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For the attention of:

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Comments of the European Fund and Asset Management Association in Response to Proposed Regulations under Internal Revenue Code Sections 1471-1474

The European Fund and Asset Management Association ("EFAMA") is pleased to submit the following comments regarding proposed regulations issued by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") in respect to sections 1471 through 1474 of the Internal Revenue Code (hereinafter also referred to as "FATCA" or "Chapter 4"). Our comments are both in furtherance of our continuing dialogue with the government regarding the impact of FATCA on the European funds industry, including on fund managers and distributors, and in specific response to the request for comments in the preamble to the proposed regulations.

We commend the IRS and Treasury on their efforts to provide comprehensive guidance regarding the implementation of FATCA. In many important areas, the proposed regulations are responsive to the extensive comments submitted by stakeholders, and the proposed regulations incorporate a number of the proposals

endorsed by EFAMA and others with the aim of easing the burdens of FATCA compliance on the funds industry without compromising FATCA's goals of combating U.S. tax evasion. While the proposed regulations are a major step to that end, there is an important need for critical refinements to the proposed rules, and a need to provide greater clarity in areas not addressed in the proposed regulations, to reach the goal of a workable set of rules that will maximize participation by the funds industry in the FATCA regime.

In this comment letter, we provide comments on specific provisions in the proposed regulations that affect the funds industry, such as requests for clarification and proposals to modify the proposed regulations in specific ways. We also provide comments on issues left unaddressed by the proposed regulations. We are aware of comments being submitted by other representatives of the funds industry, and we generally support these comments. In particular, we have reviewed the comments of ICI Global, and we are fully supportive of their recommendations. Our comment letter is not intended to be repetitive or comprehensive--rather, we have focused on selected issues that we view as critical to the effectiveness of FATCA for the funds industry.

On the same day that the proposed regulations were issued, the governments of the United States and five European countries (France, Germany, Italy, Spain, and the United Kingdom) released a joint statement in which they announced their intention to enter into intergovernmental agreements that would permit FFIs to report the information required under FATCA to their local tax authorities, rather than to the IRS. Such information would then be forwarded to the IRS by the local tax authorities. We commend these efforts to enter into intergovernmental agreements and to address concerns raised by data privacy restrictions. However, we believe it is extremely important that the implementation dates for the regulatory and intergovernmental rules be aligned with adequate time allowed for stakeholders to adapt their systems and procedures in accordance with the combined rules. While the consensus is that such agreements should ultimately be multilateral, such multilateral agreements are a long-term solution. The current approach of negotiating bilateral agreements is necessary, however, given the short time frame in which FATCA will be implemented. Once a country enters into an agreement with the United States, it will need to enact laws to implement the agreement. Thus, in order for FFIs in such countries to be prepared to comply with FATCA, the agreements will need to be negotiated quickly. Moreover, while financial institutions require a large degree of consistency in the international agreements so that they will not have to be subject to entirely different FATCA-based rules in the various

jurisdictions in which they do business, it is also necessary that the intergovernmental agreements are sensitive to local market concerns and legal environments. It is especially important that the negotiations have a high degree of transparency and that the United States and its negotiating counterparties seek the input of the relevant stakeholders during the negotiating process. It is of paramount importance that the intergovernmental agreements make FATCA compliance easier, rather than more difficult, by leading to increased deemed-compliant treatment of FFIs, by leading to greater clarity, and by significantly reducing the potential impact of passthru withholding.

EFAMA welcomes the opportunity to discuss our proposals with you. In ordering our comments, we first provide comments on the proposed regulations (beginning with comments addressing deemed-compliant foreign financial institutions ("FFIs"), followed by comments addressing the various categories applicable to retirement funds and accounts) and then provide comments on issues not addressed in the proposed regulations (such as clarification of the treatment of umbrella/sub-fund structures and of contractual funds, which we view as absolutely crucial).

We have included an appendix to this comment letter, which lists our specific recommendations in the order of the corresponding provisions of the proposed regulations.

1. Deemed-Compliant FFIs and Fund Distributors

a. Restricted Funds under Proposed Regulation Section 1.1471-5(f)(1)(i)(D)

We are pleased that the proposed regulations contain a deemed-compliant category for restricted funds. We believe that the restricted funds category can serve as a valuable tool for funds that do not permit U.S. investors and will enable such funds to comply with FATCA without having to undertake the full burdens of entering into an FFI agreement. However, we have identified several critical areas where modifications or technical corrections are needed for the restricted funds category to be useful to a meaningful segment of the funds industry. In order for the restricted funds category to be widely used by the funds industry, it is crucial that becoming a restricted fund makes FATCA compliance easier for those funds eligible to become restricted funds. If fund managers

perceive the burdens of being a restricted fund to be too onerous, they are unlikely to take advantage of the restricted funds category, even where such funds should qualify for streamlined FATCA compliance because they inherently present a lower risk of U.S. tax evasion.

The restricted funds category reflects an understanding that certain funds present a low risk of being used for U.S. tax evasion because they do not accept U.S. investors. The category can be useful because many funds already prohibit U.S. investors for other reasons. The value of the restricted funds category is that it builds on existing procedures and adapts those procedures to FATCA. However, the requirements for restricted funds with respect to the identification and documentation of new accounts are the same as those placed on participating FFIs and will require significant changes to current anti-money laundering ("AML") regimes. These requirements impose a disproportionate burden on a category of funds that presents a low risk because it does not have U.S. investors. In this regard, we generally endorse ICI Global's comments addressing easing account identification and documentation burdens.

i. Restricted Distributors in the Chain of Ownership Need to be Treated as Deemed-Compliant

The restricted funds category is inextricably linked to restricted distributors, as defined in Proposed Regulation Section 1.1471-5(f)(4). Our specific comments on restricted distributors are contained in Section 1.b of this letter. However, due to the importance of restricted distributors to the restricted fund category, it is important to note at the outset that, as currently drafted, the proposed regulations do not appear to make restricted distributors a deemed-compliant category in their own right. This presents difficulties in the application of the restricted funds category.

Fund distributors can generally be separated into two categories: those that are in the chain of ownership (i.e., by holding the fund interests in a nominee capacity) and those that act in an advice only capacity (such as an introducing broker). Under FATCA, the former are likely FFIs, while the latter may not be. However, the restricted funds/restricted distributor model does not distinguish between these two models. For those distributors that are in the ownership chain, we believe that it is particularly important that they be considered

deemed-compliant in their own right. Such a restricted distributor should be treated similarly to a nonregistering local bank under Proposed Regulation Section 1.1471-5(f)(2)(i). As the proposed regulations are written, we are concerned that a restricted distributor that is in the chain of custody, although permitted as a distributor, is still a non-participating FFI. Accordingly, such a distributor potentially could not distribute restricted fund interests through a participating FFI (i.e., in a multi-tiered distribution chain). ***We therefore recommend that restricted distributors acting in a chain-of-ownership capacity be certified deemed-compliant FFIs in their own right.***

ii. Specific Changes and Technical Corrections

1. Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(1) provides that "interests in the FFI may only be sold through distributors described in paragraph (f)(1)(i)(D)(2) of this section *or redeemed directly by the restricted fund*." (emphasis added) If the italicized language is applied literally, it may mean that restricted funds' direct accounts may only be sold through redemption, to the exclusion of using a subscription model. We do not believe that it should matter whether the restricted fund uses a redemption or a subscription model. ***This concern can be eliminated by simply removing the word "redeemed," as the provision then would refer to interests "sold" directly by the restricted fund.***

2. Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(1) also requires a restricted fund to be "regulated as an investment fund under the laws of its country of incorporation and organization..." A similar requirement is imposed on qualified collective investment vehicles (which are discussed below) under Section 1.1471-5(f)(1)(i)(C)(1). In the EU, the Alternative Investment Fund Management Directive ("AIFMD") regulates the activity and management of any collective investment vehicles other than funds already regulated as UCITS. However, strictly speaking, AIFMD regulates the activity and management of the fund, rather than the fund itself. ***To avoid ambiguity, we recommend that guidance specifically clarify that the requirements of Section 1.1471-5(f)(1)(i)(C)(1) and (D)(1) are met with respect to a fund where the fund's manager is regulated, including under AIFMD.***

3. Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(2) requires each distributor of the fund's interests to be a participating FFI, a registered deemed-compliant FFI, a nonregistering local bank, or a restricted distributor. Some of the funds that likely will seek to take advantage of the restricted funds category may have an additional type of distributor not covered in Section 1.1471-5(f)(1)(i)(D)(2). In particular, United States financial institutions may have operations in European countries through entities which are organized under local law and which are local tax residents, but which have elected to be treated as disregarded entities for U.S. federal income tax purposes. These entities generally are also qualified intermediaries, and they do not distribute fund interests to U.S. investors. Because they are disregarded for U.S. tax purposes, they are viewed as foreign branches of U.S. financial institutions. However, in reality they present no greater risk in terms of distributing restricted fund interests than participating FFI distributors. ***Accordingly, we recommend that Section 1.1471-5(f)(1)(i)(D)(2) be amended to permit distribution of restricted fund interests through a foreign branch of a U.S. financial institution, 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. It would be appropriate to treat such a distributor similarly to a participating FFI in respect of its relationship with the restricted fund.***

4. Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(3) requires the restricted fund to ensure that its distribution agreements prohibit sales "to U.S. persons, nonparticipating FFIs, or passive NFFEs with one or more substantial U.S. owners (other than interests which are both distributed by and held through a participating FFI)." Meeting this requirement will necessitate changes to existing distribution agreements. Under the proposed regulations, the implementation of these changes appears to be a precondition to eligibility for deemed-compliant status as a restricted fund. Funds, regardless of whether they currently already prohibit U.S. investors, will need to amend their prospectuses and renegotiate their distribution agreements in order to become FATCA-compliant. In some jurisdictions, amendment of fund regulations and contracts requires approval by the supervisory authority. Additionally, certain jurisdictions do not permit forced redemptions of fund units or only allow them under restrictive conditions, with the consequence that funds in such jurisdictions will require additional time to implement rules for forced redemptions, or even to lobby for changes in local law. It will take some time for funds that wish to qualify as restricted funds to complete these tasks. The final regulations should provide a transition rule that gives restricted funds sufficient time to renegotiate their

distribution agreements. ***This could be accomplished by deeming any distribution agreements that already contains prohibitions on U.S. investors (i.e., restrictions that are included for U.S. securities laws purposes) to be in compliance with the requirements of Section 1.1471-5(f)(1)(i)(D)(3) until a future date, such as two years after registration as a deemed-compliant restricted fund.***

5. We are also concerned that the placement of the parenthetical language "other than interests which are both distributed by and held through a participating FFI" can be construed to refer only to its immediate antecedent "passive NFFEs with one or more substantial U.S. owners." In light of the restricted funds discussion in the preamble, we believe that the parenthetical is intended to apply to the entire list. ***This should be clarified by moving the parenthetical to the beginning of the sentence so that the provision reads "... prohibits sales of debt or equity interests in the FFI (other than interests which are both distributed by and held through a participating FFI) to U.S. persons, nonparticipating FFIs,..."***

6. Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(4) requires a restricted fund to "ensure that each agreement that governs the distribution of its debt or equity interests" requires any distributor to notify the FFI of a change in status within 90 days of such change. If the distributor ceases to be a permitted distributor, the restricted fund is then required to terminate its distribution agreement with the distributor and to acquire or redeem all debt and equity interests of the restricted fund issued through that distributor. This remedy can be applied where the distributor has a direct relationship with the FFI, but it is not feasible where the distributor is further down the distribution chain and is unnecessary where the upper tier distributor is a participating FFI (similar to the approach taken in Section 1.1471-5(f)(1)(D)(3)). For example, where a fund uses a distributor who then subcontracts distribution of the fund units with a subdistributor, the subdistributor's contractual relationship is with the distributor, not with the fund. While it is appropriate to require the *distributor* to terminate the relationship in such circumstances and equally appropriate that the contract between the fund and the distributor require any subdistribution agreements to contain similar provisions, it will not legally be possible for the fund itself to terminate the contract between the distributor and the subdistributor. ***Accordingly, the regulation should be modified to: (i) clarify that the obligation of the FFI to terminate the distribution agreement applies only with respect to distributors in direct contractual privity with the fund, (ii) impose the***

requirements of Section 1.1471-5(f)(1)(i)(D)(4) on the party with whom the distributor has the contractual relationship, and (iii) exclude interests in the fund held by participating FFIs.

b. Restricted Distributors under Proposed Regulation Section 1.1471-5(f)(4)

As briefly discussed above, distributors of fund interests can be divided into two general categories. The first category consists of distributors that hold fund interests as nominees for investors. Because such distributors are acting in a custodial capacity, they generally will be FFIs. However, many distributors of fund interests act in an advice or introducing only capacity. Such a distributor may market fund interests to its customers and/or may act as an introducer. However, it will not be the record owner of fund interests. Such a distributor, if it does not have other activities, generally will not be an FFI. Even if the distributor's other activities cause it to be an FFI, the advice only distribution will not be a financial account. Both types of distributors should be entitled to be restricted distributors; however, different concerns apply to each category, which are not reflected in the proposed regulations. In particular, some of the requirements of Section 1.1471-5(f)(4) appear unnecessary in the case of advice only distribution.

We accordingly request that the rules for restricted distributors should distinguish between distributors acting in a nominee capacity and advice/introducing only distributors. As discussed in Section 1.a, it is crucial that restricted distributors acting in a nominee capacity be certified deemed-compliant FFIs in their own right.

1. Proposed Regulation Section 1.1471-5(f)(4)(ii) provides that a restricted distributor must be required to perform AML due diligence procedures under the laws of its country of organization. This requirement should be applied where the distributor generally is required to perform AML procedures for all of its accounts under the laws of its country of organization. Our concern is that, in some circumstances, a European distributor that is required to perform AML procedures with respect to its accounts may be excepted from performing AML procedures on certain investors (e.g., those where another entity has already performed AML). Such exceptions under local law should not disqualify the distributor from meeting the requirement of Section 1.1471-5(f)(4)(ii). ***Accordingly, we recommend that Section 1.1471-5(f)(4)(ii) be revised 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 must be FATF-compliant).”

