

# TAX SECTION



www.floridatallaxlawyers.org

## **CHAIR**

Domenick R. Lioce  
Nason Yeager Gerson White & Lioce  
1645 Palm Beach Lakes Blvd., Ste. 1200  
West Palm Beach, FL 33401-2214

## **CHAIR-ELECT**

Michael Allen Lampert  
The Forum, Suite 900  
1655 Palm Beach Lakes Blvd.  
West Palm Beach, FL 33401-2225

## **SECRETARY**

Abrahm William Smith  
Baker & McKenzie, LLP  
1111 Brickell Ave., Suite 1700  
Miami, FL 33131-3137

## **TREASURER**

Janette M. McCurley  
B. Gray Gibbs, PA  
100 2nd Avenue South, Suite 101S  
St. Petersburg, FL 33701  
(727) 892-9901/FAX: (727) 892-9902  
E-mail: jmm22869@yahoo.com

## **IMMEDIATE PAST CHAIR**

Guy E. Whitesman  
Henderson Franklin et. al.  
Post Office Box 280  
Fort Myers, FL 33902-0280  
(239) 344-1180/FAX: (239) 344-1200  
E-mail: guy.whitesman@henlaw.com

## **BOARD LIAISON**

Laird A. Lille  
3033 Riviera Drive, Suite 104  
Naples, FL 34103-2746  
(239) 649-7778/FAX: (239) 649-7780  
Email: Lille@lairdAlille.com

## **EDUCATIONAL PROGRAMS**

Harris L. Bonnette, Jr., Director  
Andrew T. Huber, Director

## **SECTION ADMINISTRATION**

Steven Hadjiligiou, Director  
Vivian N. Rodriguez, Director

## **STATE TAX**

Joseph B. Schimmel, Director  
Rex D. Ware, Director

## **FEDERAL TAX**

William R. Lane, Jr., Director  
D. Michael O'Leary, Director

## **LONG RANGE PLANNING**

Cristin Conley Keane, Director  
Joel D. Maser, Director

## **New Tax Lawyers**

Daniel Bensimon, Director  
Tiffany J. Kolb, Director

## **DIRECTORS AT LARGE**

Richard B. Comiter  
Mark E. Holcomb  
Mitchell I. Horowitz  
Michael D. Minton  
Robert E. Panoff  
Mark Scott

## **PROGRAM ADMINISTRATOR**

Ashlea Wiley  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, Florida 32399-2300  
(850) 561-5624/FAX: (850) 561-9427  
E-mail: awiley@flabar.org

April 30, 2012

CC:PA:LDP:PR (REG-121647-10)  
Room 5205  
Internal Revenue Service  
PO Box 7604  
Ben Franklin Station  
Washington, DC 20044

Via Federal eRulemaking Portal: <http://www.regulations.gov> (IRS REG-121647-10)

RE: Comments to Proposed Regulations to Chapter 4 of Subtitle A (Sections 1471 through 1474) of the Internal Revenue Code of 1986.

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's comments to the proposed regulations to Chapter 4 of Subtitle A (Sections 1471 through 1474) of the Internal Revenue Code of 1986 (the "Proposed Regulations").

Principal responsibility for these comments was exercised by Steven Hadjiligiou, Erika Litvak, Alfredo Tamayo, and Abrahm W. Smith. The comments were reviewed by James H. Barrett.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the Proposed Regulations, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

Contact Person:

James H. Barrett  
Baker & McKenzie, LLP  
1111 Brickell Ave, Ste. 1700  
Miami, FL 33131-3137  
Telephone: (305)789-8957  
Fax: (305)789-8953  
Email: james.barrett@bakermckenzie.com

FATCA Proposed Regulations

Page 2

April 30, 2012

---

The Florida Bar Tax Section is comprised of approximately 2,000 members. These materials were prepared by the Comment Projects Subcommittee of the Tax Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,



