American Bankers Association
Building Success. Together.

Francisca N. Mordi
Vice President & Senior Tax Counsel
(202) 663-5317
fmordi@aba.com

November 12, 2010

Mr. Stephen E. Shay
Deputy Assistant Secretary
U.S. Treasury
1500 Pennsylvania Ave
Washington, DC 20220

Ms. Manal S. Corwin
International Tax Counsel
U.S. Treasury
1500 Pennsylvania Ave
Washington, DC 20220

Mr. Michael Danilack
Deputy Commissioner (Int'l) LB&I
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Mr. Steven A. Musher
Associate Chief Counsel (Int'l)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: ***American Bankers Association's Response to IRS Request for Comments on the Foreign Account Tax Compliance Act (FATCA)***

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

The American Bankers Association (ABA) is pleased to submit the following comments in response to the Treasury Department and Internal Revenue Service's (collectively, the "Service") request for public comments with respect to the Service's regulatory project on the Foreign Account Tax Compliance Act ("FATCA") provisions of the HIRE Act. The ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.

The ABA actively supports the efforts of the Service to provide clear guidance on the detailed requirements of the FATCA provisions as soon as possible in order to ensure that financial institutions are equipped with information necessary to implement FATCA in advance of the January 1, 2013 effective date. It is important for both taxpayers and the Service that all the systems necessary for effective regulation be put in place by the Service prior to the compliance due date. This letter does not address every issue that is inherent in the FATCA provisions, but rather, issues that we have identified as the most problematic for our members – some of which we have provided recommendations for addressing. We are providing comments that address issues affecting U.S. Financial Institutions (USFIs) as well as issues affecting Foreign Financial Institutions (FFIs) because even though our members, as USFIs, may not directly have the same issues that FFIs have under the FATCA rules, our members may have subsidiaries that are FFIs and clients that are FFIs.

Moreover, as USFIs, our members do business with FFIs, and some of the issues they will need to address under FATCA will have trickle-down effects that would force USFIs to also confront these issues, or else find themselves in an untenable position with respect to some of their foreign clients and customers or unable to effectively compete in the global market. Thus, the first section of this letter addresses concerns and comments affecting USFIs, while the second section addresses issues concerning FFIs. We have not limited our comments to issues addressed in Notice 2010-60, as there are pressing issues that the Notice did not address. As necessary, we will submit letters supplementing comments already submitted or provide additional comments on future guidance provided by the Service.

Section 1: Issues Impacting USFIs

1. Identification of Payees by USFIs

Under the FATCA rules, a USFI making withholdable payments will need to determine whether the recipient is a U.S. person, an FFI, an entity described in section 1471(f), or a Non-Foreign Financial Institution (NFFE). If an entity is determined to be an FFI, the USFI will then have to determine whether it should be treated as a participating FFI (pFFI), deemed-compliant FFI (dcFFI) or non-participating FFI (npFFI). If an entity is determined to be an NFFE, the USFI will have to determine if it should be treated as an excepted NFFE or "other" NFFE. In order to comply with the obligations imposed under the new law, USFIs will need clear and workable rules. One suggested method for providing such clear and workable rules for identification of new foreign entity payees would be to redesign the current W-8 forms. The new form should make it possible for USFIs to be able to rely on certifications provided by payees and clearly spell out any additional due diligence requirements that a USFI would be subject to.

A. New Form W-8

The ABA recommends that the IRS develop a new Form W-8 that combines information required for compliance with both Chapter 3 and Chapter 4. The ABA also recommends, however, that separate W-8s be developed for individuals and legal entities. Separate Forms W-8 for individuals and entities would make it easier for individuals not affected by FATCA to complete an abbreviated form, reserving a more complex form for legal entities. Thus, the form for individuals would be very simple and need not contain the series of questions and fact-gathering provisions that would be included in the form designed for entities. The form for entities, on the other hand, would be used by the USFI to collect information to be used to make the determination about the type and status of the entity for FATCA purposes, and thus, should be designed in a manner that would make collection of such information easier and more prompt. For instance, in addition to all relevant certifications, the form should include checkboxes on Line 3 for FFIs, NFFEs, excepted NFFEs, and entities described in Sec. 1471(f). It should also include a checkbox that entities can use to certify that they are not engaged in active trade or business as a financial institution, and a checkbox that corporations can use to indicate that they are publicly traded. Furthermore, the form should require FFIs to certify their FFI status above the signature line and enter their pFFI EIN and describe it as such on Line 6.