2. Proposed Regulation Section 1.1471-5(f)(4)(iv) requires a distributor not to solicit customers outside its country of incorporation or organization and provides that, for this purpose, “an FFI” will not be considered to solicit customers outside its country of organization merely by operation of a website. As discussed above, advice/introducing only distributors may not be FFIs; accordingly, changing the reference to an FFI to “a distributor” is appropriate as a technical correction. Moreover, it is not clear how the restriction on advertising operates where a distributor advertises, for example, in a newspaper with a circulation outside of its immediate target country or on a television station that is distributed in other countries. For example, most in-country television stations in Europe are distributed more broadly to other EU countries, and many major local-targeted newspapers (e.g., the Times, the Frankfurter Allgemeine) are distributed outside their immediate target market and often in multiple countries. ***Accordingly, we recommend that; (i) the phrase ”an FFI” be changed to “a distributor,” (2) the first reference to ”website” be expanded to add ”or advertises in print or other media of general circulation,” and (iii) there be added after the second reference to ”website” the phrase ”or advertisement.”***

3. Proposed Regulation Section 1.1471-5(f)(4)(v) contains a limitation on gross revenues and assets under management that must be met by restricted distributors. While the concept of assets under management applies to distributors acting in a nominee capacity, advice/introducing only distributors will generally not have assets under management and may not have access to the amounts their clients invest. ***Accordingly, we recommend that the size limitation for advice and/or introducing only distributors be restricted to the gross revenues limitation.***

4. The application of Proposed Regulation Section 1.1471-5(f)(1)(i)(D)(4) (i.e., the requirement that restricted funds redeem fund interests if a distributor ceases to be a permitted distributor) is also unclear and unworkable with respect to advice/introducing only distributors because such a distributor will not itself hold any fund interests that could be redeemed by the fund. Similarly, the requirement of Section 1.1471-5(f)(4)(vii) that the distributor will redeem or cancel interests to prohibited persons is not workable where an advice/introducing only

distributor is concerned for the same reason. ***These requirements (modified as we have suggested above) should not apply unless the distributor is in the chain of custody with respect to the restricted fund.*** Moreover, the requirement that the distributor will forfeit the commission paid to it by the FFI may be prohibited by local law because of specific discrimination concerns. ***We recommend that the requirement that "the commission paid to the distributor will be forfeited to the FFI" be eliminated.***

c. Qualified Collective Investment Vehicles under Proposed Regulation Section 1.1471-5(f)(1)(i)(C)

We expect that the qualified collective investment vehicles ("qualified CIVs") category contained in Proposed Regulation Section 1.1471-5(f)(1)(i)(C) will prove useful to the funds industry in a variety of scenarios. First, where a fund issues a global certificate that is held by a participating FFI, the fund should be able to be a qualified CIV. Second, many funds are sold exclusively to and held directly by large institutional investors, such as pension plans. Such funds should also be able to be qualified CIVs. In terms of assets under management, the qualified CIV category can thus provide extensive relief to the funds industry. Third, certain publicly traded funds may also be able to take advantage of the qualified CIV category. While these scenarios are distinct from each other and each presents its own issues under FATCA, we believe that the qualified CIV category may be useful for all three.

However, certain modifications and clarifications will be necessary to maximize the usefulness of the qualified CIV category. For historic reasons, certain funds with a global certificate have also issued additional physical certificates in bearer form. Because issues with respect to such bearer certificates affect funds more broadly, we address them in the section of this comment letter addressing issues not covered by the proposed regulations.

In addition, some European funds employ a hybrid fund registry system. A portion of such a fund's interests will be securitized in the form of a global certificate, which is deposited with a central securities depository (which is likely to be a participating FFI). The remainder of the fund's interests, however, are directly on the fund's register. Under the proposed regulations, such a fund cannot qualify as a qualified CIV because it will have

direct interest holders that are not permitted of qualified CIVs. Instead, such a fund likely has to become a participating FFI. Although the fund will be able to perform account identification with respect to the investors that appear on the fund's register, it will not be able to determine who the ultimate investors are that hold through the fund's global certificate. Rather, the fund will only be in a position to know that the global certificate is held by a participating FFI (which itself has the account identification obligation with respect to its clients).

Proposed Regulation Section 1.1471-4(a)(2) generally describes a participating FFI's obligation to obtain such information regarding each account holder as is necessary to determine whether the account is held by a U.S. account holder, a recalcitrant account holder, or a nonparticipating FFI account holder. It appears clear that a participating FFI fund's account identification with respect to a global certificate held by another FFI is met if the fund determines that the holder of the global certificate is a participating FFI (in other words, if the global certificate is held by a participating FFI, then the fund has no further obligation to identify the ultimate investors holding through the global certificate). However, our members are concerned that this result is not sufficiently clear under the proposed regulations. The concern stems from reading the participating FFI obligations in conjunction with the qualified CIV obligations. Where the obligations on a participating FFI require the identification of "accounts," the qualified CIV rules require only a determination of who the direct holder of an interest is. Arguably, therefore, the reference to a participating FFI's requirement to identify "accounts" can be construed to require a determination of who the ultimate investor is. If this reading was intended, funds employing a hybrid registry as described above could not become FATCA compliant; they could not be qualified CIVs because of their direct accounts, and they could not comply with the participating FFI requirements because they have no ability to identify the ultimate investors holding through the global certificate. Because of the importance of certainty in this respect, ***we recommend that future guidance clarify that where a fund has a hybrid registry (as described above) 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.***

i. Publicly Traded Funds

Under Section 1471(d)(2)(C), equity or debt interests in an FFI which are regularly traded on an established securities market are not financial accounts. Accordingly, an FFI that has only such interests will not have financial accounts. If a publicly traded fund has no financial accounts, then no "financial accounts" of the publicly traded fund can be held directly by any of the prohibited holders for qualified CIVs. However, Proposed Regulation Section 1.1471-5(f)(1)(i)(C)(2) refers to holders of direct debt interests, holders of equity interests, "or any other account holder of a financial account with the FFI." As written, it is not clear that the reference to equity and debt interests refers only to equity and debt interests that are financial accounts. The distinction is important because while a publicly traded fund may not have financial accounts, it does have equity interests. Thus, if the reference to equity and debt interests is interpreted restrictively to apply only to equity or debt interests that are financial accounts, then many publicly traded funds likely will be eligible to become qualified CIVs. However, if the reference is interpreted more expansively to include any equity or debt interests, even if not financial accounts, then it may be difficult for publicly traded funds in certain countries to become qualified CIVs.

In some countries, the record interest holders in a publicly traded fund will not be the ultimate investor, but rather will be another FFI. If this FFI is a participating FFI, then publicly traded funds in countries that use such a model could still become qualified CIVs, even under the broad interpretation of debt and equity interests discussed above. However, in other countries, such as Ireland, the record holder of publicly traded fund interests generally is the ultimate beneficial owner (i.e., the retail investor is on the publicly traded fund's share register as the record holder of the interest). In these countries, a broad reading of debt and equity interests would render such publicly traded funds ineligible to become qualified CIVs. Thus, an issue of immense importance--whether any publicly traded funds in certain countries can become qualified CIVs--depends on whether the reference to debt and equity interests in Section 1.1471-5(f)(1)(i)(C)(2) is read narrowly or expansively. We believe that all publicly traded funds should be equally eligible for the qualified CIV category, and we therefore request that the proposed regulations be unambiguously clarified to ensure this. ***This***

ambiguity should be clarified, either by revising Section 1.1471-5(f)(1)(i)(C)(2) or by adding a new subsection that specifically addresses the treatment of publicly traded funds.

ii. Funds With Certain Institutional Investors

We believe that funds targeted at institutional investors also will seek to become qualified CIVs. For example, certain funds may be specifically limited to investment by pension plans. By including exempt beneficial owners as permissible holders of direct interests in a qualified CIV, the proposed regulations appear designed to permit such funds to become qualified CIVs.

