very substantial obligations both to collect and to examine documentary evidence to support investor certifications. Documents would be required, under the Proposed Regulations, from certified deemed compliant FFIs (such as nonregistering local banks) and from exempt beneficial owners (such as retirement funds, nonprofit organizations, and funds restricted to exempt beneficial owners). The types of documentary evidence that a firm's employees would be required to examine could include financial statements, annual reports, articles of incorporation, and government certifications.

Determining whether these documents support the status claimed may require both specialized training, as noted above, and command of a foreign language (since documentary evidence provided by a foreign client easily could be in a language that the firm's employee cannot read). The requirement to review financial statements, organizing documents, etc., can introduce substantial potential liability (including an obligation to pay all amounts that should have been collected from the investor whose documentation in fact did not support the status claimed) and will impose costs far exceeding any compliance benefits.

Consequently, we suggest that the Final Regulations eliminate the requirement to collect and review documentary evidence to support certifications made by certified deemed compliant FFIs and exempt beneficial owners. If the Final Regulations nevertheless require firms to collect documentary evidence, the firms should be permitted to rely upon the evidence provided unless the person reviewing the evidence knows or has reason to know that the evidence provided does not support the status claimed. Alternatively, the firms should be permitted in all cases to rely upon a letter from counsel attesting to the FFI's status. We also would support allowing certified deemed compliant FFIs to register with the IRS and receive an FFI-EIN.

3. *Other Documentary Issues*

We have six other document-related suggestions. First, financial institutions should be permitted to rely upon copies and electronic images (such as PDFs) of completed forms. Customer information today routinely is collected through electronic means. Electronic documents that financial services firm risk managers have determined are adequate for business purposes should be adequate for tax compliance purposes as well. Substantial burdens will be imposed if firms must change their business practices and, for FATCA purposes only, collect only paper originals or faxed copies of investor certifications and/or supporting documentary evidence.

Second, any documentary evidence collected by a financial institution to support a W-8 should remain valid, and should not need to be "refreshed," even if (such as in the case of a passport) its validity expires before the W-8 itself expires. The additional burdens that will be placed upon financial institutions to monitor the expiration dates of both W-8s and underlying documentary evidence seem unlikely – absent knowledge or a reason to know that the investor's status has changed – to enhance tax compliance. Requiring that in all cases both the W-8 and the documentary evidence be valid currently could increase substantially the number of times that information must be solicited from clients. The more times a client is required to update information, the more times it is possible that the client inadvertently will fail to respond. Failure to respond will subject a client to withholding that otherwise would not have been imposed. Absent actual knowledge or a reason to know that a client's status has changed, a financial institution should be permitted to rely upon documentary evidence collected until the associated W-8 expires.

Third, strong consideration should be given to extending the time period for which W-8s and any documentary evidence collected only for FATCA purposes remain valid. One approach would be to permit continued reliance unless the financial institution knows or has reason to know that an investor's status may have changed. This "exception redocumentation" would limit the number of new recalcitrant account holders that would appear on a financial institution's books every time a W-8 or piece of documentary evidence expired without being updated.

Fourth, the documentation requirements for entities wholly owned by exempt beneficial owners should not obligate the entity to pass along the associated documentation for each underlying participant in the investment fund. Rather, a self-certification from the entity should suffice. This proposal is consistent with the certification requirements that apply to registered deemed compliant funds. If this requirement is not changed, withholding agents potentially will be asked to validate hundreds of pages of documentation relating to entities that are considered to pose no risk of tax evasion. We submit that a fund operating in this manner will have robust procedures in place to ensure that all participating investors are exempt. We suggest that the IRS may gain additional comfort on this issue if the entity attests to its procedures in a penalties of perjury statement that is associated with signing the W-8.

Fifth, we suggest that a U.S. phone number not be treated, in itself, as sufficient indicia of U.S. ownership. Non-U.S. investors have U.S. phone numbers for a wide range of personal reasons. As the number of such investors, we understand, is high, substantial additional compliance burdens will be imposed if a U.S. phone number, without more, is sufficient to trigger additional due diligence regarding an account.

Finally, we urge that financial institutions be required to check the continuing validity of an FFI-EIN no more frequently than annually. A clear and manageable standard is needed regarding a financial institution's obligation to review FFI-EINs that have been verified, upon receipt, as valid.

IV. Retirement Accounts

A. Introduction

We support the many significant improvements made by the Proposed Regulations to the treatment of retirement plans and accounts. The Proposed Regulations effectively recognize that the typical foreign retirement account does not provide U.S. persons with the ability to hide assets.

Special consideration must be given to retirement plans because they generally must be operated under their home-country laws for the primary purpose of preserving plan participants' retirement savings. The obligations that FATCA imposes on financial institutions to withhold in certain situations and to close accounts in others, however, are inconsistent with the laws under which these plans are organized.

We recognize the difficulty of crafting rules that distinguish effectively between vehicles that might allow for assets to be hidden and those that would not allow for such behavior. In the case of retirement plans and accounts that are organized under a country's laws for the principal purpose of saving for retirement, however, no line-drawing should be required. All such plans and accounts should be treated as deemed compliant, as exempt beneficial owners, or as excluded from the definition of financial account.

While many of the requirements contained in the Proposed Regulations (which are based on U.S. principles) are not problematic, a few requirements create significant, if not overwhelming, difficulties for certain types of retirement accounts. Each problematic area is discussed below. While we suggest targeted changes for some of these issues, we submit that a more comprehensive and effective solution should be provided. This solution would accommodate arrangements that are designed to meet specific local requirements and the financial needs of local workers.

Specifically, the Final Regulations should state that, except to the extent provided by the Secretary, any retirement plan organized under a country's laws for the principal purpose of saving for retirement will be eligible for treatment as a certified deemed compliant FFI, will be treated as an exempt beneficial owner, and will be excluded from the definition of financial account. Any concerns that certain types of plans should not be treated as eligible could be addressed by the "except to the extent provided" provision.

B. Specific Concerns

1. *The Five-Percent Participant Interest Limit*

The Proposed Regulations condition a retirement fund's eligibility for treatment – under one of the certified deemed compliant FFI categories[20] and one of the exempt beneficial owner categories[21] – on the fund not having a single beneficiary with a right to more than five percent of the entity's assets. In the case of certain large plans, this limitation creates an unnecessary compliance-monitoring requirement. In the case of certain smaller plans, this limitation can cause plans to flip in and out of qualification.

For certain large plans, the five-percent limit can impose a compliance monitoring requirement even when it is highly unlikely that a participant could have that significant an interest. The Chilean pension fund system, for example, requires mandatory contributions by approximately seven million individuals to fund mandatory pension accounts that are managed by one of six providers. Rather than force each of these providers to monitor account sizes, we suggest (as an alternative to the five-percent limit) that this requirement be satisfied if the assets are held solely for the beneficiary of a government-designed, broad-based pension system.

For certain smaller plans, the five-percent limit can preclude a plan from qualification in the first instance; the five-percent limit also can cause the plan to flip in and out of qualification as participants enter or leave the plan and/or as asset values of investment options change. To illustrate the difficulty of this well-intentioned test, consider the treatment of a very small plan that acquires a 20th participant. This plan no longer can qualify for treatment as a deemed compliant retirement plan under Prop. Treas. Reg. § 1,1471-5(f)(2)(ii)(A)(2) because it has more than 19 participants. The plan cannot satisfy the requirements for treatment as a deemed compliant retirement plan under Prop. Treas. Reg. § 1,1471-5(f)(2)(ii)(A)(1), however, unless each of the 20 participants has exactly the same five-percent interest in the plan's assets. Given our example of a 20th participant joining the plan, it is clear that at least one (and probably several) of the other plan participants will exceed the five-percent limit.

The difficulties created by the five-percent limit would be ameliorated at least somewhat if the limitation were increased to ten percent.

2. *Plans that Allow for Excess Contributions*

We appreciate greatly that the Proposed Regulations allow contributions of up to 100 percent of earned income without causing a plan to fail to qualify for the exception to the definition of

[20] Prop. Treas. Reg. §§ 1.1471-5(f)(2)(ii)(A)(1)(ii).

[21] Prop. Treas. Reg. §§ 1.1471-6(f)(1)(ii)(C).

financial account, for certified deemed compliant FFI status, or for exempt beneficial owner status.[22] Certain types of government-mandated plans, including some in Australian and Hong Kong, allow for contributions in certain instances that are not limited to earned income. Some others allow for "unused amounts" in one year to be rolled over to subsequent years. As we understand you will receive detailed submissions from several national associations, including those in Australia and Hong Kong (among others), we will not attempt to describe other countries' plans here. What is clear, however, is that these plans cannot be used by U.S. persons to hide assets. Hence, the limitation tied to earned income is both extremely problematic and unnecessary.

3. *Plans that Incur Annual Taxation*

We also appreciate other enhancements made by the Proposed Regulations to the ability of retirement plans to qualify as certified deemed compliant FFIs or as exempt beneficial owners. The requirement that a fund not be taxable,[23] we understand, is problematic for Australian superannuation funds – which are taxed at a concessionary rate of 15 percent. Because these funds will be addressed in the Australian association's submission, we will not attempt to describe those plans here. Clearly, some taxation of a retirement plan's income should not disqualify the plan from qualifying as a certified deemed compliant FFI or as an exempt beneficial owners.