An entity that checks the box indicating it is an NFFE should be required to attach a schedule containing the name, address and TIN of each of its substantial U.S. owners. The information contained in the schedule will be used by the USFI in preparing its annual IRS information reporting with respect to the NFFE's substantial U.S. owners. The USFI should not be required to monitor changes in ownership percentages for substantial U.S. owners for an NFFE for which it has received a W8. The NFFE should have the obligation of providing any changes or updated information regarding its substantial U.S. owners to the USFI.

The new Form "W8-Entity" and its instructions should be issued in draft form and the public given an opportunity to provide comments prior to its issuance as final. USFIs will need adequate lead time to implement the new forms, because they will have to be incorporated into new account-opening procedures and customer communications. Moreover, the new forms may also require software to be upgraded by institutions that automate W-8 validation through the use of software. Thus, we recommend that the new forms be made available at least one year prior to when the new law will become effective for new accounts.

B. <u>Standards for Determining Pre-Existing Payee Status</u>

We agree with the Service that for pre-existing accounts, USFIs should be able to rely on existing documentary evidence in their account files for determining whether an entity is a U.S. account holder, an FFI or an NFFE. Rather than require USFIs to "prove the negative" (i.e., proving that an entity is non-U.S.), the Service should provide presumption rules similar to those in IRS Reg. 1.6049-5 and the Sec. 1441 regulations, and allow USFIs to rely on the IRS Reg. 1.6049-4 "eyeball tests," as proof that an entity is foreign. In effect, guidance should allow USFIs establish standards to be used to make an initial determination about a payee's status – for instance, the presence of "Bank" or "Trust" in the entity's name would warrant a presumption that the entity is an FFI. A USFI can then request that the payee provide a W-8 on which it will certify whether it is a pFFI, dcFFI, or npFFI.

2. <u>USFI Verification of FFI Status as "Participating" or "Non-Participating"</u>

As discussed above, the redesigned Form W-8 for entities should require certifications by foreign payees of their pFFI status and certifications by NFFEs with substantial U.S. owners. While we understand that the Service will not permit USFIs to rely solely on such certifications without further verification, we recommend that the Service provide simple and clear rules for the due diligence required for such verification and that such due diligence be as streamlined and efficient as possible. Such rules would also be helpful to many USFIs' internal audit departments, which already monitor their firms' Anti Money Laundering/Know Your Customer and Patriot Act compliance. We recommend that the Service develop an FFI validation program similar to the current IRS TIN matching program. Under this validation program, a USFI will submit a list of pFFI names/TINs to the IRS for validation. Similar to the IRS TIN matching system, the IRS will notify the requesting USFI of FFIs on the submitted list that are in fact pFFIs and those that have not been validated as pFFIs. Like the TIN matching program, such validation should need to be done only once by the USFI. Furthermore, the validation program should be designed in a manner that would make it possible for the IRS to automatically send a message to a requesting USFI about any changes or updates in the status of any FFI that was included in the requesting USFI's list. For instance, if an FFI's status as a pFFI changes at any time, the USFI that requested validation on such FFI should automatically receive a message through the validation program notifying it about the FFI's status change. In effect, the USFI should not be required to perform any monitoring – even if an online or manual list exists – for a possible change in an FFI's participating status. A notification of pFFI status change should work essentially like a C-Notice – the USFI will institute withholding until such time as the situation has been corrected.

We recommend that that the new Form W-8 for entities have a longer life than the 3-year life span that currently applies for Forms W-8. In this respect, we are suggesting a 5-year life span, especially because under the validation program suggested above, a USFI will be notified by the IRS of a pFFI's change in status and thus, it would be unnecessary to repaper FFIs more frequently than every 5 years.

