

Appendix - List of Proposals

This appendix contains a list of the proposals we have made in the comment letter. For ease of reference, this list is organized in the order that our proposals would appear in the proposed regulations.

Section 1.1471-5

- **(b)(2)(i)(A)(2)(ii)**: remove this provision.
- **(b)(2)(i)(A)(2)(ii)**: Remove ambiguity by making clear that the denial of tax benefits that would otherwise be accorded is an example of the referenced penalties.
- **(b)(2)(i)(B)(1)**: Remove this provision.
- **(b)(3)(iv)(A)**: Provide a safe harbor rule for determining when interests will be treated as being traded in other than de minimis quantities.
- **(b)(3)(iv)(B)**: Avoid inconsistency in the application of the “regularly traded” standard by applying a 3-year look-back rule, so that interests would be treated as regularly traded if they met the applicable requirements during any one of the three previous calendar years.
- **(f)(1)(i)(A)**: Grant discretionary relief to FFIs that meet the spirit of the local FFI rule but fail to meet all technical requirements because they operate in more than one country.
- **(f)(1)(i)(A)(3)**: Provide that a fund that is priced in U.S. dollars will not trigger the prohibition on advertising U.S. dollar denominated investments if the advertisement is not otherwise targeted toward U.S. customers.
- **(f)(1)(i)(A)(4)**: Clarify that the requirement to perform either information reporting or withholding of tax is met with respect to any FFI that is incorporated or organized in a country that has implemented the EU Savings Directive or an agreement with the European Community providing for measures equivalent to the EU Savings Directive.
- **(f)(1)(i)(A)(5)**: Reduce the percentage of accounts maintained by the FFI that must be held by residents of its country in which it is organized from 98 percent to 85 percent.
- **(f)(1)(i)(C)**:
 - Provide that if any of the holders of direct interests in the CIV cannot be identified because such interests were issued in bearer form, such CIV may nevertheless be described in paragraph (f)(1)(i)(C) if all payments on such interests (i.e., distributions and redemption payments) can only be made through a participating FFI that itself is obligated to perform (or agrees with the CIV to perform) account identification, reporting, and/or withholding with respect to the interests under its own FFI agreement.

Alternatively, provide a grandfathering rule for an FFI that has issued bearer shares where its other shares are held by permitted interest holders and it agrees not to issue bearer shares in the future, to put policies in place to redeem these shares where possible with the ultimate goal of eliminating them over time, and to perform diligence on the bearer shares when they are presented for redemption or other payment.
 - Permit a reasonable cure period (e.g., six months) after a qualified CIV learns that one of its direct account holders ceases to be a permitted interest holder.

- Permit seed capital during the first two years of a qualified CIV, even if such seed capital would not otherwise as an interest held by a permitted interest holder in the CIV.
- **(f)(1)(i)(C)(1):** Clarify that the requirement that a fund be “regulated” is met where the fund’s manager is regulated, including under AIFMD.
- **(f)(1)(i)(C)(2):**
 - Revise to clarify ambiguity over whether publicly traded funds meet this requirement.
 - Permit certified deemed-compliant FFIs to directly hold interests in qualified CIVs.
- **(f)(1)(i)(D)(1):**
 - Remove “redeemed” so that the clause refers to interests “sold” through distributors described in paragraph (f)(1)(i)(D)(2).
 - Clarify that the requirement that a fund be “regulated” is met where the fund’s manager is regulated, including under AIFMD.
- **(f)(1)(i)(D)(2):** Permit distribution of restricted fund interests through a foreign branch of U.S. financial institutions, if such foreign branch is regarded as an entity separate from its owner in its country of incorporation or organization and if such branch is a qualified intermediary. Such a distributor should be treated comparably to a participating FFI distributor in respect to its relationship with the restricted fund.
- **(f)(1)(i)(D)(3):**
 - Deem any distribution agreements that already contain prohibitions on U.S. investors to be in compliance until a future date, such as two years after registration as a deemed-compliant restricted fund.
 - Move the parenthetical language “other than interests which are both **distributed by and** held through a participating FFI” so that it immediately follows “prohibits sales of debt or equity interests in the FFI.”
 - Clarify that the requirement that a fund be “regulated” is met where the fund’s manager is regulated, including under AIFMD.
- **(f)(1)(i)(D)(4):**
 - Clarify that the obligation of the FFI to terminate distributions agreements applies only with respect to distributors in direct contractual privity with the fund.
 - Impose the requirements of Section 1.1471-5(f)(1)(i)(D)(4) on the party with whom the distributor has the contractual relationship.
 - Exclude interests in the fund held by participating FFIs from the requirements of Section 1.1471-5(f)(1)(i)(D)(4).
 - Apply this provision only to distributors in the chain of custody with respect to the restricted fund.
- **(f)(1)(ii)(A):**
 - Change the requirement that the “chief compliance officer or an individual of equivalent standing with the FFI” certify the FFI’s compliance with the requirements of the applicable deemed-compliant FFI category and replace it with “a responsible officer of the FFI.”