4. *Arrangements to Earn Income for Benefit of Exempt Plans*

The definition of a retirement account should be expanded to include any arrangement to earn income for the benefit of one or more exempt pension plans. These arrangements currently are treated as exempt retirement accounts in the U.S.' income tax treaties with Canada and the United Kingdom and should be treated as such for FATCA purposes as well.

V. <u>Transition Issues</u>

We appreciate the transition relief provided by the Proposed Regulations. More transition relief, however, is necessary.

Funds and financial institutions will need sufficient time, after final FATCA regulations are issued, to comply with the new and detailed obligations that will be imposed on them. Firm's "FATCA teams" involve business executives, securities lawyers, tax lawyers and other tax compliance personnel, communications personnel, operations and computer systems personnel, and many other experts from offices around the globe. Their compliance efforts have been diligent and undertaken in

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[22] Prop. Treas. Reg. § 1.1471-5(b)(2)(i)(A) (exception to definition of financial account); Prop. Treas. Reg. § 1.1471-5(f)(2)(ii)(A)(1)(i) (certified deemed compliant FFI); and Prop. Treas. Reg. § 1.1471-6(f)(1)(ii)(B) (exempt beneficial owner).

[23] *See*, Prop. Treas. Reg. §§ 1.1471-5(f)(2)(ii)(A)(1)(iii) and 1.1471-6(f)(1)(ii)(D).

good faith. The Final Regulations, however, will need to be studied closely and implemented carefully.

To address these concerns, we request that FATCA's requirements apply no sooner than one full calendar year after the FATCA regulations are finalized. Under our proposal, finalization of the regulations in 2012 would cause FATCA's reporting requirements to apply beginning with payments made in calendar year 2014. Similarly, because the timeline provided by the Proposed Regulations calls for FATCA's withholding rules to apply beginning one calendar year after the FATCA reporting rules become effective, it would follow under our proposal that FATCA withholding would begin on January 1, 2015. All of the Proposed Regulations' other requirements, such as receiving customer documentation on specific forms, would apply no sooner than January 1, 2014.

* * *

We would like to discuss this letter's proposals with you. The time spent already by you and your staffs with us and others is appreciated greatly. As the industry will need substantial lead-time to implement final FATCA regulations, I will contact you shortly to discuss the timing for our next meeting. Please feel free, at any point, to contact me for additional information or to discuss our proposals. My direct dial number is 202/326-5832. Many thanks.

Sincerely,

Keith Lawson
Senior Counsel – Tax Law

Attachments

cc: Michael Caballero
J. D. Carroll
Ron Dabrowski
Jesse Eggert
Josephine Firehock
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Danielle Nishida
Doug O'Donnell
Michael Plowgian
Danielle Rolfes
John Sweeney
www.regulations.gov (IRS REG-121647-10)

April 30, 2012

ATTACHMENT A
ICI COMMENT LETTER ON FATCA PROPOSED REGULATIONS

ORGANIZATION AND OPERATION OF REGULATED INVESTMENT COMPANIES

I. RICs are Investment Pools

U.S. funds registered under the 1940 Act generally are treated for U.S. tax purposes as regulated investment companies ("RICs"). Subchapter M of the Internal Revenue Code[1] provides the general tax regime for RICs.

RICs are investment vehicles that provide individuals and entities with asset diversification and professional management at costs far lower than the average investor could achieve by investing directly in the same securities held by the RIC. In essence, investors pool their assets through the RIC to improve their investment return. Each RIC shareholder effectively has an undivided interest in the RIC's assets.

RICs generally calculate each day the net asset value ("NAV") of their shares. The NAV reflects each investor's interest, on a per-share basis, in the RIC's assets. RICs that may be purchased pursuant to continuous public offerings and redeemed upon shareholder demand (referred to in the 1940 Act as "open-end investment companies" and known colloquially as "mutual funds") price their shares at the NAV. Thus, a mutual fund shareholder effectively can liquidate his or her undivided interest in the fund's assets every day at the net value (after accrued expenses) of those assets.

II. Distribution of RIC Shares

RICs typically are publicly offered only in the U.S. In very limited situations, a few RICs have been offered for public sale in specific jurisdictions.[2] The shares of many RICs (such as "exchange-traded funds" or "ETFs") trade on stock exchanges. Some RICs, particularly institutional funds and those holding bonds, may acquire shareholders through private placements.

While the overwhelming majority of all investors in RICs are U.S. persons (whose status has been documented by valid taxpayer identification numbers ("TINs")), the non-U.S. investment in RICs is not inconsequential; even a very small percentage of the over $13 trillion invested in RICs is a large amount. Foreigners invest in RICs both directly and through FFIs; foreign institutional investment (*e.g.,* from foreign pension plans) is important to many ICI members.

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[1] 26 U.S.C. §§ 851 *et seq.*

[2] A few RICs have been offered for public sale in Germany, where relatively comparable tax treatment for German investors in U.S. and German funds eliminated a significant competitive disadvantage for U.S. funds.

RICs may be created for different distribution channels and/or different types of investors. RICs often are created for distribution to individual investors purchasing through the retail market ("retail funds"). Other RICs are created primarily for distribution to institutional investors, such as employer-sponsored retirement plans, charities, and corporate cash management offices ("institutional funds"). In many cases, RICs will have separate classes of shares for retail and institutional investors.

The typical RIC has thousands of shareholders; some RICs have hundreds of thousands of shareholders. RIC shareholders may hold their shares directly with the RIC's transfer agent. More commonly, the shares are held through an intermediary who often holds the shares in a nominee account. RICs often have hundreds or thousands of intermediary shareholders.

Nominee accounts include street name accounts set up by brokerage firms, banks, and financial planners for their customers and those set up by so-called "fund supermarkets," which are created by financial services firms to invest their clients' assets in other firms' RICs. Nominees may hold for other nominees; financial planners can hold their clients' assets in an account with another nominee, such as a fund supermarket, that will be the shareholder of record at the RIC level. Because customer identity information is a valuable commercial asset, firms with the customer relationship may utilize the nominee account structure to shield the client's identity from competitors, including RICs and the financial services firms that manage RICs. The nominee account structure, importantly, does not shield client information from the IRS.

III. The Tax Treatment of RICs and Their Shareholders

RICs effectively are required to distribute annually essentially all of their income and gains. These distribution requirements are found in Code sections 852[3] and 4982.[4]

U.S. individuals and other taxpaying persons investing in RICs are taxed upon (1) the receipt of RIC distributions (whether received in cash or reinvested in additional RIC shares) and (2) the disposition of RIC shares. Backup withholding under Code section 3406 is imposed on all reportable

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[3] Under Code section 852, a RIC must distribute with respect to its taxable year at least 90 percent of its income (other than net capital gain). The remaining 10 percent of ordinary income, and all capital gain, may be retained. All retained income, however, is taxed at regular corporate tax rates. Because a RIC that incurs corporate tax provides a lower return than one that does not incur such tax, RICs generally attempt to distribute all of their income.

[4] U.S. tax law imposes an excise tax (under Code section 4982) on any RIC that does not distribute essentially all of its income during the calendar year in which it is earned. To eliminate any excise tax liability, a RIC must distribute by December 31 an amount equal to the sum of: (1) 98 percent of its ordinary income earned during the calendar year; (2) 98.2 percent of its net capital gain earned during the 12-month period ending on October 31 of the calendar year; and (3) 100 percent of any previously-earned amounts not distributed during the prior calendar year. A tax of 4 percent is imposed on the amount, if any, by which the RIC's required distribution exceeds the amount actually distributed. The excise tax, in effect, acts as an interest charge on undistributed amounts. RICs typically seek to avoid this charge by electing to distribute their income currently.

payments (including dividends and gross proceeds from securities dispositions) made to persons who have not furnished a TIN or have furnished a TIN determined to be incorrect.

Foreign investors incur tax on their RIC investments pursuant to Code section 1441. Importantly, a foreign individual investor will be treated as a U.S. person who has not provided a valid TIN, and hence will be subject to Code section 3406 backup withholding, unless the person has provided appropriate documentation (*e.g.,* a valid IRS Form W-8) establishing the person's status as foreign.

ATTACHMENT B
ICI COMMENT LETTER ON FATCA PROPOSED REGULATIONS

PROPOSAL FOR CALCULATING A RIC PASSTHRU PAYMENT PERCENTAGE

I. Calculating the Passthru Payment Percentage for Share Dispositions

The ICI supports the approach taken in Notice 2011-34 of using U.S. and non-U.S. asset percentages in determining the passthru payment percentage for share dispositions. Among other things, this approach will provide the RIC investor with FATCA treatment comparable to that of the direct investor who sells the same securities that are in the RIC's portfolio on the date the RIC interest is sold or redeemed. Comparable treatment is important because it allows RICs to demonstrate to their customers that the RIC structure is not in any way disadvantaging the RIC investor vis-à-vis the direct investor. In effect, the Notice's approach treats the disposition of the investor's RIC shares as a disposition of his or her undivided interest in the RIC's assets.

We also support the use of average portfolio composition to determine a RIC's passthru payment percentage. By requiring portfolio composition averaging, the Notice reduces potentially significant swings in a RIC's passthru payment percentage (if a RIC moves actively into and out of the U.S. securities markets based upon expected relative returns between U.S. and foreign markets). These passthru payment percentage swings might be confusing to shareholders and/or cause any recalcitrant account holder to manipulate the timing of redemptions to minimize FATCA withholding.

Using the portfolio composition for a RIC's last four fiscal quarters, regardless of the time period over which a RIC investor held RIC shares, also is appropriate.[1] FATCA withholding is not designed to be precise; it is designed to ensure reporting on U.S. persons. The costs of attempting to build a computer system to tie testing dates to the period during which a person was a RIC shareholder would be astronomical.