3. <u>Exclusion of Certain Payments from the Definition of Withholdable Payment</u>

While the new law generally exempts certain types of payments from the definition of "withholdable payments" for purposes of FATCA, it specifically grants the Service broad authority to also exclude other type of payments, including those that the Service determines pose a low risk of U.S. tax evasion. There is no question that certain investment-type income, such as interest payments on short-term debt and bank deposits, as well as payments to vendors for services and license fees, pose a very low risk of U.S. tax evasion. Moreover, subjecting interest on bank deposits to withholding under chapter 4 (whereas such payment is not subject to withholding under Chapter 3) would for the first time impose two withholding tax rates on such payment (30% and the backup withholding rate). Implementing this regime for payments that pose a very low risk of U.S. tax evasion would require major and costly system modifications and processing. Thus, we recommend that the Service exclude these types of payments from the definition of withholdable payments under the FATCA rules.

Furthermore, we suggest that the definition of "withholding agent" should not be expanded to include U.S. payors that are neither financial institutions nor payors of interest or dividends in excess of an established de minimis amount, but rather, should be limited to financial institutions (as defined in new Code Section 1471(d)(5)) and to payors of dividends and interest that exceed a specific threshold amount (e.g., $1,000,000, which is the threshold amount used for a QI external audit waiver).

4. **<u>Presumption Rules with Respect to Controlled Foreign Corporations, U.S. Branches of FFIs, and Foreign Branches of U.S. Financial Institutions</u>**

We recommend that the Service reconsider its position with respect to previous requests that it treat controlled foreign corporations (CFCs) and U.S. branches of FFIs as deemed-compliant FFIs because these entities are already subject to various information reporting and withholding requirements. We support the Joint Committee on Taxation's statement in its Report that because these entities are treated as U.S. payors for purposes of the existing information reporting and backup withholding rules, they should not be subject to the FFI reporting rules of Code Section 1471(c). These entities are already reporting (and backup withholding if appropriate) on payments made to their U.S. non-exempt payees, and thus, should not also be subject to FATCA as FFIs. A requirement that they be treated as FFIs would subject them to both the FATCA FFI rules and the U.S. payor rules under current law. The Service has itself acknowledged that the possibility of duplicative reporting exists with respect to accounts maintained by U.S. branches of foreign FFIs, and thus, intends to provide rules that will coordinate the reporting required of FFIs with U.S. branches under Chapter 4. We believe that the solution would be to exempt CFCs and U.S. branches of foreign financial institutions from the FFI rules under FATCA and continue to treat them as U.S payors. If the Service persists in its current position that CFCs will be treated as FFIs subject to FATCA, we recommend that the Service clarify that the FATCA rules trump other rules, thereby eliminating the existence of duplicative reporting for CFCs. In effect, CFCs will no longer be subject to the current law requirement that they engage in full Form 1099 reporting after they become subject to FATCA reporting and withholding rules. Rather, CFCs treated as FFIs should subsequently only be subject to a "1099 light" reporting rule.

5. Filing Returns for NFFE Substantial U.S. Owners

A. Content of Returns

Section 1472(b)(3) requires the USFI to file an information return as prescribed by the Secretary of the Treasury for an NFFE's substantial U.S. owners. We suggest that the Service clarify that the information required to be included on such return be limited to the U.S. owner's name, address, TIN and an optional identifying account number as assigned by the USFI. No other information, such as the U.S. owner's percentage of ownership or percentage of income, should be required to be reported.

B. Validation Following TIN Mismatches

In connection with the above (and pursuant to Paragraph (2) of section 6724(d), which was amended to include information returns required to be filed under chapter 4), we suggest that the reasonable cause regulations (Treas. Reg. section 301.6724-1) be amended for purposes of information returns filed by a USFI for an NFFE's substantial U.S. owners. The regulations should permit the USFI, if notified by the IRS of an incorrect Name/TIN combination, to validate that it reported the exact name/TIN combination provided by the NFFE for the substantial U.S. owner on the information return. If such information is determined to be incorrect, rather than instituting backup withholding or requiring the USFI to solicit additional information or a certification from the NFFE, the USFI should first be given an opportunity to correct the information in its records and files and to use such corrected information on future information returns.

