April 30, 2012

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United States Department of the Treasury
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Washington, D.C. 20220

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CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
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Re: Response to REG-121647-10, Proposed Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities (the "Proposed Regulations")

Dear Ms. Corwin and Messrs. Musher, Danilack, and Sweeney:

The Clearing House Association L.L.C. ("The Clearing House"), an association of major commercial banks,[1] and the American Bankers Association[2] (the "ABA" and, together with The

[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing – through regulatory comment letters, amicus briefs and white papers – the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer and check-image payments made in the U.S. See The Clearing House's web page at www.theclearinghouse.org.

Clearing House, the "Associations") appreciate the opportunity to jointly submit these comments with regard to the Proposed Regulations.

I. Executive Summary

The Associations recognize and appreciate the considerable time and effort that the United States Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") expended to produce the Proposed Regulations for the implementation of the Foreign Account Tax Compliance Act ("FATCA"). We further commend Treasury and the IRS for their willingness to listen and respond to many of the concerns expressed by impacted persons over the past year, as evidenced in the Proposed Regulations. While the Proposed Regulations provide much needed relief, the Associations continue to have significant concerns with respect to certain provisions in the Proposed Regulations. We respectfully request that Treasury and the IRS consider the comments and recommendations set forth below when drafting the final rules.

Specifically, the Associations:

- *recommend* that United States Financial Institutions ("USFIs") and Foreign Financial Institutions ("FFIs") be permitted to treat any account opened prior to January 1, 2014 as a preexisting account (see section II, below);

- *recommend* that a withholding agent be permitted to rely on the certifications made by an account holder on an IRS Form W-8 and not be required to collect additional documentation absent obvious inconsistencies;

  - If Treasury and the IRS do not accept the previous recommendation, the Associations *recommend* that the account holder's representation should be required to be supplemented with a letter from third-party counsel (or a third-party auditor) in support of the representation made, as opposed to any type of independent verification requirement to be performed by the withholding agent (see section III, below);

- *recommend* that the standards of knowledge under chapter 4 of the Internal Revenue Code of 1954, as amended (the "Code") relating to when a withholding agent has "reason to know" that an account holder's documentation is invalid or incorrect contain the same safe harbor language set forth in the corresponding chapter 3 provisions (see section IV, below);

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[2] The ABA represents banks of all sizes and charters, and is the voice for the nation's $13 trillion banking industry

- *recommend* that the presumption rules for certain exempt recipients be eliminated and that the final regulations require a presumption of foreign status if, and only if, there are foreign indicia associated with an entity account;

  - If Treasury and the IRS do not accept the previous recommendation, the Associations *recommend* that a withholding agent be able to rely on other information to establish such entity's U.S. status (*i.e.,* organizational documents, third-party databases, internet information, etc.) (see section V, below);

- *recommend* that (i) it be clarified that the use of government issued identification that does not contain a street address (*e.g.,* passports) is acceptable for purposes of chapter 4 account documentation when the withholding agent has a street address for the account holder as part of its account holder file; and (ii) documentary evidence standards, such as those related to the validity period and method of receipt, mirror the standards acceptable under local law (see section VI, below);

- *recommend* that all payments made for services be excluded under the provisions relating to ordinary course of business payments (see section VII, below);

- *request* that the IRS implement an FFI-EIN verification procedure similar to its existing TIN-matching program and *recommend* that the IRS publish a separate electronically accessible list of FFIs that have been removed from the list of valid participating FFIs ("PFFIs") and registered deemed compliant FFIs ("DCFFIs") and that a withholding agent not be required to re-verify the status of its entire PFFI and DCFFI customer base more often than once annually, and that when a withholding agent determines that an FFI has lost its PFFI or DCFFI status, that the withholding agent have 30 business days to update its records for the new status of the FFI. (see section VIII, below);

- *recommend* that, for owner-documented FFIs: (i) debt interests in excess of $50,000 not prevent an entity from meeting the requirements of this entity classification; (ii) an affiliation with an entity that is classified as an FFI under one of the other three categories of FFIs will not preclude an otherwise qualifying entity to utilize this deemed compliant category; (iii) local law be determinative with respect to the validity period of the documentation provided for the underlying direct or indirect owners; and (iv) for preexisting accounts, the existing documentation remain valid indefinitely in those circumstances where a PFFI has conducted an electronic search for U.S. indicia and has received the relationship manager's certification that there is no actual knowledge of U.S. ownership (see section IX, below);

- *recommend* that the limited FFI provisions be extended at least until December 31, 2017 (see section X, below);

- *recommend* that information reporting for PFFIs begin in 2015, with respect to calendar year 2014 (see section XI, below);

- *recommend* that a PFFI have 90 days to provide a U.S. account statement, if requested, to the IRS (see section XII, below);

- *recommend* that a PFFI be permitted to report foreign withholdable payments made to nonparticipating FFIs ("NPFFIs") on a pooled basis (see section XIII, below);

- *recommend* that, in the event that a preexisting account holder opens an additional account at a withholding agent, the final regulations limit the requisite due diligence review to those documents required to open the additional account (see section XIV, below); and

- *recommend* that the final rules treat certain other foreign entities as excepted FFIs (see section XV, below).