The Notice's approach would be far more administrable for RICs and their distributors, however, if the disposition percentage applied to all RICs for a longer, and more uniform, period. Because of the large volume of shareholder transactions, the most effective withholding system will be highly automated. Such a system will operate more effectively the fewer times that a passthru payment percentage needs to be updated and the more uniform the period for which the percentage applies.

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[1] We would not oppose using more quarters, such as the last twelve, if regulators determined that a longer measurement period was necessary.

Consequently, we suggest that the passthru payment percentage for dispositions of a RIC's interests be based upon the RIC's last four fiscal quarters that end before December 31 and that this percentage apply for the entire subsequent calendar year.

Example 1. Assume a RIC with a calendar-year-end. This RIC's last fiscal quarter before December 31, 2014 is September 30. Thus, the passthru payment percentage for this RIC for 2015 would be based upon the average of the four quarterly determinations made on: September 30, 2014; June 30, 2014; March 31, 2014; and December 31, 2013.

Example 2. Assume a RIC with a November 30 year-end. This RIC's last fiscal quarter before December 31, 2014 is November 30. Thus, the passthru payment percentage for this RIC for 2015 would be based upon the average of the four quarterly determinations made on: November 30, 2014; August 31, 2014; May 31, 2014; and February 28, 2014.

This proposal, we submit, would have three substantial benefits. First, it would allow the percentage to be determined before it becomes applicable,[2] so that the percentage could be disseminated throughout the RIC's distribution network and inputted into withholding systems before that percentage is applied to dispositions by recalcitrant account holders. Second, by applying the percentage for an entire calendar year, the proposal would minimize distributor confusion caused by different RICs having different fiscal quarter-ends and hence having their passthru payment percentages expire on different dates. Third, an annual (rather than quarterly) percentage would reduce by seventy-five percent the number of times that the withholding percentages for RICs making this election would need to be updated.

The benefits of an annual passthru payment percentage for dispositions of RIC shares, we submit, outweigh any imprecision caused by less frequent updating. As noted above, the purpose of FATCA withholding is not to collect any precise amount of tax; the purpose is to ensure reporting on U.S. persons. Our proposal accomplishes this objective just as well as the approach taken in the Notice. An annual percentage likewise will not lead to manipulation. Each quarterly percentage applies for four quarters under both the Notice's approach and our suggestion. The only difference is in the quarters to which the quarterly percentage applies. Finally, the Notice provides an anti-abuse rule that allows Treasury and the IRS to disregard transactions designed to manipulate an FFI's passthru payment percentage.

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[2] The Notice may or may not produce this result. As we read the Notice, a participating FFI must calculate its passthru payment percentage each quarter and disseminate that information within three months after the quarterly testing date. If the percentage applies for the quarter following the last quarterly testing date, this information almost surely would not be available to distributors for dispositions occurring early (or perhaps even late) in the next quarter.

II. Calculating the Passthru Payment Percentage for Distributions

Calculating a passthru payment percentage for distributions based upon the RIC's assets, as proposed by the Notice, does not provide RIC shareholders with treatment comparable to that received by direct investors in the same underlying securities. Comparable treatment is important, as noted above, because it allows RICs to demonstrate to their customers that the RIC structure is not in any way disadvantaging the RIC shareholder vis-à-vis the direct investor.

We suggest that FATCA regulations address these concerns by permitting a RIC to elect[3] to determine its passthru payment percentage for distributions made to its investors based upon the sources of the income that is distributed.[4] This approach, in effect, would allow an electing RIC to trace the source of the income being distributed for FATCA purposes. Any RIC that determined that the benefits of additional precision described above did not justify the costs of adopting a tracing approach would not make the election.

The formula for determining the passthru payment percentage for RIC distributions should be based upon a proportionate allocation between gross income from U.S. and foreign sources of income received by the RIC during the period in which the RIC earned the income it is distributing.[5] By requiring that proportionate gross (rather than net) income to be used in the calculation, the possibility of manipulation should be negated. The anti-abuse relief provided by the Notice to the IRS should be available here as well to address any concerns that might arise.

> *Example 3.* Assume a RIC that distributes its income annually, in December. Further assume that the RIC bases its annual distributions on its net income received through November 30 of that year (so that the per-share distribution can be calculated, approved, declared to shareholders of record, and paid by December 31). For the period December 1, 2013 through November 30, 2014, 40 percent of the RIC's gross income (*e.g.,* dividends, interest, and net gains from securities sales) is from U.S. sources and the remaining 60 percent

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[3] The election must be crafted to prevent manipulation. Because concerns might arise, initially, about how the election might work, perhaps the first election would be for a specified number of years (*e.g.,* three years, unless revoked with the Commissioner's consent). Subsequent elections (perhaps automatic, unless revoked by the FFI) might be for a single year or for another specified number of years.

[4] To the extent that distributions to different classes within a CIV vary by amount (such as because of the manner in which the differing expenses of each class are allocated to the relevant class), the sources of the income distributed to the classes might vary. To the extent that differences arise, we propose that the CIV be permitted to elect to apply the tracing proposal on a class-by-class basis.

[5] In determining the tracing percentage for distributed gains, the CIV would take into account only net gains (and not gross proceeds) from the disposition of U.S.-source and non-U.S.-source portfolio securities (determined by reference to the issuer).

is from non-U.S. sources. Thus, 40 percent of the RIC's 2014 distribution would be a passthru payment.

Example 4. Assume a RIC that distributes its income quarterly – in March, June, September, and December. Further assume that the RIC bases its quarterly distributions on its net income received through the end of the preceding month (February, May, August, and November). For the period December 1, 2013 through February 28, 2014, 15 percent of the RIC's gross income (*e.g.,* dividends, interest, and net gains from securities sales) is from U.S. sources and the remaining 85 percent is from non-U.S. sources. Thus, 15 percent of the RIC's March 2014 quarterly distribution would be a passthru payment.

III. Additional Elective Simplification Suggestions

Two additional simplifying suggestions are offered for your consideration. We would be pleased to discuss these suggestions with you in additional detail.

First, we suggest that a RIC be permitted to elect to treat its passthru payment percentage as the maximum U.S. investment permitted by the RIC s prospectus. If the RIC cannot invest more than 20 percent of its assets in U.S. securities, for example, it should be permitted to simplify FATCA's application by always treating its passthru payment percentage as 20 percent. While it seems inconceivable that a RIC would violate its prospectus to report a passthru payment percentage lower than the otherwise-applicable percentage, the Notice's anti-abuse mechanism would be available to address any abusive situation that were to arise.

Second, because of the difficulties of imposing FATCA withholding on small amounts, we suggest that any RIC with a passthru payment percentage below a *de minimis* threshold, such as five or ten percent, be permitted to treat its passthru payment percentage as zero. To the extent that the FATCA withholding amount is too small to serve as an effective tool for ensuring reporting, treating a RIC as having a passthru payment percentage of zero would reduce the burden of implementing FATCA.

ATTACHMENT C to OCTOBER 22 2012 ICI/ICI GLOBAL FATCA LETTER

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By Electronic Delivery

30 April 2012

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RE: FATCA Proposed Regulations

Dear Ms. Corwin, Mr. Danilack, and Mr. Musher:

ICI Global[1] strongly supports administrable rules that implement, consistent with Congressional intent, the Chapter 4 reporting and withholding rules.[2] The progress made by the Proposed Regulations[3] in developing administrable rules is commendable. The proposals made in

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[1] ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICIG seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICIG manage total assets in excess of US $1 trillion.

[2] This letter refers to Chapter 4's rules as "FATCA reporting" and "FATCA withholding" rules because they first were included in legislation known as the Foreign Account Tax Compliance Act ("FATCA").

[3] http://www.irs.gov/pub/newsroom/reg-121647-10.pdf.

this letter, we submit, would enhance both the effectiveness and the administrability of the FATCA reporting regime.

I. Introduction

ICI Global represents regulated funds publicly offered to investors in leading jurisdictions worldwide. ICI Global's fund members are foreign financial institutions ("FFIs"). The distributors of the typical fund's interests often, but not always, also are FFIs; a given fund may have hundreds, or even thousands, of distributors and sub-distributors. Investors in a fund also may be FFIs (holding fund interests for themselves or as nominees for their customers); a fund also may have as investors non-financial foreign entities ("NFFEs") and/or individuals. ICI Global's members have a very keen interest in FATCA's administrability.

This letter addresses several important industry issues. First, and foremost, the letter focuses on a wide range of issues impacting ICI Global's members that seek to qualify as registered deemed compliant FFIs. Appropriate modifications to these rules are necessary for FATCA to be administrable for foreign funds. The letter also discusses several issues that are specific to funds and how they are structured and sold to investors. Other issues addressed include the treatment of retirement accounts, customer documentation burdens, and the need for additional transition relief.[4]

II. Registered Deemed Compliant FFIs

A. Methods By Which a Fund Can Become FATCA Compliant

FATCA applies to investment funds, we understand, in the following manner.[5] If a fund has direct individual investors, the fund can be FATCA compliant only by (1) entering into an agreement with the U.S. Internal Revenue Service ("IRS") and becoming a participating FFI ("PFFI") or (2) satisfying the registered deemed compliant FFI requirements to be treated as a "restricted fund." If a fund does not have any direct individual investors, it may be eligible to become FATCA compliant as (1) a PFFI or (2) a restricted fund, or (3) by satisfying the registered deemed compliant FFI requirements to be treated as a qualified collective investment vehicle (a "qualified CIV").