- Provide that the responsible officer may provide the certification if the officer does not know or have reason to know that the FFI has not met the requirements for the applicable deemed-compliant category.
- **(f)(2)**: Provide certified deemed-compliant FFIs the option to certify their FATCA-status directly to the IRS and be issued an FFI-EIN.
- **(f)(2)(ii)(A)(1)(i)**:
 - Clarify that retirement funds will not cease to qualify as deemed-compliant FFIs if they permit participation by self-employed persons, partners, or other owners of businesses or if they permit up to a certain amount of contributions that are not made from earned income.
 - Clarify how the earned income limitation applies in case of a plan with a strict monetary annual contribution limits by revising the provisions to refer to “contributions that are limited by reference to earned income or are limited to a specific or ascertainable monetary limit.
- **(f)(2)(ii)(A)(1)(ii)**: Increase the 5 percent limitation to 10 percent.
- **(f)(2)(ii)(A)(2)(v)**: increase the \$250,000 limitation on assets to \$2 million.
- **(f)(4)**:
 - Distinguish between distributors in the chain of ownership and advice/introducing only distributors.
 - Restricted distributors acting in a chain-of-ownership capacity should be certified deemed-compliant FFIs in their own right.
- **(f)(4)(ii)**: Revise to provide “The distributor must be in compliance with AML due diligence procedures under the anti-money laundering laws of its country of organization (which is FATF-compliant).”
- **(f)(4)(iv)**:
 - Replace reference to “an FFI” in the second sentence with “a distributor.”
 - Expand reference to “website” to add “or advertises in print or other media of general circulation.”
 - Add “or advertisement” after the second reference to “website.”
- **(f)(4)(v)**: Restrict the size limitation for advice and/or introducing only distributors to the gross revenues limitation.
- **(f)(4)(vii)**:
 - Apply this provision only to distributors in the chain of custody with respect to the restricted fund.
 - Eliminate the requirement for distributors to forfeit commissions to the FFI.
- **(i)**:
 - Clarify that a fund and an investor will not be considered to be in the same expanded affiliated group if the fund is managed by an entity unrelated to the investor.
 - Provide that during the two-year period following the date a fund is formed, seed capital contributed to the fund by its manager or any entity affiliated with the manager will not be considered in determining whether the fund is a part of an expanded affiliated group.

- **(i)(2):** Clarify that a contractual fund will be considered to be an entity separate from its management company for purposes of applying the expanded affiliated group rules.

Section 1.1471-6

- **(f)(1)(i):** Clarify that a retirement fund that is eligible for treaty benefits as the beneficial owner of a payment will be treated as the beneficial owner for purposes of Section 1.1471-6(f)(1).
- **(f)(1)(ii)(B):**
 - Clarify that retirement funds will not cease to qualify as exempt beneficial owners if they permit participation by self-employed persons, partners, or other owners of businesses or if they permit up to a certain amount of contributions that are not made from earned income.
 - Clarify how the earned income limitation applies in case of a plan with a strict monetary annual contribution limits by revising the provisions to refer to “contributions that are limited by reference to earned income or are limited to a specific or ascertainable monetary limit.
- **(f)(1)(ii)(C):** Increase the 5 percent limitation to 10 percent.
- **(g):**
 - Permit certified deemed-compliant retirement funds and non-profit organizations to be owners of FFIs described in Section 1.1471-6(g).
 - Revise this provision to refer not only to entities that are “wholly owned” by permitted owners, but also to an FFI “if all investors in such FFI” are otherwise described in Section 1.1471-6(b) through (f) or Section 1.1471-5(f)(2)(ii) or (iii).
 - Permit FFIs described in Section 1.1471-6(g) to be owners of other FFIs described in Section 1.1471-6(g).

Items Not Addressed by the Proposed Regulations

- Clarify that each sub-fund that is part of an umbrella/sub-fund structure will be treated as a separate FFI, regardless of whether it has a legal personality under local law.
- Clarify that a contractual fund that has no legal personality under local law is nevertheless a separate FFI for FATCA purposes.
- Provide a centralized compliance option for funds.
- Provide an exemption from a fund’s requirement to document any equity and debt interests in such fund if the investor’s aggregate debt and equity interests in such fund do not exceed \$50,000.
- Clarify that a fund and an investor in the fund will not be considered to be in the same expanded affiliated group if the fund manager is unrelated to the investor.
- Clarify that physical certificates issued in bearer form will not jeopardize a fund’s status as a participating FFI or as a restricted fund if the fund performs (or requires another party to perform and confirms that it has performed) the required account identification procedures applicable to its respective status as a participating or deemed-compliant FFI when the bearer certificate is presented for payment.

- Support for the broad principle that a transfer agent should not have a greater Chapter 4 obligation than the fund on whose behalf it is acting as a transfer agent, and the FATCA status of the transfer agent should not supplant or add to which would otherwise be applicable to the fund.
- Clarify that where a fund has a hybrid registry and its global certificate is directly held by another FFI (i.e., a central securities depository), the fund may treat the global certificate as the “account” and may treat the central securities depository as the “account holder,” so that if the fund is a participating FFI and the central securities depository is also a participating FFI, the fund’s account identification obligations with respect to the global certificate are met if the fund knows that the central securities depository is a participating FFI (i.e., the fund does not have to look beyond the central securities depository), thus ensuring compliance with FATCA.