However, the proposed regulations contain a significant limitation that may not permit such funds to become qualified CIVs: Proposed Regulation Section 1.1471-5(f)(1)(i)(C)(2) does not permit certified deemed-compliant FFIs to hold direct interests in a qualified CIV. This can be particularly problematic where a fund is restricted to retirement funds as investors. While many such retirement funds likely will be exempt beneficial owners--and therefore permitted to hold interests in qualified CIVs--the proposed regulations recognize that certain retirement funds may not be considered to beneficially own the payments they receive and provide a mechanism whereby many such retirement funds may still be able to qualify as certified deemed-compliant FFIs. While the certified deemed-compliant category for such retirement funds offers relief to the retirement funds, a qualified CIV with only retirement funds as investors may need to determine whether such retirement funds are beneficial owners of the payments they receive, and will not be able to accept certified deemed-compliant retirement funds as direct investors. This would be a fundamental change in the way these funds are distributed today and add great uncertainty and risk to a category of funds that should not be faced with such burdens. The qualified CIV would potentially need to redeem any interests held by certified deemed-compliant retirement funds before the CIV could become a qualified CIV (which, with the amounts invested by large institutional investors, is not easily accomplished and may not be permitted under the fund agreement) or will not be eligible for the qualified CIV category. Because such certified deemed-compliant retirement funds do not present a significant risk of being used for tax evasion, permitting them to invest directly in qualified CIVs serves the policy goals of FATCA.

Likewise, non-profit organizations that are certified deemed-compliant do not present a significant risk of being used for tax evasion. Similar to retirement funds, such non-profit organizations (e.g., universities) are among the large institutional investors to which certain funds are targeted. Accordingly, such certified deemed-compliant non-profit organizations should be permitted to invest directly in qualified CIVs.

Further, we endorse ICI Global's recommendation that FFIs with only low-value accounts and nonregistering local banks be permitted to invest directly in qualified CIVs.

We accordingly recommend that certified deemed-compliant FFIs be permitted as direct holders of a qualified CIVs interests.

iii. Additional Concerns

1. ***We propose that future guidance provide that where a fund ceases to meet the requirements of being a qualified CIV because one of the direct holders of the fund's interests ceases to be a permitted interest holder (e.g., a participating FFI that becomes a nonparticipating FFI), the qualified CIV should be permitted a reasonable cure period after learning of the change in status (e.g., six months) before the fund loses its qualified CIV status.***

2. Additionally, when a new fund is created, it is common for seed capital to be contributed from the fund manager or an affiliate. Seed capital is capital that a fund manager or its affiliate will invest in the fund as an initial capital amount when forming the fund. Because the entity that contributes the seed capital may not be an FFI, it may not be one of the permitted interest holders in a qualified CIV. ***We recommend that the qualified CIV category permit such seed capital during the first two years of the fund's operation, even if it would not otherwise qualify as an interest that is held by a permitted interest holder in the CIV.***

3. If the qualified CIV is part of an expanded affiliated group, the proposed regulations require all other FFIs in the expanded affiliated group to be either participating FFIs or registered deemed-compliant FFIs. ***We***

recommend expanding this rule to permit certified deemed-compliant FFIs to be members of an expanded affiliated group that contains a qualified CIV.

d. Local FFIs under Proposed Regulation Section 1.1471-5(f)(1)(i)(A)

The registered deemed-compliant category for local FFIs in the proposed regulations is extremely helpful and reflects the efforts undertaken in the proposed regulations to minimize the burdens of FATCA compliance in appropriate circumstances.

i. Discretionary Grants of Local FFI Status

We recognize the need to draw geographic limitations around the local FFI category. In general, we believe these geographic restrictions will work. However, there are instances where FFIs that operate in multiple countries will otherwise meet the spirit of the local FFI rule. For example, a relatively small FFI may be organized in a city that is close to a border with another country and may have an office in that other country or, even in the absence of such an office, may have clients across the border that make it impractical to meet the local residents test. This may especially be prevalent in smaller countries within the EU and would put FFIs in smaller countries at a disadvantage in comparison to FFIs in larger countries. ***We recommend that the IRS grant discretionary relief to such FFIs.*** For this proposal to be useful, procedures would need to be in place to have these discretionary grants made on an expeditious basis. To this end, future guidance could circumscribe the circumstances under which such relief may be granted.

ii. Points of Clarification and Modification

1. We appreciate that for local FFIs to present a suitably low risk of being used for U.S. tax evasion, a large proportion of the accounts local FFIs maintain must be held by residents of the country in which they are organized (or, in the case of local FFIs organized in one of the EU countries, in the EU). The proposed regulations require that 98 percent of the accounts maintained by a local FFI be so held. In many cases in the EU, the 98 percent number is unrealistically high and would artificially limit the usefulness of the local FFI

category. It will be the norm in many countries that sufficient numbers of citizens move out of the country, especially in smaller EU countries and particularly upon retirement, that more than 2 percent of some local FFIs' account holders will not be residents of the EU. ***We recommend reducing the percentage from 98 percent to 85 percent to decrease this potential problem.***

2. Proposed Regulation Section 1.1471-5(f)(1)(i)(A)(3) prohibits a local FFI from advertising the availability of U.S. dollar denominated deposit accounts or other U.S. dollar denominated investments. The commercial reality in Europe is that many investment funds are priced in U.S. dollars, even though they are not targeted toward U.S. customers. This is significantly more likely if the fund invests in U.S. capital markets. For example, a fund manager may offer its non-U.S. investors a fund that invests in the S&P 500. Such a fund will logically be priced in U.S. dollars. The availability of U.S. dollar denominated investments is not relevant to whether U.S. persons would use an FFI for U.S. tax evasion. Prohibiting local FFIs to advertise investments in the United States for their non-U.S. client base could lead to a chilling effect on foreign investment in the United States and increase the tendency for people outside the United States to drop the dollar standard. ***Accordingly, future guidance should 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.***

3. Proposed Regulation Section 1.1471-5(f)(1)(i)(A)(4) requires that a local FFI be required under the tax laws of the country in which the FFI is incorporated or organized to perform either information reporting or withholding of tax with respect to accounts held by residents. The preamble, in another context, states that "financial institutions in EU Member States have common tax reporting and withholding obligations with respect to EU residents." However, it is not clear whether such common tax reporting and withholding obligations are what was contemplated by Section 1.1471-5(f)(1)(i)(A)(4). ***We recommend that future guidance clarify that this requirement 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.***

e. Other Issues with Respect to Deemed-Compliant FFIs

i. Providing Certified Deemed-Compliant FFIs and Exempt Beneficial Owners the Option to Certify Their Status to the IRS

The proposed regulations recognize that a limited category of inherently low risk FFIs should not be required to register with the IRS in order to qualify as deemed-compliant (certified deemed-compliant FFIs). The proposed regulations also permit certain low risk FFIs to be exempt beneficial owners, which also do not need to register with the IRS. However, one effect of being registered deemed-compliant is that it may be easier for a registered-deemed compliant FFI to certify its status to withholding agents than for certified deemed-compliant FFIs or exempt beneficial owners. For example, where a certified deemed-compliant FFI may have to provide each withholding agent with organizational documents supporting its claim of certified deemed-compliant status, a registered FFI can simply provide its FFI-EIN. Other distinctions are that most certified deemed-compliant FFIs are prohibited from being indirect owners of and distributors for restricted funds, and that certified deemed-compliant FFIs cannot be direct holders of qualified CIVs.