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[4] Working collaboratively with our colleagues at other associations, we have sought to identify issues of particular significance to funds and retirement plans around the globe. We support the general approaches taken in the letters filed by associations such as the European Fund and Asset Management Association ("EFAMA"), the Investment Management Association ("IMA"), the Investment Funds Institute of Canada ("IFIC"), the Hong Kong Investment Funds Association ("HKIFA"), Australia's Financial Services Council ("FSC"), and the Association of Global Custodians ("AGC").

[5] One or more additional methods may be available for an FFI to become FATCA compliant once countries enter into reciprocal agreements with the United States.

B. Transition Relief is Necessary

Transition relief is necessary to address both general and registered-deemed-compliant-FFI-specific FATCA issues. We suggest different forms of relief to address these general and more specific concerns.

1. *General Timing Relief*

As a general matter, it seems highly unlikely that there will be sufficient time, between the date FATCA regulations are finalized and when they begin to apply under the timeline provided by the Proposed Regulations, for funds to become FATCA compliant. The effort, described in section IX below, that will be required to ensure FATCA compliance by the common investment manager to a group of funds (hereinafter, sometimes a "fund complex" or a "family of funds")[6] is considerable.

To address this general concern, we request that FATCA's requirements apply no sooner than one full calendar year after the FATCA regulations are finalized. Under our proposal, finalization of the regulations in 2012 would cause FATCA's reporting requirements to apply beginning with payments made in calendar year 2014. Similarly, because the Proposed Regulations' timeline calls for FATCA's withholding rules to apply beginning one calendar year after the FATCA reporting rules become effective, it would follow under our proposal that FATCA withholding would begin on 1 January 2015. All of the Proposed Regulations' other requirements, such as receiving customer documentation on specific forms, would apply no sooner than 1 January 2014.

2. *Provisional Registration Relief*

Funds seeking to register as deemed compliant FFIs will face additional challenges. First, for a fund to establish its status as either a qualified CIV or as a restricted fund, the fund apparently will need to know that *every* distributor of its interests satisfies at least one category (*e.g.,* PFFI or restricted distributor) before *the fund* knows that it can satisfy *its* requirements to register as a deemed compliant FFI. Second, challenges will arise because of the lack of precision around what obligations a fund might have if it is organized in a country that enters into a reciprocal agreement with the United States. Because of this lack of precision, funds cannot make judgments at this time about whether to seek to qualify as a restricted fund, for example, or qualify (under rules not provided by the Proposed Regulations) as an FFI that is deemed to comply with FATCA pursuant to an agreement between the U.S. government and a foreign government.

[6] The fund complex may include funds organized in different jurisdictions and managed by different subsidiaries of the same parent company. All references in this letter to "fund manager" refer, collectively, to the parent and its subsidiaries.

To address these registered-deemed-compliant-FFI-specific issues, provisional registration should be permitted. Specifically, a fund should be permitted to register as a deemed compliant FFI based upon an intention to distribute only through eligible distributors and allow direct investment only from eligible investors. This provisional registration period, we suggest, should last for one year beyond the date that FATCA otherwise applies to the fund. Any fund that could not meet the requirements for registered deemed compliant FFI status after the provisional period ended could be required to disclose the distributors and/or investors that precluded its eligibility for registered deemed compliant status. This reporting would be comparable to the FATCA reporting required by Prop. Treas. Reg. § 1.1471-4(d)(7); under this section, an FFI will report with respect to calendar years 2013 and 2014 only information regarding an account's owner, the account balance, and the account number.

C. Additional General Considerations

Funds may be required to accept representations from thousands of distributors and investors (some of which may be PFFIs, registered deemed compliant FFIs, or certified deemed compliant FFIs). Given the large volume of representations to be received, funds generally should be permitted to rely on representations received subject to a know/reason to know standard. One caveat, of course, is that the fund would have an obligation to check any IRS-issued tax identification number (known by the acronym "FFI-EIN") provided to the fund by the investor. As discussed below, we are very concerned about any obligation on funds to make subjective determinations about documentary evidence received. For this reason, as discussed below, we urge that funds be permitted to rely upon certifications received (subject to the qualifications discussed above). Moreover, any obligation to verify the continuing validity of an FFI-EIN should be limited to, at most, an annual check of an IRS database.

Second, the Final Regulations should provide for situations in which a fund no longer qualifies for a specific category of registered deemed compliant FFI status. In some cases, the fund may be eligible to qualify in multiple categories (*e.g.,* as a qualified CIV and as a fund organized in a country that has an intergovernmental agreement ("IGA") with the United States (hereinafter the fund's country of organization may be referred to as an "IGA country")). In this situation, a fund should be given a grace period to change its registration from one type of registered deemed compliant FFI to another type of registered deemed compliant FFI. In other cases, a fund may have been eligible to qualify under only one category of registered deemed compliant FFI. To remain FATCA-compliant, the fund in this situation would need to become a participating FFI.

Third, funds that register for different categories of registered deemed compliant FFI status should have the same ability to "cure" situations in which they no longer meet one of the requirements for such status. The Proposed Regulations already provide such a cure for a restricted fund. Specifically, the fund has a grace period, after a distributor notifies the fund of a change in the distributor's FFI status, to terminate the distribution agreement with this distributor and acquire its interests that were issued through the distributor. A comparable cure period should be provided for a fund that registers as a qualified CIV and then, for example, has a distributor lose its status as an eligible distributor. A fund should not need to consider, when deciding between qualified CIV status and restricted fund status, the possibility of a cure being available only if it chooses to become a restricted fund.

Finally, clarification would be appreciated regarding the nature of a country's securities regulation that is required for a fund to be "regulated." At a minimum, it would be helpful for the preamble to the Final Regulations to state that a regulatory regime comparable to U.S. securities law regulation is not required.

D. Qualified CIVs

The qualified CIV category of registered deemed compliant FFIs, as noted above, appears designed for funds without any direct investment by individual investors or by entities that might have substantial U.S. owners. The types of funds that this category of registered deemed compliant FFI appears to cover include: (1) a fund the interests in which can be held only through a centralized securities depository ("CSD") which is a participating FFI; (2) a so-called institutional fund, the interests in which may be held only by institutions such as pension funds; and (3) a fund sold only through distributors that are FFIs.

Funds, such as those described above, that do not have direct individual investors or direct entity investors that might have substantial U.S. owners, are not the type that presents potential tax compliance concerns. In all such cases, either another party with FATCA responsibilities has a more direct relationship with the fund's investors or the fund's investors are not of a type that is problematic. Thus, it is appropriate that such funds be eligible for registered deemed compliant FFI status.

The limits placed by the Proposed Regulations on the types of eligible distributors for a qualified CIV and on the types of eligible investors in a qualified CIV, however, are unnecessarily restrictive. The tax-compliance objectives of this category of registered deemed compliant FFI can be achieved without such stringent restrictions.

1. *Expand Categories of Eligible Distributors*

The categories of eligible distributors[7] for a fund seeking to register as a qualified CIV are too restrictive. No type of certified deemed compliant FFI, for example, would be permitted by the Proposed Regulations to distribute interests in a qualified CIV.

We recommend that the list of eligible distributors be expanded to include two types of certified deemed compliant FFIs: nonregistering local banks and FFIs with only low-value accounts. A nonregistering local bank (which must tax report) should be an eligible distributor because it is similar to a local FFI that qualifies as a registered deemed compliant FFI.[8] Likewise, an FFI with only low-value accounts (which present, at most, a *de minimis* abuse potential) should be an eligible distributor.

2. *Expand Categories of Eligible Investors*

The categories of eligible investors[9] for a fund seeking to register as a qualified CIV also are too restrictive. If the purpose for the qualified CIV category is to allow a fund that is not open to direct investment by individuals to become FATCA compliant without either becoming a PFFI or a restricted fund, there is no reason not to allow the following types of investors to acquire interests in the fund directly.

First, all certified deemed compliant FFIs should be eligible investors. All retirement plans and exempt organizations should be eligible direct investors in a qualified CIV, and not just those that qualify as exempt beneficial owners. This change is particularly important for funds open only to institutional investors (including tax-exempt organizations). Investments by these entities should not preclude such a fund from qualified CIV status.

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[7] This list includes a PFFI, a registered deemed compliant FFI, and a person (such as a publicly-traded corporation) that is excluded from the definition of U.S. person. Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(C)(2).

[8] In one respect, the requirements for local FFI status also should be relaxed. Specifically, Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(A)(3) should be modified to permit a local FFI to offer U.S.-dollar-denominated instruments. Many non-U.S. investors purchase these instruments today to gain exposure to the U.S. dollar and to hedge against declines in other currencies. This prohibition on offering U.S.-dollar-denominated instruments also should be removed from the requirement, in Prop. Treas. Reg. § 1.1471-5(f)(2)(i)(C), for qualifying as a nonregistering local bank.

[9] The list of eligible investors (as opposed to distributors) includes only (1) a person (such as a publicly-traded corporation) that is excluded from the definition of U.S. person and (2) an exempt beneficial owner. Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(C)(2).

Second, entities already required to do U.S. pass-through reporting (such as reporting by partnerships on Form1065) should be eligible investors. All information about the underlying investors already will be reported directly to the IRS.

Third, active NFFEs should be eligible investors. As the Proposed Regulations effectively have exempted active NFFEs from FATCA reporting, there is no reason not to allow them to invest directly in a qualified CIV.

