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By Electronic Delivery

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RE: FATCA Proposed Regulations

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

ICI Global¹ strongly supports administrable rules that implement, consistent with Congressional intent, the Chapter 4 reporting and withholding rules.² The progress made by the Proposed Regulations³ in developing administrable rules is commendable. The proposals made in

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").

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 distributors⁷ 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 investors⁹ 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.

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 Form 1065) 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. Restricted Funds

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.

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. Clarify Relationship Between Funds and Their Advisor and Service Providers

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 funds

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 account¹⁶ 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 categories¹⁸ and one of the exempt beneficial owner categories¹⁹ – 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,

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

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

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

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. funds³² – 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.

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 account holders. 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.

* * *

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,



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