Although certified deemed-compliant FFIs should not be required to register, ***we recommend that certified deemed-compliant FFIs and exempt beneficial owners be provided an option whereby they could certify to the IRS that they meet the requirements of their applicable status (i.e., by providing the IRS with a withholding certificate and the other documentation required to establish their FATCA status) and be issued an FFI-EIN.*** This would permit certified deemed-compliant FFIs and exempt beneficial owners to streamline their FATCA certification procedures. We anticipate that such a registration option would be particularly useful to certified deemed-compliant FFIs and exempt beneficial owners that have to provide numerous certifications.

ii. Standards of Knowledge under Proposed Regulation Section 1.1471-5(f)(1)(ii)

Proposed Regulation Section 1.1471-5(f)(1)(ii)(A) requires the chief compliance officer or an individual of equivalent standing with the FFI to certify to the IRS that all of the requirements for the deemed-compliant category claimed by the FFI have been satisfied as of the date the FFI registers as a deemed-compliant FFI.

Elsewhere in the proposed regulations, reference is made to certification by a "responsible officer" of an FFI (see, e.g., Sections 1.1471-4(a)(6)). However, with reference to registered deemed-compliant FFIs, the proposed regulations specify that the chief compliance officer or an individual of equivalent standing certify that the FFI meets the requirements of its deemed-compliant status. To maintain consistency and to permit FFIs flexibility in deciding on the appropriate person to execute the certification, ***we recommend that the reference to "the chief compliance officer or an individual of equivalent standing with the FFI" be amended to read "a responsible officer of the FFI."***

We have already addressed the issues certain FFIs, particularly restricted funds, may face in meeting these requirements by the time they would need to provide the certification, and we have suggested that transition rules be provided where necessary. Additionally, the proposed regulations do not specify the standard of knowledge that will be imposed on the chief compliance officer or other person providing the certification. ***Future guidance should specify 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 deemed-compliant category it has claimed (similar to the standards of Treas. Reg. Sec. 1.1441-7(b)).***

iii. Other Deemed-Compliant FFI Categories

There is a case that certain closed ended listed FFIs where investors have no right to redemption and where controls on U.S. investors are present could be treated as presenting a low risk of tax evasion. We support the request by the Association of Investment Companies for a potential additional category of deemed-compliant funds.

2. Retirement Funds and Financial Accounts

The proposed regulations contain numerous rules seeking to ease the burdens of FATCA for retirement funds and certain other savings vehicles. Such relief is provided through granting exempt beneficial owner status to certain retirement funds, granting certified deemed-compliant status to certain other retirement funds, and providing an exception from the definition of financial account for certain retirement or other savings vehicles. These rules have important distinctions but also often contain parallel language.

a. Exceptions from the Definition of Financial Account for Certain Retirement and Other Savings Accounts under Proposed Regulation Section 1.1471-5(b)(2)(i)

Proposed Regulation Section 1.1471-5(b)(2)(i) contains exceptions from the definition of financial accounts for certain retirement and pension accounts and for certain non-retirement savings accounts. We understand that these exceptions are designed to provide an exemption from FATCA for certain individually directed savings vehicles that present a low risk for tax evasion. For example, the exception could apply to vehicles comparable to individual retirement accounts (IRAs) or 401(k) accounts in the United States. Both exceptions have requirements such as a $50,000 annual contribution limitation and a requirement that the account be tax-favored with regard to the jurisdiction in which it is maintained.

While it is generally appropriate to have such limitations, some of the specific limitations contained in the proposed regulations are unnecessarily restrictive.

Proposed Regulation Section 1.1471-5(b)(2)(i)(A)(2)(ii) requires that all contributions to a retirement account be employer, government, or employee contributions that are limited by reference to earned income. It appears that this provision was included to provide a parallel to provisions contained in the exempt beneficial owner and certified deemed-compliant categories. However, it is unclear why it is necessary to limit contributions by reference to earned income when a strict $50,000 limit already exists. Moreover, it is unclear why contributions for such savings vehicles must come from government, employer, or employee contributions if there is already a strict limit on contributions. We note that it is unlikely that a U.S. IRA account could meet this limitation because

contributions thereto can come from sources other than earned income (e.g., savings). Similarly, many retirement savings vehicles in the EU that otherwise have strict contribution limits will not meet this requirement because they permit contributions without regard to whether those contributions are made out of wages from employment. ***We therefore recommend that Section 1.1471-5(b)(2)(i)(A)(2)(ii) and Section 1.1471-5(b)(2)(i)(B)(1) be eliminated from the proposed regulations.***

It is also unclear how the $50,000 limitation of Proposed Regulation Section 1.1471-5(b)(2)(i)(A)(2)(iii) applies. While the provision first appears to require a strict $50,000 limitation, it goes on to provide that limits or penalties must apply to annual contributions exceeding $50,000. It is thus unclear whether the $50,000 limit is absolute or whether annual contributions in excess of $50,000 are permissible as long as penalties apply to such contributions. In some countries, the consequences of exceeding a monetary limit is that contributions in excess of the limit and the earnings on those contributions do not receive any tax benefit (i.e., the excess contributions are not deductible and/or the earnings on the contributions are not deferred from current taxation***. We recommend that this ambiguity be clarified in future guidance, including making clear that the denial of tax benefits that would otherwise be accorded is an example of the relevant penalties.***

b. Retirement Funds as Exempt Beneficial Owners under Proposed Regulation Section 1.1471-6(f) and as Certified Deemed-Compliant FFIs under Proposed Regulation Section 1.1471-5(f)(2)(ii)

The proposed regulations contain rules permitting certain retirement funds to be either exempt beneficial owners (if they beneficially own the payments they receive) or certified deemed-compliant (if they are not beneficial owners of payments they receive but instead act as "investment conduits"). The exempt beneficial owner rules of Section 1.1471-6(f)(1)(ii) and the certified deemed-compliant rules of Section 1.1471-5(f)(2)(ii)(A)(1) have substantial overlap, and we therefore address these two sections together. These provisions appear intended to provide broad relief to many retirement funds; however, several limitations and ambiguities may limit the usefulness of these provisions.