E. <u>Restricted Funds</u>

We appreciate that the Proposed Regulations, through the restricted fund category of registered deemed compliant FFIs, attempt to address the global fund industry's concerns about the burdens that funds not sold to U.S. persons would face were they required to become PFFIs. In several important respects, the restricted fund category responds effectively to these concerns. Nevertheless, as discussed below, this category of registered deemed compliant FFI will achieve its objective only if some fairly significant changes are made.

1. *Provisional Registration/Transition Relief is Particularly Important Here*

The timing and provisional registration relief requested in section II.B, above, is particularly important for funds seeking to qualify for restricted fund status. The challenges that a fund will face in qualifying as a restricted fund include: (1) drafting all necessary changes to legal documents (*e.g.,* prospectuses and distribution agreements); (2) receiving all necessary regulatory approvals for changes to legal documents (*e.g.,* prospectuses), to marketing materials, and to any other relevant documents; (3) ensuring that each of the fund's distributors is eligible to distribute interests in a restricted fund; and (4) renegotiating distribution agreements with hundreds or thousands of distributors.

2. *Sub-Distributors And Advice-Only Financial Planners*

The requirement that a restricted fund have agreements with its "distributors" raises a few ambiguities that should be addressed. First, the Proposed Regulations provide that the fund must "ensure" that each agreement governing the distribution of its interests meets certain specific requirements.[10] While this obligation is administrable when the fund deals only with distributors with which it has agreements, the obligation is more problematic when these distributors, in turn, deal with other, lower-tier, distributors (so-called "sub-distributors"). Are these distribution

[10] *See, e.g.,* Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(D)(3).

agreements, to which the fund is not a party, within the category of distribution agreements the terms of which it must ensure?

While a fund can instruct its distributors to enter into agreements only with sub-distributors who agree to be bound by the Proposed Regulations' obligations, the fund has no easy mechanism for "ensuring" that distribution agreements between the upper-tier and lower-tier distributors contain all of the relevant provisions. Consequently, we recommend, with respect to sub-distributors, that the fund's obligations be limited to requiring its distributors to certify that their distribution agreements with sub-distributors comply with all applicable restrictions.

Similarly, if a sub-distributor no longer qualifies for Chapter 4 status, the sub-distributor should be required to notify the upper-tier distributor with which it has a distribution agreement of the change in its status. This upper-tier distributor, rather than the fund, should terminate the distribution agreement with the sub-distributor. Moreover, the upper-tier distributor should be permitted to "acquire" the fund's interests – in the sense that it could hold the interests in the fund as a nominee for the sub-distributor's clients. In this situation, the upper-tier distributor would perform all relevant FATCA due diligence, information reporting, and withholding responsibilities previously performed by the sub-distributor.

Third, some persons involved in the distribution of a fund's interests may not be financial intermediaries at all. While many of FATCA's requirements work well when all of a fund's distributors are FFIs, some of the requirements become more problematic if an independent financial advisor ("IFA"), whose principal activity involves providing investment advice, is deemed to "distribute" a fund's interests. These ambiguities should be addressed by permitting the distributor that is an FFI and that executes trades for the IFA to perform all relevant FATCA responsibilities.

3. *Modifications to Requirements for Restricted Distributor Status*

a. Restricted Distributor Geographic Restrictions Should be Relaxed

The single-country restriction for restricted distributor status should be relaxed in two respects. First, a restricted distributor operating in one European Union ("EU") Member State should be permitted to operate in all EU Member States. This change would provide comparability with the rules for local FFIs; under these rules, a resident of any EU Member State is treated as a resident of the EU Member State in which the local FFI is organized. Second, the single-country restriction should be relaxed if the distributor operates only in FATF-compliant countries and/or in countries that the IRS determines have standards reasonably equivalent to those of FATF-compliant countries. In this situation, the distributor would be operating only in countries that have adequate investor identification procedures.

b. Restricted Distributor Asset and Revenue Limits Should be Increased

The limits on a restricted distributor's assets and gross revenues will be problematic for many distributors that do not have U.S. clients but that would find the burdens of becoming PFFIs too significant. Other commentators have urged substantially higher limits on these distributors' assets and gross revenues. We agree that these limits should be increased.

c. Re-Qualification Grace Period Should be Provided

The strict client, asset, and revenue limitations for qualifying as a restricted distributor create the potential for a distributor to move in and out of restricted distributor status. The Proposed Regulations do not take into account the possibility of a distributor moving in and out of this status. Instead, the Proposed Regulations require that the distribution agreement with a restricted distributor be terminated within 90 days after notification of a change in the distributor's status.[11]

A re-qualification grace period of 90 days should be provided if a distributor that fails to meet one of the restricted distributor tests reasonably expects to re-qualify. Under our proposal, for example, a distributor that lost a client (and thereby fell below the 30-client minimum) could begin a 90-day grace period to re-qualify rather than inform the restricted fund of its disqualification. If the distributor could not re-qualify during the grace period, the restricted distributor would notify the restricted fund of its failure when the grace period ended.

Any distributor that was able to re-qualify within 90 days after notifying the restricted fund of its disqualification, whether it utilized the grace period or not, should be permitted to continue to act as a restricted distributor. In this situation, there would be no need to cancel the distribution agreement within the 90-day period provided by the Proposed Regulations.

d. Reliance Upon Representations of Restricted Distributor Status

We also request clarification that a restricted fund may rely on a distributor's claim of restricted distributor status unless the restricted fund knows or has reason to know that the claim is invalid. The Proposed Regulations appear to provide this result because they place the burden on a distributor to inform a restricted fund if it no longer qualifies for restricted distributor status. Confirmation of this point would be helpful.

[11] Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(D)(4).

4. *U.S. Investment Limitation*

a. Seed Money

The strict prohibition on U.S. investors in a restricted fund could be problematic in one narrow context involving a fund's formation. Specifically, to form a fund, the manager or an affiliate may "seed" the fund by investing an initial capital amount; the "seed capital" usually is an amount required by regulation, although business circumstances may necessitate a higher amount.[12] Situations will arise in which the seed capital today is provided by a U.S. fund manager or a U.S. affiliate of a non-U.S. fund manager. If the U.S. entity providing the seed capital is publicly-traded, the investment does not appear to be disqualifying.[13] A U.S. manager that is privately held, however, could not provide seed capital to a fund seeking to qualify as a restricted fund.

It *might* be possible for a non-publicly-traded manager to resolve this concern by having the seed capital provided instead by a non-U.S. affiliate of the fund manager. This source of capital, however, might be impractical, unnecessarily expensive, or simply unavailable.

We do not believe that any tax policy rationale supports distinguishing between privately-held and publicly-held fund managers when determining whether seed capital disqualifies a new fund from restricted fund status. Consequently, we urge that a restricted fund be permitted in all cases to receive seed capital from a U.S. manager or a U.S. affiliate of a non-U.S. manager.

b. Clarification Regarding Intermediaries

We request clarification that a restricted fund may utilize a U.S. distributor, such as a securities dealer or a broker, that is excepted from the definition of specified U.S. person under Prop. Treas. Reg. § 1.1473-1(c). As a restricted fund is not precluded from maintaining an account for these U.S. persons,[14] these persons also should be eligible to distribute interests in a restricted fund – so long as they follow the prospectus and distribution agreement restrictions on sales to specified U.S. persons.

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[12] Seed capital generally must remain in the fund for a specified minimum time period although the manager may keep the seed capital invested for longer if the fund has not grown enough to function effectively without the seed capital remaining in the fund.

[13] Proposed Treas. Reg. § 1.1471-5(f)(1)(i)(D)(6) provides that a restricted fund cannot maintain an account for any specified U.S. person. Proposed Treas. Reg. § 1.1473-1(c)(1), in turn, excepts from the definition of specified U.S. person a corporation the stock of which is regularly traded on one or more established securities markets.

[14] *See* Proposed Treas. Reg. § 1.1471-5(f)(1)(i)(D)(6).

F. Intergovernmental Agreement

1. *General Support for the Intergovernmental Agreement Approach*

Financial institutions with a global focus – because they have cross-border activities or investments and/or a client base that is not purely domestic – have a very keen interest in customer identification rules and government-to-government information-sharing protocols that are as harmonized as possible across jurisdictions. The Organization for Economic Cooperation and Development ("OECD") for several years has brought together tax compliance experts from governments and financial institutions from around the globe to address these issues. Through the so-called TRACE project,[15] considerable progress has been made in developing a framework for harmonizing customer identification procedures (including a standardized investor self declaration ("ISD") that could be used on a reciprocal basis) and simplifying procedures for verifying to governments the status (*e.g.,* residence) of a financial institution's customers. The United States, as you know, has taken a leading role in this effort.

We strongly support the work of the TRACE project as a vehicle for providing enhanced tax relief and for improving tax compliance in an administrable manner that benefits both governments and business. We also recognize that the FATCA legislation imposes deadlines that prevent global harmonization in the near term. Consequently, our comments below recommend a number of ways in which the FATCA regulations should be modified to improve harmonization without reducing compliance.

The Joint Statement issued on 8 February by the United States, France, Germany, Italy, Spain, and the United Kingdom regarding an intergovernmental agreement ("IGA") approach to FATCA implementation is an encouraging start. More work needs to be done. First, the dialogue between these six governments should be expanded promptly to include business representatives who have been working with these governments for several years on compliance enhancement. FATCA's requirements are so extensive, and affect financial institutions in so many different ways, that governments cannot possibly develop administrable rules without substantial business input. Second, as soon as feasible, the dialogue should be expanded further to include other governments and business representatives from these additional jurisdictions. A global solution requires a global dialogue. This dialogue should commence expeditiously.