6. Withholding Under Chapter 4

A. FATCA Withholding on New and Existing Accounts

The ABA requests clarification on the question of when a USFI would be required to start withholding for purposes of FATCA with respect to npFFIs or non-compliant FFIs (for instance, FFIs for which a valid FFI EIN verification has not been received by the USFI). We believe that the language addressing this issue is somewhat confusing and can be read to require withholding either at the end of 2013 or at the end of 2014. Further, the language seems to suggest that if a USFI has requested additional information necessary to determine whether a payee is non-compliant, the USFI has until 12/31/2014 to make the determination of whether such payee is non-compliant – based on information and documentation collected – in which case withholding will then commence. The language does not provide clarification on what the USFI should do if prior to 12/31/2014 it obtains the information necessary to classify a payee as non-compliant. The question is whether the USFI is required to commence withholding at that time or should wait until after 12/31/2014. We believe that the correct answer is that withholding will not be required until the end of 2014 (for both new and existing FFI accounts). However, because the language allows for more than one interpretation, there will likely be lack of uniformity in operation with respect to the starting date for withholding under FATCA. For instance, some USFIs may commence withholding under FATCA as of 1/1/2014, during 2014 or after 12/31/2014. This lack of uniformity in operation will result in compliance difficulties, confusing applications of the law and serious customer relations issues for many FFIs (for instance, some USFIs will be faced with the onerous task of explaining to FFIs why they are withholding while others are not).

B. <u>1042 Withholding</u>

For ease in reconciling amounts withheld under FATCA with IRS remittances, we believe that the Service should treat withholding under Chapter 4 as Form 1042 withholding. Hence, it should be clarified that: (i) U. S. withholding agents should report Chapter 4 withholdable payments to the IRS and FFIs on IRS Form 1042-S; (ii) U.S. withholding agents should report Chapter 4 withholdable payments to the IRS and NFFEs on IRS Form 1042-S; (iii) all Chapter 4 withholding liabilities should be included on the U.S. withholding agent's annual Form 1042; and (iv) all Chapter 4 withholding remittances should be deposited into the same IRS account as Chapter 3 withholdings. A new income code for Form 1042-S box 1, "Income subject to FATCA withholding," should be added to the Form 1042-S instructions. New box 13b recipient codes should also be developed for FFIs, NFFEs, and any other recipient types unique to FATCA.

The Service should ensure that there will be no duplication between (1) FATCA reporting and Forms 1099 or 1042-S reporting, and (2) FATCA withholding and backup or Chapter 3 withholding. There should be ordering rules as to which reporting/withholding scheme will apply if a payment to a particular payee could fall into more than one category.

<u>Section II: Issues Affecting FFIs</u>

7. <u>Members of the Same Expanded Affiliated Group</u>

It is important that the Service clarify that there is no requirement under FATCA for an FFI that is a member of an expanded affiliated group to certify that no other member of the same expanded affiliated group knows, or has reason to know, that any information provided to the FFI by a customer is incorrect. Thus, an FFI that has entered into a Reporting Agreement with the Service would only need to provide information pertaining to its own customers and declare (as on Form 1042) that to the best of its knowledge and belief such information is true, correct, and complete.

Typically, processing systems are developed and built in a manner that does not allow members of the same expanded affiliated group to share certain information about each other. In effect, each member develops its systems to satisfy its own specific requirements and the needs of its own lines of business, which may be different from those of other members. Thus, a provision that would require one member of an affiliated group to input information relating to another member's business units into its own system, in order to monitor the other member's customer information, would be result in very difficult compliance issues. Such a requirement would severely deter FFIs from entering into any reporting agreements with the Service.

Hence, we suggest that the Service clarify that each FFI will be required to separately provide information regarding its own customers without regard to information that other members of its expanded affiliated group might have – provided, however, that there is no evidence that the group has set up an artificial arrangement that will interfere with the transfer of relevant customer information between group members.