II. USFIs and FFIs Should be Permitted to Treat Any Account Opened Prior to January 1, 2014 as a Preexisting Account

Withholding agents will not have sufficient time to properly modify internal systems or to train personnel appropriately to use the new IRS forms by January 1, 2013, as currently required in the Proposed Regulations. Pursuant to the Proposed Regulations, USFIs will be required to obtain a new IRS Form W-8 for most new entity accounts opened on or after January 1, 2013. New entity account holders will be required to certify their status for purposes of chapter 4 of the Code on the new IRS Form W-8, as well as their status under chapter 3.[3] USFIs must address many issues before they can begin using the new IRS Forms W-8 to document new entity account holders. The first, and most pressing issue, is that there are a number of necessary system modifications that a USFI must undertake to ensure it is capturing the requisite data at the time a new entity account is opened for purposes of proper account identification and the subsequent required reporting under chapter 4 of the Code. Second, before a USFI can successfully implement changes to its chapter 4 documentation requirements, it must train both its internal staff that accept and validate the forms, as well as its entity account base that will be tasked with completing these new forms. For the following reasons, the proposed rules do not provide USFIs with adequate time to accomplish these tasks:

[3] See generally Prop. Treas. Reg. §§1.1471-4(c) and 1.1471-3(d).

A. Time Needed For Systems Enhancements

Most financial institutions have an April or May "lockdown" for any technology changes that are to be implemented in the following year. Practically speaking, this means that any technology changes that are needed for 2013 must be approved and placed in the queue of all outstanding and future technology modification projects for the entire financial institution, including those required for legal/regulatory, regulatory reporting, accounting, and business expansion purposes by April or May of 2012, at the latest. Once in that queue, it will typically take a USFI a minimum of eighteen to twenty four months to design, develop, and implement the necessary systems changes and corresponding internal testing before the new system is operational. To illustrate this point, many of our members continue to address major information reporting changes that have been making their way through this process for over two years, *e.g.*, cost basis reporting. Here, many of the technical tax issues that need to be addressed in order to adequately program and implement chapter 4 systems changes hinge on the content of the new withholding certificates (*i.e.,* IRS Forms W-8 and W-9), which we understand will not be finalized (or even available in draft form) for some time.

Once draft forms are made available, we anticipate that a USFI will be able to start the design process (*e.g.,* by creating generic business requirements document), but USFIs will not be able to begin to hard code (*i.e.,* finalize) systems changes until the final IRS forms have been issued by the IRS. It is also important to note that, given certain chapter 4 reporting rules for underlying owners of entities (*e.g.,* passive non-financial foreign entities ("NFFEs") and owner-documented FFIs), it will be necessary to undertake substantial systems modifications to enable a USFI to obtain and record both the entity and the underlying owner documentation so that it can satisfy its withholding and reporting obligations under both chapters 3 and 4 of the Code. As above, while generic design work can commence now based on the Proposed Regulations, the final systems changes necessary to implement the required reporting and withholding cannot begin until the final regulations and forms are released.

B. Time Needed for Internal and External Education and Training

In relation to education and training, it is important to point out the difficulties that withholding agents experienced when attempting to implement the use of new IRS Forms W-8 in the past. Specifically, when implementing the newly-introduced chapter 3 documentation requirements more than a decade ago, withholding agents had to overcome many obstacles and we anticipate that they will face similar obstacles under the Proposed Regulations. One major challenge was, and will be, training the necessary client-facing and back office personnel in numerous locations, and often globally, to understand the nuances related to the new IRS Form W-8 series, as well as the corresponding requirements related to form validation. Even with the delays in effective date approved by the IRS and the best efforts employed by financial institutions, many withholding agents continued to have problems obtaining properly completed forms during the initial years following the implementation of the chapter 3 rules.

These problems are likely to be exacerbated under chapter 4 of the Code given the anticipated complexity of the new forms. In addition, pursuant to the Proposed Regulations, most entities will need to provide additional documentation (such as audited financial statements or similar documents) to their withholding agents to support the claims made.[4] Consequently, educating and training personnel charged with obtaining and verifying the completeness of the new forms will be very complex and require significant amounts of time over many months. These challenges are compounded by the number of client-facing personnel within each USFI that will need to be trained, including those who perform know-your-customer ("KYC") and anti-money laundering ("AML") client onboarding functions. As a result, the Associations believe that our members will not have sufficient time to manage these critical steps between the release of the final forms and January 1, 2013, the date by which they must begin collecting and validating such forms.

Additionally, due to the many different entity types under chapter 4 of the Code, many USFIs will find it necessary to prepare general information for their entity account base to help them understand the various chapter 4 entity types and make the correct certifications (while account holders will, of course, ultimately need to rely on their own tax advisors). This customer education and preparation of "plain English" information materials will be an enormous undertaking which, as noted above, USFIs cannot consider commencing until both the Proposed Regulations and forms are finalized.

The Associations believe that Treasury and the IRS could significantly ease the aforementioned burden on USFIs by providing, in the final regulations, that a USFI may treat any account opened prior to January 1, 2014, as a preexisting account. In addition, because many USFIs have FFIs within their groups and need to implement centralized processes, as well as the fact that nonwithholding and owner-documented FFIs will be transmitting documentation and/or withholding instructions relating to their account holders to their upstream withholding agents, we believe it is imperative that the same timing rule apply to FFIs. To be clear, the Associations are not suggesting that FATCA should not apply to these entity accounts but, rather, in applying FATCA to these accounts during 2013 that the pre-existing documentation rules be used.

By way of example, since a PFFI or registered DCFFI might not receive its FFI-EIN until July 1, 2013, it may not be able to provide complete FATCA documentation until that date, at the earliest. This means that, if January 1, 2013 remains the cut-off date for preexisting accounts, many withholding agents would need to go back and revise the documentation initially collected for each such account, which would be very time consuming and costly given the anticipated volume of these accounts. The Associations believe this accommodation is necessary for its members to be compliant in 2013, and further believe that this would achieve

[4] See, *e.g.,* Prop. Treas. Reg. § 1.1471-3(c)(5).

an appropriate balance between fulfilling the policy objectives of chapter 4 and minimizing burdens imposed on financial institutions. For this reason, we recommend that Treasury and the IRS (i) include this transition rule as part of the burden-reducing measures provided for preexisting accounts in the final regulations; and (ii) issue interim guidance announcing their decision to do so as soon as practicable.