[15] TRACE is an acronym for Tax Relief and Compliance Enhancement.

2. *Clarification of Overlap With Other Categories*

The fifth category of registered deemed compliant FFI – specifically, an FFI that is incorporated or organized in an IGA country – may become a very useful approach for becoming a registered deemed compliant FFI. Because no such agreements have been negotiated yet, the Proposed Regulations do not contain any specific requirements for these FFIs.

In developing requirements for this fifth category of registered deemed compliant FFI, we urge consideration of the likely need for many funds and their distributors to register under this fifth category and another category (*e.g.,* as a restricted fund). This fifth category appears sufficient to address FATCA's objectives only if a fund operates only within one country and utilizes distributors that likewise operate only within that one country. In this case, all of the customer information that might be protected by data privacy laws would be located within that country and could be provided, under local law enacted pursuant to the intergovernmental agreement, to that country's tax authority; this information, in turn, would be provided to the IRS by the other tax authority without the FFI violating any data privacy laws.

The utility of this fifth category breaks down somewhat if the fund is distributed in multiple countries not all of which have entered into agreements with the IRS. In this latter situation, any customer information retained by distributors in other countries would not be subject to the information sharing laws enacted by the fund's home government. Thus, absent a fund's qualification as either a PFFI, a qualified CIV, or a restricted fund, the IRS would have no assurance that the fund's investors were not recalcitrant account holders.

The obvious benefit to a fund of being able to register as an FFI in an IGA country – specifically, so that it may provide customer information it possesses without violating its home country data privacy laws – is significant. The scope of this category is so narrow, however, that in many cases satisfying the requirements of this category will not be sufficient to allow a fund to be FATCA compliant. The Final Regulations will need to address the overlap between these various categories of registered deemed compliant FFIs.

III. Fund Structure Issues

A. <u>Clarify Relationship Between Funds and Their Advisor and Service Providers</u>

The Final Regulations should state affirmatively that each fund, regardless of the form in which the fund is organized under local law, is a separate FFI. Each fund is a unique investment vehicle with its own investors, its own assets, its own investment objective, and its own prospectus. Although funds often are organized in corporate form, some are organized as vehicles – such as fonds commun de placement ("FCPs") and common collective funds ("CCFs") – that do not share all structural features that are typical of bodies corporate.

FATCA, quite frankly, cannot be applied effectively unless every regulated, publicly offered fund is treated as a separate FFI. Were any such fund not treated as an FFI – which would require some other FFI to look through each such fund, and through the fund's distributors, to each of the fund's hundreds or thousands of investors – FATCA compliance, at best, would be extraordinarily difficult and burdensome. FATCA compliance will be enhanced significantly by treating every regulated, publicly offered fund as an FFI.

The Final Regulations also should state affirmatively that each fund is distinct from its advisor (which may or may not be an FFI) and that funds with a common investment manager are not part of an expanded affiliated group. Because each fund has its own separate and distinct owners, each fund must be treated separately.

Finally, it would be helpful for the Final Regulations to clarify that the fund, rather than a transfer agent acting on a fund's behalf, is the FFI with respect to directly-registered shares. Some transfer agents, we understand, are concerned that they might have FATCA obligations that are different from those of the fund when the transfer agent merely is maintaining the share register for interests acquired directly from the fund. In this situation, we submit, the fund is the FFI and the transfer agent merely is acting on the fund's behalf.

B. Clarify Treatment of Umbrella Fund Structure

Funds often are organized in an umbrella fund structure, which consist of multiple "sub-funds" in a single fund structure. Each sub-fund is a separate investment vehicle (although it may not be a separate legal entity). Investors acquire interests in one or more sub-funds based upon their desire for the investment objective of each such sub-fund.

The umbrella structure is used widely because of the many organizational and operational conveniences that reduce costs and benefit investors. This structure also is used in the United States – where individual funds often are organized as part of a "series fund." Each U.S. fund in this structure, which is similar to the umbrella fund structure, is treated as a separate person for U.S. tax purposes.

The umbrella fund structure would create innumerable compliance concerns, with potential ramifications for the U.S. capital markets, if a sub-fund without U.S. investments were subject to the same FATCA rules as a sub-fund with U.S. investments. Because each sub-fund operates effectively as a distinct investment vehicle, each should be treated as a separate FFI.

Consequently, we propose that all FFI rules be applied at the sub-fund level. One aspect of this proposal is that determinations about PFFI or deemed compliant FFI status would be made on a sub-fund-by-sub-fund basis. The common investment manager of the umbrella structure would retain the ability to serve as the administrative point of contact for all or a group of the sub-funds.

C. Publicly-Traded Funds

Publicly-traded funds present two issues. First, one unique aspect of publicly-traded funds should be considered in crafting the Final Regulations. The specific issue involves publicly-traded funds organized in countries that permit investors, after purchasing their shares on an exchange, to have the shares registered on the fund's books directly in the investor's name. The investor can sell these shares, however, only by having a trade executed by a broker on the exchange.

The issue arises from FATCA's statutory definition of financial account. Specifically, the statute effectively provides that a publicly-traded fund does not treat its shares as a financial account[16] for purposes of any FATCA obligation with respect to accounts the fund "maintains."[17] The reason for this treatment presumably is that Congress understood that shares of a publicly-traded company would be acquired on a stock exchange by or through a financial institution, such as a broker, that would be responsible for all of FATCA's customer identification, information reporting, and withholding responsibilities. In general, Congress' understanding of publicly-traded shares was spot on.

We understand the statute's application to the situation in which shares of a publicly-traded fund are purchased on an exchange and then re-registered in the investor's name directly on the share register of the fund as follows. First, when the shares are purchased on the exchange, the broker effecting the sale will be required to determine the investor's status. If the investor is a U.S. person, the broker will have an obligation to report the account, through the date the shares are re-registered directly on the fund's books, to the IRS. The publicly-traded fund would have neither reporting nor withholding obligations with respect to the shares after they are re-registered on the fund's books because these publicly-traded shares are not a financial account "maintained" by the fund. When the investor then seeks to sell the shares on the exchange, the broker executing the trade would be subject

[16] Specifically, section 1471(d)(2) of the Internal Revenue Code ("Code") provides in part that "the term 'financial account' means, with respect to any financial institution ... (C) any equity or debt interest in such financial institution (other than interests which are regularly traded on an established securities market)."

[17] Specifically, four of the six "reporting, etc." obligations of Code section 1471(b)(1) are imposed on accounts "maintained" by the financial institution. Two of the six obligations are not limited to accounts "maintained" by the financial institution.

to all of FATCA's customer identification, information reporting, and withholding obligations. Confirmation of the appropriate treatment of this situation would be appreciated.

A second issue involving publicly-traded funds should be addressed as well. The Proposed Regulations treat equity interests as "regularly traded on an established securities market" if, among other things, at least ten percent of the shares (in aggregate) traded on the exchange during the prior calendar year. For some thinly-traded fund shares, this ten-percent requirement might not be met in any given calendar year. To minimize the likelihood that a fund would move into and out of "regularly-traded status," we request that a fund be permitted to look to the average of its trade volume over the past three calendar years.

D. Centralized Compliance Option

The Proposed Regulations, unlike Notice 2011-34, do not provide the option of centralizing FATCA point-of-compliance responsibilities in a single entity. We recommend that a centralized compliance option be provided in Final Regulations.

Funds, in many respects, would benefit more from a centralized compliance option than would corporate affiliates. Unlike corporate affiliates, funds typically do not have employees; instead, the administrative services provided to all funds with a common asset manager or other agent (hereinafter "manager") are performed by the manager's employees (or third-party service providers hired by the manager). This manager may have responsibilities for many hundreds (or more) of funds.

We strongly support providing the manager with the option to take centralized compliance responsibilities for its funds. The manager could execute a single PFFI agreement, or secure registered deemed compliance status through a single consolidated filing, for all funds that are subject to FATCA. The manager would serve an administrative function only; it would not incur any liability arising from the fund's FATCA obligations. All liability (other than that imposed on the manager pursuant to its contract with a fund) would rest with the funds that had entered into PFFI agreements or registered for deemed compliant FFI status.

IV. Retirement Accounts

A. Introduction

We support the many significant improvements made by the Proposed Regulations to the treatment of retirement plans and accounts. The Proposed Regulations effectively recognize that the typical foreign retirement account does not provide U.S. persons with the ability to hide assets.

Special consideration must be given to retirement plans because they generally must be operated under their home-country laws for the primary purpose of preserving plan participants' retirement savings. The obligations that FATCA imposes on participating FFIs to withhold in certain situations and to close accounts in others, however, are inconsistent with the laws under which these plans are organized.

We recognize the difficulty of crafting rules that distinguish effectively between vehicles that might allow for assets to be hidden and those that would not allow for such behavior. In the case of retirement plans and accounts that are organized under a country's laws for the principal purpose of saving for retirement, however, no line-drawing should be required. All such plans and accounts should be treated as deemed compliant, as exempt beneficial owners, or as excluded from the definition of financial account.

While many of the requirements contained in the Proposed Regulations (which are based on U.S. principles) are not problematic, a few requirements create significant, if not overwhelming, difficulties for certain types of retirement accounts. Each problematic area is discussed below. While we suggest targeted changes for some of these issues, we submit that a more comprehensive and effective solution should be provided. This solution would accommodate arrangements that are designed to meet specific local requirements and the financial needs of local workers.