8. Carve-Out Provisions

A. Carve-Out Provision for Certain FFIs

We recommend that the Service provide a carve-out or exemption provision for certain FFIs. By so doing, the Service would be able to apply the FATCA rules in a manner that most effectively achieves the intended goals without expanding unnecessary burdens for financial institutions. Such carve-outs should, at a minimum, specifically cover: (i) FFIs owned by U.S. parents or U.S. holding companies; (ii) FFIs located in jurisdictions where they are already required to provide comprehensive reports on their clients; and (iii) FFIs located in jurisdictions that have entered into tax information exchange agreements (TIEA) or tax treaties with the U.S. containing effective information exchange clauses. As discussed above, we believe that these covered FFIs should be carved out of FATCA application because they are already in compliance with reporting rules, either directly or through their U.S. parents or U.S. holding companies, and thus, do not need to be subjected to unnecessary additional or duplicative reporting rules. Moreover, we believe that it is unlikely that U.S. citizens who wish to evade U.S. taxes would be inclined to become customers of FFIs located in jurisdictions that actively enforce their information exchange agreements with the U.S. Thus, excluding FFIs located in such treaty/TIEA countries will help reduce the need for the Service to administer the FFI reporting rules on a very large scale and enable it to concentrate its resources on those FFIs that may be of greater concern. Finally, such a provision would be an incentive for other jurisdictions to enter into treaty/TIEA arrangements with the U.S.

The list above is not exhaustive of FFIs that should be covered by a carve-out provision in the regulations. We understand that other trade groups have provided their views on this issue to the Service, and we urge the Service to consider them as well.

B. Carve-Out Provision for Certain NFFEs

For the same reasons noted above, we suggest that the Service include a carve-out provision for certain Non-Financial Foreign Entities (NFFEs), including NFFEs located in a country that: (i) has entered into a tax treaty containing an exchange of information clause or TIEA with the U.S., and (ii) is regarded by the U.S. as actively complying with its information exchange obligations. There is no question that payments to such NFFEs would pose a low risk of tax evasion.

C. Carve-Out Provision for Certain Beneficial Owners

We suggest that the Service clarify that investors such as foreign insurance companies, foreign pension funds, pension fund pooling vehicles and other pooled investment vehicles utilized by charities, other entities exempt from U.S withholding under tax treaties, and publicly traded companies are included in the beneficial owner exceptions for (Foreign) Financial Institutions or NFFEs. Given the significant level of investment made by these investor types and the institutional nature of such investments, we believe they should be included in the beneficial owner exceptions for (Foreign) Financial Institutions and NFFEs, as part of the "other" class of persons identified as posing a low risk of tax evasion.

Further, the Service should align the beneficial owner exceptions for (Foreign) Financial Institutions with those for NFFEs. For instance, the (Foreign) Financial Institution beneficial owner exceptions do not include certain corporations and other entities that are included in the beneficial owner exceptions for NFFEs.

9. <u>FFI Determination of "Specified United States Person"</u>

Since most FFIs and NFFEs are unfamiliar with U.S. tax laws, there is a question of how such payees will be able to accurately determine how an entity should be classified for U.S. tax purposes, and what constitutes a specified U.S. person for purposes of establishing whether an entity to which payment is made contains a "Substantial United States Owner". Practical rules developed in this area, with examples, would help resolve potential disputes between a withholding agent and a non-U.S. entity as to whether the entity is an FFI, NFFE, a U.S. exempt organization, a common trust fund (as defined in IRC section 584(a)) or other type of entity (such as an exempted entity) for FATCA purposes, and therefore ensure appropriate compliance with FATCA.

We recommend that FFIs and U.S. withholding agents be allowed to rely on either information already in their records or self-certifications, for purposes of identifying and exempting the following entities from the reporting rules: (1) corporations regularly traded on an established securities market and their affiliates; (2) tax exempt entities; (3) U.S. governmental bodies and their wholly-owned agencies or instrumentalities; (4) U.S. states and their political subdivisions and wholly-owned agencies or instrumentalities; and (5) banks.

10. <u>Reporting of Specified United States Persons" and "Substantial United States Owners"</u>

The provision that requires the reporting of specified U.S. persons and substantial U.S. owners will create certain legal problems for many FFIs and NFFEs. The banking confidentiality laws in some foreign jurisdictions protect bank customers from unauthorized disclosure of customer information unless certain specific factors are present, including whether a bank is compelled by law to divulge the information. It is unclear how FFIs and NFFES can determine whether the laws of another country would qualify as "banking confidentiality laws."