III. Withholding Agents Should be Permitted to Rely on the Certifications Made by an Account Holder on an IRS Form W-8, and Should Not be Required to Collect Additional Documentation Absent Obvious Inconsistencies

Prop. Treas. Reg. § 1.1471-3(d) sets forth the rules for documenting account holders for purposes of chapter 4 of the Code, which for most entity account holders require the use of new IRS Forms W-8. It is anticipated that the new forms will permit an entity to certify to its withholding agent, under penalties of perjury, its chapter 4 classification (*e.g.,* active NFFE, PFFI, certified DCFFI, registered DCFFI, etc.). For many of these certifications, the Proposed Regulations would also require the withholding agent to make some type of independent verification relating to the account holder's entity classification representation. For example, in addition to obtaining the appropriate IRS Form W-8, a withholding agent is required to obtain the organization documents for a retirement fund to confirm that the information contained therein generally supports the representation made on the IRS Form W-8 and an audited financial statement to confirm that a nonregistered local bank's representation that its assets are within the stated thresholds.[5]

Withholding agents should not be required to independently verify an entity's chapter 4 entity classification. Whether an entity satisfies the requirements of a particular chapter 4 entity classification is, in most cases, a legal determination. In our view, such legal determination should only be made by the account holder and its advisors. A withholding agent does not, and in fact should not, provide legal or tax advice to its account holders. Currently, withholding agents struggle to be helpful to their non-U.S. account holders that question which forms to use and how to complete them while, at the same time, taking great caution to ensure that any such guidance or instructions provided will not be construed as tax or legal advice. By requiring a withholding agent to make independent verifications as to entity classification representations, the Proposed Regulations would be mandating a withholding agent to question legal determinations made by account holders and/or their legal advisors.

Further, it is significant to note that account holders certify their entity classification on IRS Forms W-8 under penalties of perjury, which include criminal sanctions under the Code. Classifications made under these circumstances, with serious consequences for falsification, should alone be sufficient for acceptance by a withholding agent in most cases. Requiring a withholding agent to make its own independent verification, after the account holder has made

[5] See, Prop. Treas. Reg. § 1.1471-3(d)(6).

a representation under penalties of perjury, undermines a core principle of our tax system – *i.e.,* that a self-certification made under penalties of perjury is a reliable means of documenting tax status.[6] In addition, in many jurisdictions it would be inappropriate, from a cultural perspective, to question the account holder's representation.

The Associations recommend that the final regulations provide that a withholding agent (i) may rely on the certifications made by an account holder on an IRS Form W-8, and (ii) should not be required to collect additional documentation unless there are obvious inconsistencies. If the Treasury and the IRS believe that they are unable to rely on self-certifications for certain certified DCFFI entities, the next preferable alternative would be that the account holders making such certifications should be required to supplement their IRS Forms W-8 with a letter from third-party counsel (or a third-party auditor) in support of the certifications made.[7]

IV. The Chapter 4 Standards of Knowledge Relating to when a Withholding Agent has "Reason to Know" that an Account Holder's Documentation is Invalid or Incorrect Should Contain the Same Safe Harbor Language set forth in the Corresponding Chapter 3 Provisions

Prop. Treas. Reg. § 1.1471-3(e)(4) sets forth the standards under which a withholding agent has "reason to know" that documentation for a non-U.S. person is unreliable or incorrect (*e.g.,* birthplace in the United States, U.S. address or telephone number, or certain standing instructions). When these so-called "red flags" are associated with an account, the withholding agent is generally required to obtain additional documentation to "cure" the identified inconsistency. It is significant to note that, with the exception of one fundamental distinction, the format and methodology of the Proposed Regulation's chapter 4 due diligence standards are very similar to those set forth in Treas. Reg. § 1.1441-7(b), relating to a withholding agent's due diligence requirements under chapter 3 of the Code. This one fundamental difference is that the Proposed Regulations chapter 4 standards of knowledge relating to when a withholding agent has "reason to know" that an account holder's documentation is invalid or incorrect do not include the safe harbor language set forth in the corresponding chapter 3 provisions. Specifically, the chapter 3 rules provide that, for financial institutions, a withholding agent will be charged with a "reason to know" that a claim may be invalid or incorrect only when one (or more) of four specified circumstances exists.[8] This safe-harbor is appropriate and important because it helps ensure that each withholding agent (i) implements the rules in a consistent and uniform manner, and (ii) can adopt clear and objective procedures that are easily administered and adhered to.

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[6] See e.g., Section 6065 of the Code.

[7] Similar to the requirement currently proposed under Prop. Treas. Reg. § 1.1471-3(d)(7)(ii).

[8] Treas. Reg. § 1.1441-7(b)(3).

The Associations recommend that Treasury and the IRS include in the chapter 4 standards the same safe harbor language limiting a financial institution's "reason to know" that the documentation provided may be invalid or incorrect to the four clear and objective circumstances specifically described in the chapter 3 due diligence provisions.[9]

V. The Presumption Rules for Certain Exempt Recipients Should be Eliminated, and the Final Regulations Should Require a Presumption of Foreign Status Only When There are Foreign Indicia Associated With an Entity Account

Prop. Treas. Reg. § 1.1471-3(f)(3)(ii) provides a presumption rule for certain recipients that are currently exempt from reporting under chapter 61 of the Code (*e.g.,* corporations, financial institutions, and brokers) and, thus, referred to as "exempt recipients." Specifically, under the proposed rule, those certain "exempt recipients" will be presumed to be foreign if a valid IRS Form W-9 is not on file. The preamble to the Proposed Regulations further provides that Treasury and the IRS intend to make a corresponding change to the current chapter 3 rules. This is a dramatic departure from the existing rules, and the rationale underlying such a change is not clear. We believe that the proposed presumption rule is overly burdensome when there are no indicia of foreign status associated with an account.