Specifically, we suggest that the Final Regulations state that, except to the extent provided by the Secretary, any retirement plan organized under a country's laws for the principal purpose of saving for retirement will be eligible for treatment as a certified deemed compliant FFI, will be treated as an exempt beneficial owner, and will be excluded from the definition of financial account. Any concerns that certain types of plans should not be treated as eligible could be addressed by the "except to the extent provided" provision.

B. Specific Concerns

1. *The Five-Percent Participant Interest Limit*

The Proposed Regulations condition a retirement fund's eligibility for treatment – under one of the certified deemed compliant FFI categories[18] and one of the exempt beneficial owner categories[19] – on the fund not having a single beneficiary with a right to more than five percent of the entity's assets. In the case of certain large plans, this limitation creates an unnecessary compliance-

[18] Prop. Treas. Reg. §§ 1.1471-5(f)(2)(ii)(A)(1)(ii).

[19] Prop. Treas. Reg. §§ 1.1471-6(f)(1)(ii)(C).

monitoring requirement. In the case of certain smaller plans, this limitation can cause plans to flip in and out of qualification.

For certain large plans, the five-percent limit can impose a compliance monitoring requirement when it is highly unlikely that a participant could have that significant an interest. The Chilean pension fund system, for example, requires mandatory contributions by approximately seven million individuals to fund mandatory pension accounts that are managed by one of six providers. Rather than force each of these providers to monitor account sizes, we suggest (as an alternative to the five-percent limit) that this requirement be satisfied if the assets are held solely for the beneficiary of a government-designed, broad-based pension system.

For certain smaller plans, the five-percent limit can preclude a plan from qualification in the first instance; the five-percent limit also can cause the plan to flip in and out of qualification as participants enter or leave the plan and/or as asset values of investment options change. To illustrate the difficulty of this well-intentioned test, consider the treatment of a very small plan that acquires a 20th participant. This plan no longer can qualify for treatment as a deemed compliant retirement plan under Prop. Treas. Reg. § 1,1471-5(f)(2)(ii)(A)(2) because it has more than 19 participants. The plan cannot satisfy the requirements for treatment as a deemed compliant retirement plan under Prop. Treas. Reg. § 1,1471-5(f)(2)(ii)(A)(1), however, unless each of the 20 participants has exactly the same five-percent interest in the plan's assets. Given our example of a 20th participant joining the plan, it is clear that at least one (and probably several) of the other plan participants will exceed the five-percent limit.

The difficulties created by the five-percent limit would be ameliorated at least somewhat if the limitation were increased to ten percent.

2. *Plans that Allow for Excess Contributions*

We appreciate greatly that the Proposed Regulations allow contributions of up to 100 percent of earned income without causing a plan to fail to qualify for the exception to the definition of financial account, for certified deemed compliant FFI status, or for exempt beneficial owner status.[20] Certain types of government-mandated plans, including some in Australian and Hong Kong, allow for contributions in certain instances that are not limited to earned income. Some others allow for "unused amounts" in one year to be rolled over to subsequent years. As we understand you will receive detailed submissions from several national associations, including those in Australia and Hong Kong (among others), we will not attempt to describe other countries' plans here. What is clear,

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[20] Prop. Treas. Reg. § 1.1471-5(b)(2)(i)(A) (exception to definition of financial account); Prop. Treas. Reg. § 1.1471-5(f)(2)(ii)(A)(1)(i) (certified deemed compliant FFI); and Prop. Treas. Reg. § 1.1471-6(f)(1)(ii)(B) (exempt beneficial owner).

however, is that these plans cannot be used by U.S. persons to hide assets. Hence, the limitation tied to earned income is both extremely problematic and unnecessary.

3. *Plans that Incur Annual Taxation*

We also appreciate other enhancements made by the Proposed Regulations to the ability of retirement plans to qualify as certified deemed compliant FFIs or as exempt beneficial owners. The requirement that a fund not be taxable,[21] we understand, is problematic for Australian superannuation funds – which are taxed at a concessionary rate of 15 percent. Because these funds will be addressed in the Australian association's submission, we will not attempt to describe those plans here. Clearly, some taxation of a retirement plan's income should not disqualify the plan from qualifying as a certified deemed compliant FFI or as an exempt beneficial owner.

4. *Arrangements to Earn Income for Benefit of Exempt Plans*

The definition of a retirement account should be expanded to include any arrangement to earn income for the benefit of one or more exempt pension plans. These arrangements currently are treated as exempt retirement accounts in the U.S. treaties with Canada and the United Kingdom and should be treated as such for FATCA purposes as well.

V. Customer Documentation Issues

A. Introduction

Financial institutions expend considerable effort ensuring their compliance with all applicable customer identification requirements. This effort is compounded when information must be collected to satisfy different legal requirements,[22] when different types of information must be collected or reviewed to verify a customer's identity or status,[23] when information collected may be

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[21] *See,* Prop. Treas. Reg. §§ 1.1471-5(f)(2)(ii)(A)(1)(iii) and 1.1471-6(f)(1)(ii)(D).

[22] Customer information might be collected to comply with know-your-customer ("KYC") rules, anti-money-laundering ("AML") rules, domestic tax-reporting requirements, and/or requirements to establish eligibility for reduced withholding under an income tax treaty.

[23] For some purposes, one simple form of identification may be adequate. In other cases, detailed forms requiring certification of various attributes or qualifications for specific treatment may be required.

relied upon (*i.e.,* is valid) for different time periods,[24] and when information must be retained for different time periods.[25]

Our comments below focus on two broad areas. First, we support steps taken in the Proposed Regulations to reduce some of the more burdensome and novel customer identification requirements that were contained in the IRS Notices that preceded the Proposed Regulations. Second, we suggest several additional modifications to these rules to reduce further the burdens imposed on financial institutions without reducing FATCA's tax compliance objectives.

B. Support for Progress Made in Proposed Regulations

The Proposed Regulations addressed in several significant ways the general business concern that the compliance burdens placed on business by the stringent due diligence requirements outweighed any associated compliance benefits by an overwhelming margin. One such example was elimination in the Proposed Regulations of the enhanced requirements that the IRS Notice would have imposed on "private banking accounts." We also support the new rules that impose substantial additional due diligence (in the absence of clear indicia of U.S. ownership) only on "high-balance" accounts (*e.g.,* $1 million, in many situations).

Two clarifications are needed. First, the Final Regulations should make absolutely clear that the $50,000 threshold below which an account need not be treated as a U.S. account applies to all accounts. The preamble to the Proposed Regulations states that preexisting individual accounts "with a balance or value that does not exceed $50,000 are exempt from review."[26] Several government officials, speaking on their own behalf at industry meetings, have restated the position taken in the preamble. The $50,000 exception to U.S. account status,[27] however, is limited to accounts that meet conditions A, B, and C – where condition A is that the account be "a depository account."[28]

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[24] Countries providing for investor self declarations ("ISDs") allow reliance upon the certifications for different periods. In some countries, reliance is permitted indefinitely for some types of certifications while other types of certifications must be renewed every few years.

[25] Because different countries have different statutes of limitations, it is inevitable that record retention periods will vary across jurisdictions.

[26] Proposed Regulations, page 22.

[27] *See* Prop. Treas. Reg. § 1.1471-5(a)(4)(i).

[28] The definition of depository account in Prop. Treas. Reg. § 1.1471-5(b)(3)(i) appears too narrow to include a securities account.

Second, the Final Regulations should make absolutely clear that the $50,000 threshold applies for all FATCA purposes. As drafted, the Proposed Regulations provide that the $50,000 threshold is an exception to U.S. account status only for certain individual accounts of participating FFIs.[29] As the term U.S. account is used throughout the Proposed Regulations, including in the rules for restricted funds,[30] and as the term is defined only once, the definition surely was meant to apply for all purposes.

These drafting ambiguities should be corrected. As the preamble and several government officials effectively have acknowledged, accounts with small balances are of insufficient concern to warrant the due diligence requirements that FATCA otherwise would impose. It would be absurd if a depository account with a $50,000 balance was deemed to be of no concern while a securities account with a balance of $500 was of concern. The dollar threshold exception from U.S. account status should apply equally to all types of financial accounts and for all FATCA purposes.

C. Additional Specific Recommendations

1. *Full Reliance Upon Local AML/KYC Procedures*

The very detailed rules for identifying customers that are provided by the Proposed Regulations eliminate much of the benefit of a fund seeking to become a restricted fund rather than as a PFFI. If a fund that is designed to exclude U.S. persons – and that is organized in a FATF-compliant country – cannot rely upon its existing AML and KYC procedures, the lack of relief on customer identification makes it less likely that a fund will incur the costs of renegotiating its distribution agreements to meet the requirements for restricted fund status. The requested relief would extend as well to determinations of substantial U.S. owners; AML procedures generally adopt a higher (25 percent) threshold for substantial owners of an entity.

2. *Reliance By Multiple Funds on a Single Form W-8*

We appreciate that all funds with a common manager (*e.g.,* funds that are part of the same "fund complex") may rely upon a W-8 provided to any fund in that complex.[31] To eliminate ambiguity, it would be helpful for the Final Regulations to note that this "shared W-8" rule – which

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[29] Prop. Treas. Reg. § 1.1471-5(a)(4)(i)(B).

[30] Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(D)(5).