Hence, there is a legitimate concern that some FFIs may not be in a position to disclose customer information, regardless of whether such customers may be Specified U.S. Persons or Substantial U.S. Owners, without the customer's consent or a change in the law of the jurisdiction where the FFI is located.

We suggest that FFIs located in jurisdictions with legal impediments to disclosure be allowed to include aggregate details on the number of customers that fall into the category of Specified U.S. Persons or Substantial U.S. Owners as part of their annual return to the Service under FATCA. Further, as part of the recommendation that a new Form W-8 be created for entities, the Service should reflect in the new W-8 the authority of an FFI/NFFE to report Specified U.S. Persons or Substantial U.S. Owners identified in those forms. Finally, the Service should consider engaging in greater multilateral coordination with these jurisdictions for the purpose of working through legal impediments to reporting.

11. FFI Election to be Withheld Upon

Under FATCA, an FFI that has entered into a Reporting Agreement may "elect" to be withheld upon, in which case such FFI would not need to withhold and deposit tax. We suggest that the Service provide additional guidance and examples in this area. For instance, it is unclear how a U.S. withholding agent would process payments for the electing FFI, since the withholding agent would not be in a position to know of the transactions giving rise to gross proceeds that were initiated by the electing FFI's customer if those transactions were not processed by the withholding agent. This is a complicated issue and we recommend that the Service clarify that the election be optional (neither automatic nor mandatory). The most reasonable approach to this issue would be to permit an FFI that wants to make the election to enter into a written agreement with the U.S. withholding agent that provides the details of the payment processing agreement reached by both parties. Both parties can agree on a structure that eliminates most of the legal and operational challenges and costs for both parties. A copy of this written agreement should be made available to the IRS for review upon request.

In addition, the requirement under FATCA that the electing FFI must waive any rights under any U.S. tax treaty with respect to the amount to be deducted and withheld presents some issues. It essentially makes the election meaningless, because it is inconceivable that an FFI can or will be in a position to relinquish another person's entitlement to treaty relief. It is extremely important that the Service's guidance clarify the intent of Congress with respect to this provision, as guidance that misapplies Congressional intent could nullify the election provision discussed above.

Section III: Issues affecting USFIs and FFIs

12. Reporting Issues for USFIs and FFIs

We suggest that the regulations provide clarification regarding the information that must be included in the FFI's Annual Report to the IRS. Specifically, the report should contain the minimum amount of information necessary for IRS compliance purposes. The data collection process that will be involved in the application of the FATCA rules will cause FFIs to incur significant costs. The requirement to include "gross receipts and gross withdrawals or payments from the account [of a U.S. accountholder]" in the Annual Report raises significant concerns, because substantial systems changes will be needed by many FFIs to collect this dynamic data, unlike the costs associated with collecting name, address, TIN, account number, and year-end account balance/value data. Moreover, there is no evidence that information on gross receipts and withdrawals plays any role in the Service's compliance efforts with respect to U.S. tax evasion. A report containing vital information such as name, address, TIN and account number would be sufficient for purposes of determining whether further action or steps should be taken with respect to a particular account, since it can be matched against tax returns filed with the IRS. If the Service decides to take any additional steps, it has the authority to request additional useful information from the FFI regarding that accountholder.

We suggest that account balance/value information captured at the end of the year not be averaged, because any such regime would increase both the complexity and cost associated with the production of the annual report. For account balance information of substantial U.S. owners, we suggest that the Service's guidance be drafted in a manner that ensures the least complex reporting process, by giving the FFI the option of reporting the entire balance of the entity account rather than the amount attributable to each substantial U.S. owner based on its ownership percentage. Further, the Service's guidance should clarify how an FFI should report amounts that are in non-U.S. currency. An example is: whether the FFI will have the option of reporting such amounts in USD (and if so, what exchange rates should be used) or, reporting such amounts in the source currency (where the FFI's system does not support USD conversion).

Finally, we recommend that the guidance clarify that the FFI's annual reports may be filed electronically according to specifications provided by the Service.