Prop. Treas. Reg. § 1.1471-3(f)(3)(i) creates a presumption of foreign status for any undocumented entity account when there are certain stated foreign indicia related to the account. Thus, the new presumption in Prop. Treas. Reg. § 1.1471-3(f)(3)(ii) for certain exempt recipients would apply even when there are no such foreign indicia associated with the account.

It is understandable that Treasury and the IRS would require a withholding agent to obtain an IRS Form W-9 to establish the U.S. status of an exempt recipient whose account was associated with foreign indicia. When no such indicia exist, however, it is difficult to imagine situations where the entity is not a U.S. entity. In fact, the withholding agent very likely has actual knowledge that the account holder is U.S., either from its name, other account documentation, or publicly available data. Consequently, the application of the new presumption rule appears to result only in added burden for withholding agents (and affected entities that may now be required to submit refund claims), with no apparent benefit to Treasury or the IRS.

The Associations recommend that Treasury and the IRS eliminate the Prop. Treas. Reg. § 1.1471-3(f)(3)(ii) presumption in the final regulations and, instead, only create a presumption of

[9] The preamble to the Proposed Regulations provides that Treasury and the IRS intend to modify the chapter 3 rules regarding standard of knowledge to conform to the proposed rules under chapter 4. For the reasons discussed above, we believe that the revised rules, if any, should include the safe harbor language set forth in the current corresponding chapter 3 provisions.

foreign status where there are foreign indicia associated with an entity account. If the Treasury and the IRS do not agree with this approach, the next preferable alternative would be that a withholding agent be permitted to rely on other clear and objective information to establish such entity's U.S. status (*i.e.,* organizational documents, third party databases, internet information, etc.). An example for such an alternative approach can be found in section 5.08(C) of the current qualified intermediary ("QI") agreement.

VI. Documentary Evidence Standards, such as Those Related to Acceptable Documents, Validity Period, and Method of Receipt, should Mirror the Standards Acceptable under Local Law

Prop. Treas. Reg. §§ 1.1471-3(c)(5)(i) and (ii) generally limit the types of documentary evidence acceptable for individuals to residency certifications and government-issued identification containing, among other requirements, an address. With respect to this latter requirement, it is important to note that in many jurisdictions, including the United States, a passport does not contain an address. Notwithstanding this omission, passport copies are routinely used to satisfy AML and KYC requirements at account opening. The use of government-issued identification that does not contain an address should not be considered insufficient for purposes of chapter 4 account documentation when the withholding agent has a street address for the account holder as part of its account holder file.[10]

With respect to the validity period of documentary evidence, Prop. Treas. Reg. § 1.1471-3(c)(6)(ii)(C) provides that, as a general rule, documentary evidence will remain valid for the same period as an IRS Form W-8BEN (*i.e.,* the last day of the third calendar year following the year during which the documentary evidence is provided). The Proposed Regulations further provide that where the documentary evidence contains an expiration date, the validity period will follow the stated expiration date, regardless of whether that date is before or after the three plus years stated in the general rule. For the reasons outlined in the remainder of this section, the Associations believe that this is inappropriate and should be modified before the regulations are finalized.

To begin with, this proposed new validity period rule is not applicable when a withholding agent is relying on documentary evidence to cure an account inconsistency under the due diligence rules (*e.g.,* a U.S. address associated with an IRS Form W-8BEN). In that instance, the documentary evidence must: (i) have been provided within the past three years;

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[10] The Associations note that the chapter 3 rules (Treas. Reg. § 1.1441-6(c)(4)) contain the same address requirement for documentary evidence where an individual is claiming treaty benefits notwithstanding the fact that the QI KYC Attachments permit a QI to obtain passports, national identity cards, social insurance cards, etc., to document individual account holders and, as indicated above, many of these documents do not contain an address. Treasury and the IRS have indicated that it will be updating certain chapter 3 provisions in the near future. The Associations recommend that Treasury and the IRS incorporate a similar rule to the one outlined in this section when modifying those rules.

(ii) have been valid when presented; and (iii) support the account holder's claim of foreign status.[11] Thus, it appears possible that documentary evidence acceptable for resolving an inconsistency in account information may be considered expired for purposes of documenting an account that has no inconsistencies.

More significantly, the proposed new validity period rule for documentary evidence is a substantial departure from most KYC and AML rules around the world. We anticipate the vast majority of accounts that will be documented with documentary evidence will be held by non-U.S. persons with no ties to the United States and no economic interests in United States assets. Consequently, overriding these local law validity periods places a tremendous burden on withholding agents that would then be required to monitor and obtain new documentation on an ongoing basis. It also results in an unnecessary burden to account holders who may be required to make additional trips to their financial institution or to notarize or certify documentary evidence submitted electronically in order to comply with such requests.[12]

Notwithstanding the apparent inconsistencies outlined above, we believe it is important to point out the reason that since 2001 Treasury and the IRS have accepted documentary evidence that is valid under local law for AML and KYC regulatory purposes as valid documentation for many offshore accounts. When the chapter 3 regime was being developed, many industry groups had discussions with Treasury and the IRS to find a non-intrusive way to document offshore accounts held by non-U.S. persons. KYC and AML regulations routinely require obtaining documentary evidence and, therefore, Treasury and the IRS agreed that, in most cases, non-U.S. financial institutions could utilize those same documents for chapter 3 documentation purposes, thereby eliminating a need to re-contact each existing account holder who had already been documented for KYC/AML purposes. Additionally, Treasury and the IRS likewise agreed that the documentation obtained under those rules would remain in effect for purposes of chapter 3 for as long as the documentation remained valid under local law. We understood that Treasury and the IRS were comfortable with this because KYC and AML rules are risk-based, requiring new information or documentation only when there are material changes in circumstance.