Under Section 1.1471-6(f)(1)(i), a retirement fund may qualify as an exempt beneficial owner if it is the beneficial owner of the payments it receives and if (among other requirements) it is entitled to benefits under an income tax treaty with the United States. It is unclear whether the test for beneficial ownership for such a retirement follows the determination made for purposes of claiming treaty benefits, or if a different test (e.g., similar to Treas. Reg. Sec. 1.1441-1(c)(6)) applies. ***We recommend that future guidance clarify that where a retirement fund is eligible for treaty benefits with respect to an item of income and otherwise meets the requirements for being a retirement fund described in Section 1.1471-6(f)(1)(i), it will be treated as the beneficial owner of the payment for purposes of Section 1.1471-6(f)(1).***

Both Sections 1.1471-5(f)(2)(ii)(A)(1)(i) and 1.1471-6(f)(1)(ii)(B) require that all contributions are "employer, government, or employee contributions that are limited by reference to earned income." There are two potential problems with this definition. First, limiting contributions only to employers, governments, and employees fails to take into account plans that are organized in such a way that self-employed persons may contribute. By way of analogy, we note that contributions to the social security system in the United States come not only from employee and employer contributions, but also by contributions from self-employment income. A similar system in a foreign country, if privatized (so that it would not qualify as a foreign government that is an exempt beneficial owner under Section 1.1471-6(b)), likely could not qualify as an exempt beneficial owner or certified deemed-compliant FFI. A number of European countries have retirement funds that permit self-employed persons to contribute. For example, a retirement plan may permit members of a professional association, such as attorneys, to participate. While a number of the participants would be employees (e.g., of law firms), some would not be (e.g., partners at law firms, solo practitioners). Such plans represent no greater risk of use for tax evasion if contributions thereto are otherwise appropriately limited. An additional concern exists that certain retirement funds may permit some contributions even where persons are not employed. For example, retirement plans in the United Kingdom permit individuals to contribute up to GBP 3,600 annually even if those individuals are unemployed. Such de minimis contributions, where appropriately limited, do not present a significant risk of tax evasion. ***We accordingly recommend that future guidance clarify that retirement funds will not fail to qualify as deemed-compliant FFIs or exempt beneficial owners if they permit participation by self-employed persons, partners, or other owners of businesses or if they permit up to a limited amount of contributions that are not made from earned income.***

Second, the rule that contributions must be limited "by reference to earned income" is ambiguous. While it appears that a plan that permits contributions only out of wages from employment (and thereby structurally limits contributions to a participant's earned income) will meet this criterion, it is unclear whether a plan that places a strict cap on contributions (e.g., an annual limit of 50,000 Euros) will qualify because such a cap may not reference earned income. ***We accordingly recommend that future guidance clarify how the earned income limitation applies in case of a plan with a strict monetary annual contribution limit by revising Sections 1.1471-5(f)(2)(ii)(A)(1)(i) and 1.1471-6(f)(1)(ii)(B) to refer to "contributions that are limited by reference to earned income or are limited to a specific or ascertainable monetary limit."***

Moreover, Sections 1.1471-5(f)(2)(ii)(A)(1)(ii) and 1.1471-6(f)(1)(ii)(C) provide that no single beneficiary may have the right to more than 5 percent of the entity's assets. While this requirement may not present a problem for large retirement funds, it can present a problem for smaller retirement funds. However, given the extremely restrictive requirements imposed on small retirement funds under Section 1.1471-5(f)(2)(ii)(A)(2) (discussed immediately below), most smaller retirement funds likely will not be able to benefit from that provision. ***To make the retirement fund categories more workable, we recommend increasing the 5 percent limitations of Sections 1.1471-5(f)(2)(ii)(A)(1)(ii) and 1.1471-6(f)(1)(ii)(C) to 10 percent.***

In addition to the provisions discussed, the certified deemed-compliant provisions under Section 1.1471-5(f)(2)(ii)(A)(2) contain a category that appears designed to provide relief for certain small retirement funds. While we appreciate that Treasury and the IRS may have greater concern that such plans could be used for tax evasion if not sufficiently limited, the restrictions as drafted will render this provision unworkable.

Section 1.1471-5(f)(2)(ii)(A)(2)(v) permits no participant that is not a resident of the country in which the FFI is organized to be entitled to more than $250,000 of the plan's assets. We appreciate the concern that a small plan could be inappropriately used as a vehicle for tax evasion. However, bearing in mind that the retirement fund is an accumulation of a lifetime of contributions by or on behalf of the participant, a $250,000 asset limitation is extremely low for a retirement savings vehicle and would make the small plan category of very limited utility. ***We recommend that the limitation be increased to $2 million.***

3. Other Items Addressed in the Proposed Regulations

a. Exempt Beneficial Owners under Proposed Regulation Section 1.1471-6(g)

Proposed Regulation Section 1.1471-6(g) provides that entities that are wholly owned by exempt beneficial owners described in paragraphs (b) through (f) of Section 1.1471-6 are themselves exempt beneficial owners. This provision can prove especially useful where an entity that beneficially owns the payments it receives presents an extremely low risk of being used for tax evasion because it is wholly owned by other low-risk entities, such as foreign governments, international organizations, foreign central banks of issue, governments of U.S. possessions, and exempt beneficial owner retirement funds.

However, Section 1.1471-6(g) does not permit certified deemed-compliant retirement funds or certified deemed-compliant non-profit organizations to be owners of an exempt beneficial owner described in Section 1.1471-6(g). Such certified deemed-compliant retirement funds or non-profit organizations present no greater risk of being used for tax evasion than the entities described in Section 1.1471-6(b) through (f), especially where the beneficial owner of the payments is the entity described in Section 1.1471-6(g). Moreover, in certain jurisdictions, there are investment vehicles open exclusively to local retirement funds (e.g., investment foundations in Switzerland). Under the proposed regulations, it is unclear whether such vehicles would be treated as exempt beneficial owners because these vehicles as such are not formally "owned" by exempt beneficial owners, as there are no "owners" of foundations. Nevertheless, these vehicles cannot represent a risk of being used for tax evasion if their investors are all exempt beneficial owners. ***We accordingly recommend that Section 1.1471-6(g) be amended to provide that an FFI is described in Section 1.1471-6(g) "as long as such FFI is wholly owned by one or more entities described in paragraph (b), (c), (d), (e), or (f) of this section or in section 1.1471-5(f)(2)(ii) or (iii) or if all investors in such FFI are entities described in paragraph (b), (c), (d), (e), or (f) of this section or in section 1.1471-5(f)(2)(ii) or (iii)."***

We are also concerned that a potential ambiguity exists whether the ownership described in Section 1.1471-6(g) must be direct or may be indirect. We note in this regard that Section 1.1471-6(g) refers only to FFIs that are

"wholly owned," whereas Section 1.1471-6(b)(3), referring to controlled entities of a foreign sovereign, specifically provides for direct or indirect ownership. It should not matter whether the Section 1.1471-6(g) FFI is directly or indirectly owned by permitted owners, as long as the indirect ownership chain does not include any owners that are not described in Section 1.1471-6(g). ***We therefore recommend that the list of entities that may be permitted owners of an FFI that is described in Section 1.1471-6(g) be further expanded to include other FFIs that are described in Section 1.1471-6(g).***

b. Definition of "Regularly Traded on an Established Securities Market" under Proposed Regulation Section 1.1471-5(b)(3)(iv)

Section 1471(d)(2)(C) provides that equity or debt instruments in certain financial institutions are not financial accounts if such equity or debt interests are "regularly traded on an established securities market." The proposed regulations provide that such equity or debt interests are regularly traded on an established securities market if two requirements are met: (i) trades in such interests are effected, other than in de minimis quantities, on such market or markets on at least 60 days during the prior calendar year; and (ii) the aggregate number of such interests that were traded on such market or markets during the prior calendar year was at least ten percent of the average number of such interests outstanding during the prior calendar year. This rule suffers from several deficiencies.

This definition of "regularly traded on an established securities market" uses similar concepts as are used for purposes of the limitation on benefits articles of numerous income tax treaties to which the United States is a party. The treaty analogy appears to have been chosen in favor of other tests for "regularly traded" contained in U.S. federal income tax law (e.g., under Treas. Reg. Sec. 1.1296-2(b)).