13. Refund Process

A. Specialized Processing Unit

It is reasonable to conclude that a significant volume of refund claims will result from the FATCA withholding rules. The Service will, therefore, need to develop a very efficient and timely method for processing the numerous claims for refund of excess withholding (i.e., over-withholding due to errors) or withholding with respect to beneficial owners who qualify for treaty reductions. For instance, the customers of a non-participating FFI may have no idea that their institution has opted out of participating FFI status and suddenly find themselves subject to maximum withholding through no fault of their own, notwithstanding that the customers themselves would not be subject to FATCA withholding and have provided all necessary KYC documentation and a valid treaty claim. We suggest that the Service develop a specialized unit to process FATCA refund claims, devote sufficient personnel to process the claims, and publish detailed guidance clarifying what materials must accompany a refund claim and how it must be submitted. Under current rules, the IRS typically requires the refund applicant to present a Form 1042-S, but we believe that alternative types of proof should be allowed under FATCA. Further, we suggest that an FFI be allowed to apply for a collective refund (as is the case under the current QI rules), as this will reduce the filing and administrative burdens on both non-U.S. investors and the IRS. However, this guidance should also contain: (i) provisions allowing a beneficial owner to present specified proof to the IRS to establish that that the beneficial owner qualifies for the refund; (ii) circumstances in which an FFI can get a refund for its own account – for instance, where the FFI is subject to inadvertent or erroneous withholding and must seek a refund; and (iii) a provision allowing a non-participating FFI to seek a refund in excess of what it is entitled to under a tax treaty, provided that it agrees to substantiate its U.S. accounts, if any, and comply with the FFI regime prospectively.

B Option of Refunding Amounts Withheld

As discussed above, the Service will be required to deal with an overwhelming amount of refund claims resulting from the application of FATCA provisions. We recommend that the Service give USFIs the option of being able to refund withholdings that were instituted during the year due to documentation errors, miscommunications, or improper documentation – as long as correction and proper documentation is established prior to the end of the calendar year. In effect, a USFI that has withheld on payments to another USFI, either because the USFI did not receive appropriate documentation or there was an error in documenting an FFI, should have the <u>option</u> of refunding amounts withheld at any time prior to the filing of information returns, as long as all errors have been corrected by that time and the USFI is able to determine that the FFI is not subject to withholding. This will help both the IRS and the USFIs, as the IRS will not have to deal with an overwhelming amount of FFI claims for refunds and the USFIs will continue to maintain good client relations with their FFI customers.

Section IV: Timing and Transition

A. FFI Agreements

As soon as possible, the Service should release its timetable for: issuing a Model pFFI agreement in draft form, finalizing it, accepting and processing financial institutions' applications for a pFFI agreement, and entering into pFFI agreements with financial institutions.

Since many of an FFI's deadlines for requesting or obtaining accountholder documentation are measured from the effective date of its pFFI Agreement, all pFFI agreements should have a standardized effective date of January 1 in order to facilitate compliance. In effect, even if the FFI agreement is entered into at anytime during the calendar year, the agreement should be made retroactive to January 1 of that year. Thus, if an FFI enters into an agreement during the calendar year and such agreement is then made retroactive to January 1 of that year, the USFI should treat the FFI as a pFFI starting from January 1 and should have the option of refunding any amounts withheld during that year (because, based on the retroactive application of the agreement, there should not have been any withholding with respect to the FFI).

B. Waier of Penalties

The ABA strongly recommends that the Service provide a "transition period" with respect to the imposition of penalties for noncompliance. Financial institutions will require a significant amount of time to structure, test and implement new systems and procedures. There are bound to be some mistakes, and rather than imposing penalties immediately, the Service should consider providing an initial period during which penalties will be waived if there is a showing of reasonable attempts to comply and/or reasonable efforts to correct the mistakes.

We would welcome an opportunity to further discuss any of our comments with you in person or on the phone. Please contact me at 202.663.5317 or fmordi@aba.com if you would like to discuss our comments.

Sincerely,

Fran Mordi
Vice President & Senior Tax Counsel

cc: Michael Plowgian
Attorney Advisor, Office of the International Tax Counsel, Department of the Treasury

Carl Cooper
Senior Counsel, Office of the Associate Chief Counsel (Int'l), International Revenue Service