It is unclear why Treasury and the IRS now believe that there is risk related to reliance on documentary evidence obtained pursuant to local KYC and AML rules, bearing in mind that these rules are heavily regulated in the local jurisdictions. This is of particular concern because, as mentioned above, we anticipate that most accounts documented with local law documentation will be held by individuals that have no ties to the United States (*i.e.,* maintain no U.S. investments and have no U.S. indicia). The Associations are concerned about customer inquiries and reactions that our members will face when they contact these account holders

[11] Prop. Treas. Reg. § 1.1471-3(e)(4)(i)(B)(1)(i).

[12] See Prop. Treas. Reg. § 1.1471-3(c)(6)(iv).

and request them to come in and provide updated documentation for purposes of these new U.S. tax laws where the account holder has absolutely no ties to the U.S., where there is no such mandate under local law and where such practices are not part of the normal business practices in the particular country.

The change in circumstances requirements, as currently drafted in the Proposed Regulations, provide a sufficient safety net and should obviate the need for an expiration date on documentary evidence. Pursuant to these rules, a withholding agent must obtain additional documentation when certain changes occur. Where there has been no change in circumstances to an account since the time the PFFI obtained the related documentary evidence, it is difficult to understand the potential benefit this rule may provide to the government when compared to the expense for PFFIs that would be required to monitor varying expiration dates and update documentation on an ongoing basis for millions of affected accounts worldwide. Given the breadth of the FATCA rules, it is imperative that Treasury and the IRS adopt a risk-based approach. Mandating the continuous renewal of documentary evidence for certain pre-existing and all new offshore accounts, where there has been no change in circumstances that would indicate any association between the account holder and the United States, falls considerably short of that objective. The Associations cannot stress strongly enough their belief that, where there have been no changes in circumstance associated with an account, there is little, if any, risk in permitting the PFFI to follow its local law requirements as they relate to validity periods of documentation obtained under KYC and AML rules.

It is also important to point out two other deviations from many jurisdictions' local KYC and AML requirements. Specifically, Prop. Treas. Reg. § 1.1471-3(c)(6)(iii) provides that, as part of its record-keeping obligations, a withholding agent must note in its records the date the documentary evidence was received and by whom it was accepted and reviewed. Further, Prop. Treas. Reg. § 1.1471-3(c)(6)(iv) provides that where such documentary evidence is provided electronically, it must be a certified or notarized copy. Noting the same fundamental premise set forth above, (*i.e.,* the use of documentary evidence for U.S. withholding and reporting tax purposes was intended to be a useful, unobtrusive, method to address documentation requirements), the newly added restrictions undermine the accepted practice that has been the foundation for documenting non-U.S. individuals' offshore accounts for over a decade.[13]

Finally, in many jurisdictions, local KYC and AML regulations permit financial institutions to rely on third-party verification ("TPV") of account application data, including the verification

[13] See, *e.g.,* Treas. Reg. § 1.6049-5(c)(4)(i)(for amounts not subject to chapter 3 withholding, a withholding agent is not required to obtain new documentary evidence where it is not customary to do so); Section 5.11 (A) of QI Agreement (absent a change in circumstances, documentary evidence remains valid as long as it remains valid under local law).

of the account holder's identity. In particular, this is facilitated through the use of correspondent banks or other independent TPV providers. This verification method has become an increasingly accepted practice with the emergence of online banking. The documentary evidence rules, as drafted, are inconsistent with the online banking model.

For all of the aforementioned reasons, the Associations recommend that when the withholding agent has a street address for an individual account holder as part of the account holder file, there should not be a requirement that the documentary evidence contain an address. In addition, the Associations strongly recommend that the requirements relating to documentary evidence (methods of receipt, validation, and validity period) should follow those mandated by local law in the applicable jurisdiction.

VII. All Payments made for Services should be Excluded under the Provisions relating to Ordinary Course of Business Payments.

We appreciate that the Proposed Regulations provide an exclusion for routine, nonfinancial, accounts payable type payments that a withholding agent makes in the ordinary course of its trade or business. However, with respect to services income, it is not clear how a withholding agent should distinguish between financial and nonfinancial payments. Specifically, Prop. Treas. Reg. § 1.473-1(a)(4)(iii) provides for an exclusion, among others, from the definition of a withholdable payment for "payments made in the ordinary course of the withholding agent's business for nonfinancial services …" The exclusion makes clear that payments that are financial in nature (*e.g.,* interest other than interest on accounts payable, dividends, and dividend equivalent payments) are not excluded.

From the description in the Proposed Regulations, the withholding agent must be able to distinguish among the types of payments it makes. While the examples provided in the regulation are clear, for certain payments related to services the delineation may be more difficult. For example, certain fee income (fees for market data and management or advisory fees paid to an investment manager) is treated as a payment for services. While such fees are related to business that is financial in nature, it is not clear whether this type of fee income may be excluded from the definition of withholdable payment. Because the existing regime requires a withholding agent to impose withholding under chapter 3 or Section 3406 of the Code (depending on the presumption rules) where the income is U.S. source, U.S. persons are not likely to perform these types of services through the use of offshore entities. The requirement to treat financial service payments as FATCA withholdable payments will result in a substantial expenditure of upfront and ongoing resources by many withholding agents and their accounts payable and other operations without a substantial associated benefit in reduction of tax avoidance. Accordingly, the Associations believe the legislative goals of FATCA will be achieved without the requirement to treat financial service payments as withholdable payments and recommend that all service income should be excluded as an ordinary course of business payment.