However, in the treaty context, the importance of these deficiencies is much less pronounced than in the context of FATCA. Most treaty claimants that rely on this test are established publicly traded multinational corporations where these deficiencies are rarely relevant. For Chapter 4 purposes, the consequences of the interests not being "regularly traded" are much more fundamental. On the one hand, the FFI may have no financial accounts and may therefore qualify for deemed-compliant treatment (e.g., as a qualified CIV, as discussed above) and/or

may not have to incur the expenses of undertaking due diligence or building new reporting and withholding systems because it does not have financial accounts. On the other hand, if the interests cease to be "regularly traded," the FFI is suddenly thrust into a situation where it must fully comply with all the requirements applicable to participating FFIs and, unless and until it rectifies its status, its investments with other FFIs could jeopardize the FATCA status of those other FFIs.

For this reason, it is extremely important that the "regularly traded on an established securities market" definition under Chapter 4 be structured in a way that minimizes ambiguity and that minimizes year to year changes in whether the FFIs debt or equity interests are "regularly traded."

First, we recommend that the rule in the proposed regulations should not be applied on a year to year basis. Rather, inconsistency could be avoided by applying a 3-year look-back rule, so that the interests would be treated as regularly traded if they met the requirements during any one of the previous three calendar years. Although not preferable, a 3-year average (similar to the Section 1.1471-5(d)(4) definition of when an entity is engaged primarily in the business of investing, reinvesting, or trading) could also reduce unpredictability.

Second, even in the treaty area, it is not clear what is meant by trades "other than in de minimis quantities." The IRS has published little guidance in this area. If the de minimis requirement is retained, it is crucial that additional clarity be given regarding what constitutes more than de minimis trading. ***This could be accomplished, for example, by a safe harbor rule. If necessary, such a rule could be restricted by its terms to Chapter 4.***

Additionally, we endorse the case set out by the Association of Investment Companies that in the case of closed ended listed FFIs where the traded shares are widely held, either as a result of the non-close company requirements and/or liquidity requirements under the rules of the relevant established securities market, it is not necessary to meet the turnover threshold or the minimum trading day requirement..

4. Items Not Addressed or Clarified in the Proposed Regulations

a. Treatment of Umbrella/Sub-Fund Structures

The proposed regulations did not address the treatment of umbrella/sub-fund structures. We addressed the importance of this issue in our comment letter of June 7, 2011. Currently, ambiguity exists whether FATCA must be applied at the umbrella level or at the sub-fund level. Under an umbrella/sub-fund structure, the sub-funds may not have separate legal personalities; however, funds are almost always marketed, distributed, and sold at the sub-fund level and investors in one sub-fund should not be impacted by the FATCA consequences resulting from the characteristics of another sub-fund.

Ambiguities surrounding the appropriate level at which to apply tax principles in the case of umbrella/sub-fund structures are not new and are not unique to Chapter 4. However, while such ambiguities have been manageable under Chapter 3, clarity is absolutely crucial under Chapter 4. It will simply be impossible for funds to apply FATCA without knowing whether it must be applied at the umbrella level or at the sub-fund level, and the lack of clarity will substantially undermine the ability of funds to become FATCA compliant.

The logical solution from a policy perspective is to apply FATCA at the sub-fund level. This would follow the economics of how funds are structured and would follow the tax treatment of investors. Moreover, if combined with a centralized compliance option (discussed below), applying FATCA at the sub-fund level will also lead to an administratively more effective approach for both the funds and the government. ***We recommend that future guidance specifically clarify that for purposes of applying FATCA, 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.***

b. Treatment of Contractual Funds

Similar concerns exist with respect to contractual funds (i.e., funds that are contractual vehicles but have no legal personality in their countries of organization). Unlike umbrella/sub-funds, there is some guidance, in the

form of letter rulings, that indicates that such contractual funds may be entities for U.S. federal income tax purposes and may be eligible entities under the "check the box" regulations of Section 301.7701-3. However, there is a lack of guidance that may be relied upon by foreign contractual funds. ***We recommend that future guidance specifically clarify that a contractual fund that has no legal personality under local law is nevertheless a separate FFI for FATCA purposes.***

c. Centralized Compliance Option for Funds

Notice 2011-34 states that the IRS and Treasury are considering providing funds a centralized compliance option whereby a fund manager or other agent would execute a single FFI agreement on behalf of each member of a group of funds that contracts with the fund manager. Under this option, the fund manager would act as a point of contact with the IRS with respect to the funds it manages. The proposed regulations do not provide for a centralized compliance option for funds. ***We support such a centralized compliance option and suggest that future guidance clarify how it would be implemented***, particularly because it cannot be implemented if it leverages the expanded affiliated group concept.

We note that the discussion of a centralized compliance option for funds in Notice 2011-34 is contained in the section of the Notice addressing expanded affiliated groups of FFIs and the application of Section 1471(e). It is important that a centralized compliance option for funds is not dependent on the expanded affiliated group concept. Rather, a fund manager should be permitted a centralized compliance option for the funds under its management.

As discussed above, many European funds have no legal personality under local law (such as contractual funds in France, Luxembourg, and the Netherlands, as well as unit trusts in the United Kingdom), and may others will have no employees or persons acting as directors, but may instead have corporate directors. Regulations governing such funds usually require the participation of more than one entity in the fund structure. A common function is that of a corporate depository that is required to safeguard the fund's assets and provide oversight of the management of the fund's assets.

Where the fund has no legal personality itself, or no employees or officers, the signatory of the FFI agreement, and the role of the responsible officer, should be provided by an entity acting on behalf of the fund, with an employee of that entity taking the role of the responsible officer. While fund structures will differ from country to country, we expect that an officer of the fund manager will fulfil this role. Guidance should ensure that FATCA obligations in respect of a fund are not duplicated by virtue of the fact that, for regulatory purposes, a fund structure requires more than one entity.

FATCA regulations should also make clear that, where a fund is a participating FFI, other entities in the fund structure other than the signatory to the FFI agreement (such as the depository or trustee) should not have duplicative obligations under FATCA in respect of the FFI fund's accounts. We endorse the Investment Management Association's comments addressing these issues.

d. De Minimis Exception from the Definition of "Financial Account"

Proposed Regulation Section 1.1471-5(a)(4)(i) provides as exception from the definition of financial account for depository accounts held by individuals that do not exceed $50,000 (after applying an aggregation rule). Additionally, Proposed Regulation Section 1.1471-4 provides participating FFIs documentation exceptions for entity accounts that do not exceed $250,000, as well as for preexisting individual account holders of certain cash value insurance or annuity contracts not in excess of $250,000.

Retail investment funds have large numbers of small investors, often numbering in the tens of thousands. Under Section 1.1471-5(b)(1)(iii), all equity or debt interests in such investment funds will be financial accounts, no matter how small the account. As a consequence, such retail funds face a significant compliance burden in reviewing these small accounts, especially when compared to the risk of tax loss to the U.S.