[31] Prop. Treas. Reg. § 1.1471-3(c)(6)(vi).

already is provided for information reporting by U.S. funds[32] – applies to all funds in a complex regardless of whether the funds are organized in the same country.

3. *Documentary Evidence Burdens for Certified Deemed Compliant FFIs*

We are very concerned about various FATCA requirements that effectively require financial institution employees to make tax compliance determinations based upon subjective requirements that may require specialized legal or financial training. The final FATCA regulations should limit a financial institution's due diligence obligations to making judgments based upon objective standards – such as verifying that a form has been signed or that appropriate boxes for claiming status have been checked.

The Proposed Regulations impose upon financial institutions the very substantial obligations both to collect and to examine documentary evidence to support investor certifications. Documents would be required, under the Proposed Regulations, from certified deemed compliant FFIs (such as nonregistering local banks) and from exempt beneficial owners (such as retirement funds, nonprofit organizations, and funds restricted to exempt beneficial owners). The types of documentary evidence that a firm's employees would be required to examine could include financial statements, annual reports, articles of incorporation, and government certifications.

Determining whether these documents support the status claimed may require both specialized training, as noted above, and command of a foreign language (since documentary evidence provided by a foreign client easily could be in a language that the firm's employee cannot read). The requirement to review financial statements, organizing documents, etc., can introduce substantial potential liability (including an obligation to pay all amounts that should have been collected from the investor whose documentation in fact did not support the status claimed) and will impose costs far exceeding any compliance benefits.

Consequently, we suggest that the Final Regulations eliminate the requirement to collect and review documentary evidence to support certifications made by certified deemed compliant FFIs and exempt beneficial owners. If the Final Regulations nevertheless require firms to collect documentary evidence, the firms should be permitted to rely upon the evidence provided unless the person reviewing the evidence knows or has reason to know that the evidence provided does not support the status claimed. Alternatively, the firms should be permitted in all cases to rely upon a letter from counsel attesting to the FFI's status. We also would support allowing certified deemed compliant FFIs to register with the IRS and receive an FFI-EIN.

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[32] Treas. Reg. § 1.1441-1(e)(4)(ix)(3).

4. *Other Documentary Issues*

We have six other document-related suggestions. First, financial institutions should be permitted to rely upon copies and electronic images (such as PDFs) of completed forms. Customer information today routinely is collected through electronic means. Electronic documents that financial services firm risk managers have determined are adequate for business purposes should be adequate for tax compliance purposes as well. Substantial burdens will be imposed if firms must change their business practices and, for FATCA purposes only, collect only paper originals or faxed copies of investor certifications and/or supporting documentary evidence.

Second, any documentary evidence collected by a financial institution to support a W-8 should remain valid, and should not need to be "refreshed," even if (such as in the case of a passport) its validity expires before the W-8 itself expires. The additional burdens that will be placed upon financial institutions to monitor the expiration dates of both W-8s and underlying documentary evidence seem unlikely – absent knowledge or a reason to know that the investor's status has changed – to enhance tax compliance. Requiring that in all cases both the W-8 and the documentary evidence be valid currently could increase substantially the number of times that information must be solicited from clients. The more times a client is required to update information, the more times it is possible that the client inadvertently will fail to respond. Failure to respond will subject a client to withholding that otherwise would not have been imposed. Absent actual knowledge or a reason to know that a client's status has changed, a financial institution should be permitted to rely upon documentary evidence collected until the associated W-8 expires.

Third, strong consideration should be given to extending the time period for which W-8s and any documentary evidence collected only for FATCA purposes remain valid. One approach would be to permit continued reliance unless the financial institution knows or has reason to know that an investor's status may have changed. This "exception redocumentation" would limit the number of new recalcitrant account holders that would appear on a financial institution's books every time a W-8 or piece of documentary evidence expired without being updated.

Fourth, the documentation requirements for entities wholly owned by exempt beneficial owners should not obligate the entity to pass along the associated documentation for each underlying participant in the investment fund. Rather, a self-certification from the entity should suffice. This proposal is consistent with the certification requirements that apply to registered deemed compliant funds. If this requirement is not changed, withholding agents potentially will be asked to validate hundreds of pages of documentation relating to entities that are considered to pose no risk of tax evasion. We submit that a fund operating in this manner will have robust procedures in place to ensure that all participating investors are exempt. We suggest that the IRS may gain additional comfort on this issue if the entity attests to its procedures in a penalties of perjury statement that is associated with signing the W-8.

Fifth, we suggest that a U.S. phone number not be treated, in itself, as sufficient indicia of U.S. ownership. Non-U.S. investors have U.S. phone numbers for a wide range of personal reasons. As the number of such investors, we understand, is high, substantial additional compliance burdens will be imposed if a U.S. phone number, without more, is sufficient to trigger additional due diligence regarding an account.

Finally, we urge that FFIs be required to check the continuing validity of an FFI-EIN no more frequently than annually. A clear and manageable standard is needed regarding an FFI's obligation to review FFI-EINs that have been verified, upon receipt, as valid.

VI. Foreign Passthru Payments

We support strongly the decision reflected in the Proposed Regulations to delay imposition of withholding on foreign passthru payments until at least 2017. FATCA withholding on such payments creates several difficult issues under the laws of many sovereign nations. The decision to postpone such withholding for several years, with the possibility that such withholding never will be required if the intergovernmental approach reflected in the Joint Statement is effective, is a most welcome development.

ICI Global stands ready to assist the U.S. Government in developing rules for calculating and reporting foreign passthru payments should such guidance be necessary in future years.

VII. Consent to be Withheld Upon

Because the foreign passthru payment rules have been deferred until at least 2017, the Proposed Regulations do not address the issue – raised by Code section 1471(b)(3) – of the extent to which a PFFI can consent to be withheld upon. We urge that this consent provision never be extended beyond its present scope (by qualified intermediaries with respect to U.S.-source payments).

The option provided to a PFFI by Code section 1471(b)(3) to elect to be withheld upon, rather than to withhold on payments it makes to recalcitrant account holders or non-participating FFIs, is extremely problematic for funds. While funds that seek restricted fund status might be the most affected (should a PFFI allow a U.S. investor into the fund despite the restrictions), all non-U.S. funds could be affected adversely by this election. Any fund that qualifies as a PFFI, but that limits the distribution of its units to PFFIs, should be entitled to assume that the PFFIs will honor their agreements with the IRS to impose FATCA withholding on recalcitrant accountholders. These funds – which are structured so as to avoid the substantial costs of building, testing, integrating, and maintaining withholding systems – should not be forced to incur those costs without their consent.

We urge, consequently, that this PFFI election be subject to affirmative consent by the fund. This affirmative consent feature will protect funds from incurring substantial costs that appropriately should be imposed on the PFFI dealing directly with recalcitrant account holders.

VIII. Other Issues

We appreciate the phased-in information reporting timeline provided by the Proposed Regulations. Funds will need considerable time, as discussed above and below, to comply with all of FATCA's requirements.

The responsible officer certification requirements imposed by FATCA also present important issues for funds. As detailed recommendations regarding these issues were provided recently by the American Bar Association Tax Section, we will not elaborate further on them.

IX. Transition Issues

Funds and financial institutions will need sufficient time, after Final Regulations are issued, to comply with the new and detailed obligations that FATCA will impose on them. Firm's "FATCA teams" involve business executives, securities lawyers, tax lawyers and other tax compliance personnel, communications personnel, operations and computer systems personnel, and many other experts from offices around the globe. Their compliance efforts have been diligent and undertaken in good faith. The Final Regulations will need to be studied closely and implemented carefully.

The tasks facing a fund's FATCA team after Final Regulations are issued will include (but are not limited to):

- determining whether the fund can comply with the final rules for registering as a deemed compliant FFI;
- updating its prospectus (assuming the fund will continue to hold U.S. securities);
- receiving any necessary regulatory approvals for changes that impact current investors;
- determining which of its distributors are FATCA compliant (*e.g.,* because they meet a "local distributor" exception);
- communicating with distributors regarding their FATCA obligations to the fund (regardless of whether the fund seeks deemed compliant status);
- determining what changes must be made to its distribution agreements;
- negotiating these changes with (up to) several thousand distributors (that must agree to costly new contractual responsibilities);
- determining if service providers, such as third party administrators and custodians, can comply;
- modifying existing processes and systems with service providers;

- modifying investor intake and documentation requirements;
- modifying procedures to identify *all* types of entities;
- modifying, or possibly building, withholding systems;
- advising investors of FATCA's impact; and
- (finally) seeking deemed compliant or PFFI status from the IRS.

To address these concerns, as discussed above, we request that FATCA's requirements apply no sooner than one full calendar year after the FATCA regulations are finalized. Under our proposal, finalization of the regulations in 2012 would cause FATCA's reporting requirements to apply beginning with payments made in calendar year 2014. Similarly, because the timeline provided by the Proposed Regulations calls for FATCA's withholding rules to apply beginning one calendar year after the FATCA reporting rules become effective, it would follow under our proposal that FATCA withholding would begin on 1 January 2015. All of the Proposed Regulations' other requirements would apply no sooner than 1 January 2014.

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We would like to discuss this letter's proposals with you. The time spent already by you and your staffs with us and others is appreciated greatly. As the industry will need substantial lead-time to implement final FATCA regulations, I will contact you shortly to discuss the timing for our next meeting. Please feel free, at any point, to contact me for additional information or to discuss our proposals. My direct dial number is 202/326-5832. Many thanks.

Sincerely,

Keith Lawson
Senior Counsel – Tax Law

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