VIII. The IRS should Implement an FFI-EIN Verification Procedure Similar to its Existing TIN-Matching Program

Prop. Treas. Reg. § 1.1471-3(e)(3) provides verification rules that a withholding agent must follow to verify the validity of a PFFI's, or registered DCFFI's, FFI-EIN. Specifically, the withholding agent must verify the number on the most recently published IRS list of FFI names and FFI-EINs within 90 calendar days of receipt of the FFI's claim. Further, where the FFI has applied for, and not yet received, its FFI-EIN, it may enter "applied for" on the appropriate IRS Form W-8. The withholding agent accepting an "applied for" FFI-EIN may rely on it for a 90 day period, after which the PFFI or registered DCFFI providing the form must provide its FFI-EIN. Once the withholding agent receives the number, it has an additional 90 days to verify it against the IRS published list. Finally, where a PFFI or registered DCFFI loses its status as such with the IRS, the Proposed Regulations contemplate that the entity will be removed from the IRS published list. Pursuant to the Proposed Regulations, the withholding agent that had previously accepted a PFFI's or registered DCFFI's claim has reason to know the entity no longer maintains its claimed status on the earlier of the date it discovers the entity's name has been removed from the list or the date that is one year from such removal.

It is clear from the Proposed Regulations that the IRS intends to publish a list of each PFFI and DCFFI that has obtained an FFI-EIN and that remains in good standing. Given the number of anticipated FFIs that will be obtaining FFI-EINs from the IRS, the Associations believe such a published list likely will be voluminous and therefore very possibly not "user-friendly" in terms of expedient verifications. Further, considering the large volume of PFFI and registered DCFFI account holders that a withholding agent may have, comparing its list of account holders to the IRS's voluminous list on an annual basis to confirm that none of the withholding agent's listed account holders have lost their preferred FATCA status is likewise anticipated to be a very time-consuming process. As a result of these issues, withholding agents will need assistance from the IRS so that they can effectively monitor the validity of a PFFI's or registered DCFFI's FFI-EIN.

The Associations respectfully request that the IRS implement an automated FFI-EIN verification procedure similar to its existing TIN-matching program. This system, however, must be easily accessible to all users, U.S. and non-U.S., and should not require the user to provide a U.S. taxpayer identification number or other personal information to gain access. In addition, similar to the announcements listing charitable entities that have lost their preferred status, the Associations recommend that the IRS publish a separate list of FFIs that have been removed from the list of valid PFFIs and registered DCFFIs and that the list of FFIs removed should be accessible and available electronically for an efficient comparison by the withholding agent with its file of valid PFFIs and registered DCFFIs to avoid any requirement for a burdensome and time consuming manual comparison. Further, the Associations recommend that withholding agents not be required to re-verify the status of their entire PFFI and registered DCFFI customer base more often than once annually, and that when a withholding agent determines that an FFI has lost its PFFI or registered DCFFI status, that the withholding agent have 30 days to update its records for the new status of the FFI (*i.e.,* as nonparticipating).

IX. Requirements for Owner-Documented FFIs should be Relaxed and Local Law should be Determinative with respect to the Validity Period of the Documentation Provided for the Underlying Direct or Indirect Owners

Prop. Treas. Reg. § 1.1471-5(f)(3) sets forth the requirements for owner-documented FFI status. Among the many requirements listed, an owner-documented FFI must provide documentation for each of its underlying direct and indirect owners, cannot issue debt which constitutes a financial account to any person in excess of $50,000, and cannot be affiliated with any other FFI that falls within the other three categories of FFIs (*i.e.,* those that accept deposits, hold assets in custody for others, or are insurance companies that issue cash value products). These latter requirements may prevent many FFIs from meeting the owner-documented FFI requirements. Many investment entities, even small ones, traditionally use debt as a means to further their investment activities. In addition, they may be in the same expanded affiliated group as another FFI that is not defined in Prop. Treas. Reg. § 1.1471-5(e)(1)(iii). Given the fact that the owner-documented FFI is disclosing the ownership of all direct and indirect interest holders, regardless of ownership percentage, the rules should not exclude an otherwise qualifying FFI simply because it issues debt interests in excess of $50,000 or is affiliated in the same group with entities that fall within other FFI categories.

The Proposed Regulations also require very onerous documentation standards for owner-documented FFIs that will require a withholding agent to implement extensive procedures to monitor these types of accounts. Specifically, Prop. Treas. Reg. § 1.1471-3(d)(7) sets forth the rules for documenting an owner-documented FFI. In addition to an IRS Form W-8, the owner-documented FFI must also provide an annual reporting statement, as well as documentation for each direct and indirect owner. For preexisting owner-documented FFI accounts, the new rules provide that the withholding agent may treat the account as documented where it has collected documentation that satisfies its local AML due diligence requirements with respect to each individual, specified U.S. person, owner-documented FFI, exempt beneficial owner, and/or NFFE that owns a direct or indirect interest in the entity (other than an interest as a creditor) within 4 years of the date of payment.

The documentation requirements for these accounts are very difficult for a withholding agent to administer. Specifically, a withholding agent would need to implement procedures and processes to ensure that the expiration date of each document collected (the IRS Form W-8, the reporting statement, and each piece of documentation for each direct and indirect owner) are captured and monitored. Given the varying expiration dates of these underlying documents, it is likely that the withholding agent would need to contact an owner-documented FFI several times each year requesting updated documentation. For a withholding agent with a large number of owner-documented FFIs, this is not operationally feasible. Requiring a financial institution to contact account holders several times per year, requesting *additional* documentation for U.S. tax purposes for accounts that most likely have no U.S. ownership and no U.S. investments, appears to be unnecessary. This is especially true given the change in circumstances rules that mandate the withholding agent to obtain additional information when there are certain changes made with respect to the account.

For the same reasons stated above, and in the recommendation in section VI, above, the Associations recommend that the final rules eliminate the restrictions relating to debt interests in excess of $50,000 for owner documented FFIs and affiliation with entities that fall within the other FFI categories and provide that: (i) local law dictate the validity period of the documentation provided for underlying direct or indirect owners and (ii) underlying IRS Forms W-8 and reporting statements remain valid indefinitely, absent any changes in circumstance. As we have stated previously, this safety net should sufficiently alleviate the concerns of Treasury and the IRS. Finally, for preexisting accounts, the Associations recommend that the existing documentation remain valid indefinitely where a PFFI has conducted an electronic search for U.S. indicia and obtained the relationship manager's certification that there is no actual knowledge of U.S. ownership.