Therefore, we recommend that future guidance 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.

e. Expanded Affiliated Group Considerations

The Section 1471(e) rules pertaining to expanded affiliated groups present special considerations for the funds industry. Funds organized in corporate form are unlikely to be members of the same expanded affiliated group because it is unlikely that the same person will own more than 50 percent of both the vote and the value of a fund. For funds organized in partnership form, where only value is considered, while it is possible that one person may have a greater than 50 percent economic interest, this will be the exception from the norm. While this is likely to be more common in the context of private equity than for mutual funds, we nevertheless believe that ***it should be clarified 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.*** Such a rule is also needed because under the proposed regulations, if the investor were of a type that could be a certified deemed-compliant FFI or an exempt beneficial owner, it could not take advantage of either certified deemed-compliant FFI or exempt beneficial owner provisions, because the proposed regulations require that each FFI in an expanded affiliated group that contains a participating FFI or a registered deemed-compliant FFI must itself be either participating or registered deemed-compliant.

Moreover, the management company and the fund should not constitute an expanded affiliated group. This will generally be the case because the management company and the fund's investors will be separate. We have recommended that guidance specifically clarify that contractual funds be treated as separate FFIs. If such clarification is provided, the contractual fund and its management company are unlikely to be considered members of the same expanded affiliated group. However, ***future guidance should also specifically clarify that for purposes of applying the affiliated group requirements of Section 1471(e) and Proposed Regulation Section 1.1471-5(i)(2), a contractual fund will be considered to be an entity separate from its management company.***

Additionally, in limited circumstances, an expanded affiliated group issue may arise when a fund is initially formed and the fund manager (or an entity affiliated with the fund manager) contributes seed capital to the fund. Such seed capital is provided as initial funding; accordingly, once outside investors invest in the fund, the seed capital is generally withdrawn. Even if it is not withdrawn, as outside investment comes into the fund, the seed

capital should constitute a low enough percentage that the entity providing the seed capital and the fund will not be in the same expanded affiliated group. Thus, where funds are formed with an initial injection of seed capital, the funds may initially be part of an expanded affiliated group under the proposed regulations, but will generally cease to be members of an expanded affiliated group as outside investment in the funds increases. Because this temporary situation can cause administrative difficulties, ***we recommend that Section 1.1471-5(i) provide that during the two-year period following the date the 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.***

f. Historic Physical Certificates Issued in Bearer Form

For historic reasons, funds in certain European countries have issued physical certificates in bearer form. Such certificates may have been issued in addition to a fund's global certificate that is held by a central securities depository, or it may be issued in addition to fund interests distributed through other means. Accordingly, a variety of funds, including those that will likely become participating FFIs and those that will likely seek to benefit from deemed-compliant treatment (e.g., as restricted funds or as qualified collective investment vehicles), will have to address the impact of these certificates on their ability to comply with FATCA.

The issuance of physical fund certificates in bearer form to retail investors via the depository bank of the fund was largely an earlier form of securitizing a fund. This method was used in certain European countries (such as Germany and Luxembourg) until approximately 2000 in addition to the global certificate model or the transfer agent model, but it has almost entirely lost its practical importance for issuing new fund units for administrative and cost reasons. However, such physical certificates in bearer form still exist, and some of the industry's long-operating investment funds therefore have outstanding physical certificates in bear form. Because the investment fund does not know the identity of the holder of the certificate, it cannot determine the identity of the holder until the bearer certificate is presented for payment. Under local law, the fund is not permitted to confiscate the physical certificates in order to replace them with another form of securitization. Because the buyer of such certificates would need to verify their validity, a process that is complicated and time-consuming and therefore not feasible for individuals, there is no secondary market for such certificates.

The impact of this inability to determine who the interest holder is until the certificate is presented for payment has different ramifications for participating FFI funds, restricted funds, and qualified CIVs.

In the case of a participating FFI fund, the fund will not be in a position to distinguish whether the interest is held by an individual or an entity, or by a U.S. person or a non-U.S. person. Accordingly, the participating FFI fund will not be able to identify the interest as a recalcitrant account and will not be in a position to obtain documentation with respect to the certificate until it is presented for payment (i.e., distribution or redemption). It is unclear whether such bearer certificates would be considered recalcitrant accounts and (if they are) whether an excessive amount of such bearer certificates could jeopardize the fund's FFI agreement.

A similar concern exists with respect to restricted funds, since the bearer certificates will be direct accounts of the fund. Here, however, the need is to ensure that no U.S. persons or nonparticipating FFIs are holders of fund interests.

However, both participating FFIs and restricted funds will be in a position to perform required diligence on the physical certificates when they are presented for payment. This means that a participating FFI would at all times be in a position to impose passthru withholding on such physical certificates, while a restricted fund would be in a position to comply with the requirement to redeem (or alternatively, to withhold and report) the physical certificate if it determines at the time the certificate is presented that it is held by an impermissible investor. ***We accordingly recommend that future guidance provides that where a fund has issued physical certificates in bearer form, such certificates will not jeopardize the fund's status as a participating FFI or as a restricted fund, as long as 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 in any form. It would be appropriate to require such funds to agree to not 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 agree to perform diligence on the shares when they are presented for redemption or other payment.***

A different issue presents itself for funds seeking to become qualified CIVs. The proposed regulations make clear that the qualified CIV category is intended to be available to FFIs that issue a global certificate, if such global certificate is held by, for example, a participating FFI. Such a structure is widely used in certain European countries. The advantage of the qualified CIV category is that, where all issuance of fund units and/or payment processes are performed by other FATCA-compliant entities such as participating FFIs (and these entities actually have the capacity and obligation to identify the holders of the fund's interests), compliance for the fund itself can be made significantly easier. However, in certain countries that use global certificates, additional physical shares may have been issued historically, including in bearer form. In this case, the proposed regulations appear to disqualify the fund from becoming a qualified CIV.

Section 1.1471-5(f)(1)(i)(C)(2) requires that "**each** holder of record... (for example, the holders of its units or global certificates)" (emphasis added) must be a participating FFI, registered deemed-compliant FFI, or another permitted interest holder. As a consequence of having issued bearer shares, the fund will not be able to determine that "each holder of record of interest" is a participating FFI or other permitted holder.

In the case of a fund issuing a global certificate, payment (i.e., fund distributions, redemption price) on such additional physical certificates will only be made via the fund's depository bank or a custodian bank. The fund's depository bank will be a participating FFI, and custodian banks will also need to be FATCA-compliant, with the consequence that FATCA diligence will be performed when such certificates are presented for payment.

Because payment on the certificates will be through the depository bank or a custodian bank, the fund itself will not know who the certificate holder is (for the same reasons that the fund cannot know who the ultimate investors holding through a global certificate are).

In order to alleviate this problem, ***we recommend that language be added to Section 1.1471-5(f)(1)(i)(C)(2) to provide that if any of the holders of record 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, ***we recommend a grandfather rule that permits an FFI that has issued bearer shares to be a qualified CIV as long as its other shares are held by permitted interest holders. It would be appropriate to require such funds to agree 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 agree to perform diligence on the shares when they are presented for redemption or other payment***.

g. Transfer Agents

We are aware of comments made by transfer agents requesting clarity in respect of their obligations under Chapter 4. We support the broad principle that a transfer agent should not have a broader 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 trump that of the fund.

5. Conclusion

We appreciate the opportunity to provide you with the above comments. The proposed regulations go a considerable distance towards alleviating some of the potential burdens FATCA implementation could present for the European funds industry. While significant issues remain, we believe that the above proposals, if adopted, will make FATCA more workable for the European funds industry. We welcome the opportunity to discuss our proposals and concerns with you.

Sincerely,

Peter De Proft

Director General

[Enc.]

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