X. The Limited FFI Provisions Should be Extended until at least December 31, 2017,at a Minimum

The limited FFI relief does not provide sufficient time for an entity that operates in a jurisdiction that has local law prohibitions that prevent it from achieving full FATCA compliance ("prohibitive jurisdictions") to resolve local law issues. Consequently, all FFIs in the expanded affiliated group of an FFI operating in a prohibitive jurisdiction are at risk of losing their PFFI or DCFFI status. The Proposed Regulations mandate that all FFIs within an expanded affiliate group be either PFFIs or DCFFIs. To accommodate FFIs within an expanded affiliated group that are operating in prohibitive jurisdictions, the Proposed Regulations adopt the concept of a "limited FFI."[14] The FFI that has such an entity or branch within its group can register it as a limited FFI, thereby enabling the remainder of the FFIs in the group to be conditionally FATCA compliant.

While the limited FFI cannot achieve full FATCA compliance, it must, among other things (i) agree to identify its account holders, (ii) not open any new U.S. accounts or accounts held by NPFFIs, and (iii) identify itself as a NPFFI to its withholding agents. As a result, such an entity will be subject to FATCA's penal withholding. As currently drafted, a limited FFI will cease to have such limited status after December 31, 2015. Significantly, the proposed regulations provide that where the limited FFI is no longer prohibited from complying with the terms of the FFI Agreement within this stated time frame, the "participating and deemed-complaint FFIs that are members of the same expanded affiliated group will retain their status …" Conversely,

[14] See generally Prop. Treas. Reg. 1.1471-4(e).

where the limited FFI is unable to achieve full FATCA compliance within the stated time, each participating and deemed-compliant FFI that is a member of the same expanded affiliated group will apparently lose such status.

For FFIs that operate within prohibitive jurisdictions, changes in local law will be required in order to maintain FFI status. It is anticipated that this will also be the case where a prohibitive jurisdiction wishes to enter into an intergovernmental agreement. The Associations believe that it is unlikely for such law changes to be proposed, enacted, and implemented prior to December 31, 2015. As a result, affiliated group members that may have spent tens of millions of dollars to implement FATCA compliance procedures and processes stand to lose their compliant status on December 31, 2015. This result would not appear to further the goals intended by the Proposed Regulations.

We recognize and appreciate the efforts being made my Treasury to address this issue, including conversations with a number of U.S. major trading partners about bilateral approaches to overcome legal impediments; however, absent a timely solution, in order to protect an affiliated group's FFI members in such circumstances, the Associations recommend that the limited FFI provisions be extended at least until December 31, 2017. Further, we recommend that Treasury and the IRS provide assurances that compliant FFIs in expanded affiliated groups will not lose their preferred FATCA status if they can demonstrate that there have been good faith attempts to attain the requisite legal changes in the jurisdiction(s) that prevent their group from achieving full FATCA compliance. In the alternative, the Associations recommend that if, on December 31, 2017, the prohibitive jurisdictions have not enacted the necessary law changes to enable the FFIs in that jurisdiction to fully comply with the requirements of FATCA, any expanded affiliated group that has a limited FFI operating in that jurisdiction will have two additional years to reorganize their business before losing their participating or deemed compliant status.

XI. Chapter 4 Information Reporting for a PFFI Should Commence With Information Returns Covering 2014

The requirement to report account holders for the 2013 calendar year, based on identification cutoffs that occur in 2014, is contrary to customary practices and procedures as they relate to information reporting.

The Proposed Regulations require a PFFI to report, for calendar year 2013, all accounts that are identified as U.S. or recalcitrant as of June 30, 2014.[15] Presumably, this June 30, 2014 date is attributable to the fact that a PFFI has one year to obtain documentation for preexisting high-value accounts with U.S. indicia. This requirement to cross different calendar years, however, creates processing problems for withholding agents as it relates to information

[15] See generally Prop. Treas. Reg. § 1.1471-4(d)(7)(v)(B).

reporting. Currently, information reporting systems are generally coded/programmed to capture specific information within a particular calendar year. Creating a system to compile data based on parameters crossing calendar years may be accomplished, but it would add significant complexity and expense to a PFFI's overall FATCA compliance costs, especially for requirements that are only transitional in nature (*i.e.,* it only applies to the initial year of reporting).

The first twelve to eighteen months after a PFFI has entered into its PFFI Agreement will likely be spent remediating its account base in an effort to reduce, if not entirely eliminate, the number of accounts it must treat as recalcitrant. If a PFFI could avoid the time and expense required to build a one-time reporting process and, instead, apply those resources to remediation efforts, it would likely eliminate a large percentage of unnecessary reporting at a significantly reduced overall cost.

The Associations recommend that the final regulations provide that a PFFI's initial chapter 4 reporting cover calendar year 2014, with corresponding information returns due on March 31, 2015. As explained above, this accommodation would likely result in more accurate reporting, with only a modest reporting delay (September 30, 2014 as compared to March 31, 2015) over that currently proposed.

XII. A PFFI should have 90 Days to Provide a U.S. Account Statement, if requested, to the IRS

Prop. Treas. Reg. § 1.1471-4(d)(4)(v) requires a PFFI to retain account statement copies for a period of 6 years. It further requires a PFFI to provide an account statement relating to a U.S. account to the IRS within 30 days of a request. This 30-day time period is not a sufficient amount of time for a PFFI to respond to such requests, particularly if such requests are made in bulk for many accounts at one time.

Many of our member banks have QIs within their group, and are aware from prior experiences of the issues that have arisen with 30-day requests for information. Often, by the time a document request actually makes its way through the IRS and QI's mail systems and to the proper recipient, the 30-day time period has passed. While email requests sent from the IRS to the person identified as the lead responsible officer for the group (which we understand is contemplated) may help reduce problems that occur with traditional mail requests, a longer period of time should be permitted to ensure that PFFIs have the necessary time to respond. This should not materially compromise the goals of the IRS and Treasury.

Therefore, the Associations recommend that the final regulations provide that a PFFI has 90 days to provide the requested information to the IRS.

XIII. A PFFI Should Not be Required to Issue Recipient Specific Reporting to NPFFIs

Prop. Treas. Reg. § 1.1474-1(d)(2)(ii)(A) provides that a PFFI must report, on a recipient specific basis, the aggregate amount of any foreign reportable payments made to an NPFFI in each of calendar years 2015 and 2016. This creates many problems for PFFIs that operate in jurisdictions that prohibit reporting without an appropriate waiver (especially in the case of preexisting accounts where waivers were not obtained). If the NPFFI is not receiving any U.S. source income, there would have been no previous reason under FATCA to perform withholding or reporting requirements for this account prior to March 31, 2016, the date this new reporting is first due. Accordingly, the PFFI may have been able to achieve full FATCA compliance for a number of years without obtaining a waiver. However, since it is not likely that the PFFI will be able to secure the requisite waiver in all cases, it may be unable to report on a recipient-specific basis.

Treasury and the IRS recognized the problems that a PFFI would face with certain recipient specific reporting requirements when they drafted the reporting requirements for a PFFI's recalcitrant account holders. To accommodate this problem, the Proposed Regulations permit a PFFI to report payments to this category of non-compliant account holders on a pooled basis.[16] For the same reason, the Associations recommend that the final regulations provide that a PFFI may report any foreign reportable payments that it makes to NPFFI account holders on a pooled basis.

XIV. A Withholding Agent Should Not Be Required to Review All Documents on File When an Existing Account Holder Opens an Additional Account

Prop. Treas. Reg. § 1.1471-1(b)(48) provides that a "preexisting obligation" includes any account, instrument, or contract maintained or executed by the withholding agent as of January 1, 2013. With respect to a PFFI, the definition means any account, instrument, or contract maintained or executed by the FFI prior to the effective date of the FFI's FFI Agreement. For a withholding agent, this definition is important because of the distinction in account due diligence as it relates to new and preexisting accounts. Namely, a withholding agent must review all information collected with respect to the opening or maintenance of each account, including documentation collected as part of the withholding agent's account opening procedures and documentation collected for other regulatory purposes to determine whether any such documentation conflicts with the payee's claim of chapter 4 status.

It is important to point out that a preexisting account holder often will open an additional account with the withholding agent. In this instance, the documentation requirements associated with the opening of this additional account may be minimal and, in fact, rarely require more than a telephone instruction. Since existing accounts held at the

[16] See generally Prop. Treas. Reg. § 1.1471-4(d)(6).

withholding agent may have been opened years prior, the account holder file (*i.e.,* actual paper documentation) may be warehoused offsite, and very difficult to access. Where such additional accounts are opened, the Associations recommend that the final regulations provide that the withholding agent must review all documents required with the opening of the additional account at the time of opening, but will not be required to review documents that may have been provided when the account holder opened the earlier accounts.

XV. Certain Holding Companies Within Financial Groups Should Also be Treated as Excepted FFIs

Prop. Treas. Reg. § 1.1475-5(e)(iii) provides that the term financial institution means any entity that is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, notional principal contracts, insurance contracts, or annuity contracts. Given this broad definition, it is clear that Treasury and the IRS intended to capture foreign hedge funds, private equity funds, and other types of collective investment vehicles within this third category of FFI. Moreover, because there is ambiguity in the terms "investing" and "reinvesting," it would appear that captive holding companies and funding companies will be treated as FFIs, even if they have a single owner. It is also important to note that, under the proposed rules, an entity is "primary engaged" in the above mentioned activities where the gross income generated from such activities equals or exceeds 50 percent of the entity's gross income during a specified testing period (generally three years). Given this income test, most foreign investment trusts, as well as passive corporations, will also fall within this third category of FFI, as opposed to a passive NFFE.

Prop. Treas. Reg. § 1.1471-5(e)(5)(i) provides an exception for certain entities that are nonfinancial holding companies. Specifically, a foreign entity is excluded under this rule where substantially all of its activities is to own (in whole or in part) the outstanding stock of one or more nonfinancial subsidiaries. The exception does not apply, however, where the entity functions as an investment fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes. For the same low risk rationale used by Treasury and the IRS in excepting the nonfinancial holding companies described above, the Associations believe that the following entities can be excluded from the third category of FFI without compromising the intent of these new rules:

1. Any foreign entity (that is not an investment vehicle buying capital assets for investment purposes) whose substantial activity is to own (in whole or in part) the outstanding stock of one or more subsidiaries, whether those subsidiaries are financial in nature or not.

2. Any foreign entity (that is not an investment vehicle buying capital assets for investment purposes) that is more than 50% owned in vote and value by members of its publicly traded affiliated group.

3. Any foreign entity (that is not an investment vehicle buying capital assets for investment purposes) that is not owned, directly or indirectly, by individuals (other than indirect ownership through a publicly traded entity).

* * * * *

We greatly appreciate your consideration of our comments, and would welcome the opportunity to discuss them further with you at your convenience. If we can facilitate arranging for those discussions, or if you have any questions or need further information, please contact David Wagner, Senior Vice President, Finance Affairs, The Clearing House at (212) 613-9883 (email: david.wagner@theclearinghouse.org) or Fran Mordi, Vice President & Senior Tax Counsel, the ABA at (202) 663-5317 (email: fmordi@aba.com).

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