Dominick R. Lioce, Chair

## Comments to FATCA Proposed Regulations

### **I. General**

1. The Tax Section of the Florida Bar (the "Section") is pleased that the U.S. Treasury Department ("Treasury") and the Internal Revenue Service ("IRS") considered and incorporated many of the comments that the public submitted with respect to the FATCA Notices issued during 2010 and 2011. While the implementation associated with chapter 4 is still very complex and expensive, particularly, although not exclusively, for certain institutions that fall within the category of "foreign financial institutions" (referred herein as "FFI" individually and "FFIs" collectively), the Proposed Regulations, which focus and build on existing AML/KYC processes and contemplate a more focused approach on investment vehicles that are more likely to lead to tax evasion, provides certain degree of relief for FFIs and withholding agents.
2. In connection with the issuance on February 8, 2012 of Proposed Regulations under chapter 4 of Subtitle A (§§ 1471 through 1474) of the Internal Revenue Code of 1986, the Treasury issued a Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom announcing an intergovernmental approach to FATCA implementation (the "Joint Statement"). It is unclear if the FATCA partner agreements (contemplated by the Joint Statement) will be in force by January 1, 2013 (the date FFI registration starts), or by June 30, 2013 (the date that FFIs are supposed to register in order to avoid being subject to withholding beginning on January 1, 2014). FFIs organized in the jurisdictions that have expressed interest in entering into FATCA agreements are uncertain about how to prepare for FATCA. FFIs will be required to create or update their policies and procedures, change computer systems (which will be costly and time consuming) and train personnel. FFIs in those jurisdictions are unclear what system will apply to them. Basic issues relating to FATCA remain unresolved such as the extent to which an FFI will be required to sign an FFI agreement, report to the IRS information required under chapter 4, and withhold on withholdable payments. Similarly, it is not resolved whether such FFIs will be considered to be deemed compliant FFIs, which would not, under the Joint Statement, be required to, for example, withhold on foreign pass-through payments. These provisions also would require them to report to their local tax authorities under provisions enacted by such local governments. Some of the changes that FFIs will need to do to adjust to chapter 4 compliance require time, enormous expenses and internal preparation. Therefore, it appears that FFIs cannot wait until 2013 to determine what category will be applicable to them. The Section considers that Treasury and the IRS should consider publishing a list of jurisdictions that are negotiating FATCA partner agreements so that FFIs will have notice of the jurisdictions that potentially will be impacted by this intergovernmental approach. In addition, the Section considers that there should be special implementation dates for FFIs in those jurisdictions.

## FATCA Proposed Regulations

Page 4

April 30, 2012

---

As part of the intergovernmental approach, the United States and a partner country (“FATCA Partner”) will enter into an agreement whereby each FATCA Partner agrees to implement necessary legislation to require FFIs in its jurisdiction to collect and report to the authorities of the FATCA Partner the required information, enable such FFIs to apply necessary diligence to identify U.S. accounts, and transfer to the United States, on an automatic basis, the information reported by the FFIs. In consideration of the foregoing, the United States will agree to eliminate the obligation of each FFI established in the FATCA Partner to enter into a separate FFI agreement with the IRS, and instead, permit such FFIs to report required information to the FATCA Partner rather than directly to the IRS. This approach was announced, in part, to respond to concerns raised by governments, financial institutions and practitioners that the costs associated with complying with FATCA will be too high, and that complying with FATCA, as provide in chapter 4 of Subtitle A and related regulations, may violate foreign laws.

We respectfully suggest that the implementation of FATCA be delayed until intergovernmental agreements among the United States, France, Germany, Italy, Spain and the United Kingdom are finalized so that the FFIs within each such country understand how to prepare and comply with FATCA. Pursuant to the proposed regulations, FFIs will be required to begin complying with FATCA on January 1, 2013, which provides little time for intergovernmental agreements to be finalized and for FFIs to know whether to comply with the rules contained under chapter 4 of Subtitle A and related regulations or rules contained within the intergovernmental agreements.

3. As part of the intergovernmental approach, the United States is willing to reciprocate in collecting and exchanging on an automatic basic information on accounts held in U.S. financial institutions by residents of the FATCA Partner jurisdictions. The scope of the information that the United States is willing to exchange in connection with the U.S. accounts of FATCA Partner residents is unclear. U.S. financial institutions are currently adapting their internal systems and procedures in order to be able to implement their chapter 4 withholding obligations, which are the first to become effective. Given the cost associated with changing a computer system and procedures associated with chapter 4 implementation, as well as the training associated with such changes, plus the time those changes can take (which based on comments from the affected banks can be several months), it would be advisable for these U.S. financial institutions to understand what will be required from them to collect from their account holders that are residents of FATCA partners, in order to make these changes all at the same time.
4. U.S. financial institutions (particularly smaller institutions without in-house programmers) have expressed concern regarding the timing of implementation since the systems will need to be in place (tested and put in production) by the end of November 2012 to capture the transactional data starting on January 1, 2013 which will be used to generate the reporting requirement by 2014. This appears to be very difficult to achieve in terms of timing. The Section recommends that the IRS consider a 12-month delay in the relevant FATCA effective dates.

FATCA Proposed Regulations

Page 5

April 30, 2012

---

5. Additional guidance would be welcomed in connection with the registration of new FFIs. After 2013, the time periods applicable to an FFI for registering within the IRS are unclear. It is unclear what happens with foreign entities that still do not know whether they will be FFIs (by virtue of not knowing if the income tests will be met) or that do not know at their inception whether they will be deemed compliant under one of the categories. It appears that there should be a period of time in which a newly-formed FFI could make the election retroactive to the date of formation (similar to the entity classification rules that allow for a retroactive effective date).

II. **§1.1471-1(b).**

1. **§1.1471-1(b)(6).**
  - a. A broker is defined as any person that in the “ordinary” course of a trade or business stands ready to effect sales to be made by others. It is unclear what “ordinary course” of a trade or business is. As with the definition of FFI’s, it would be advisable to include a bright line test based on gross income.
  - b. The definition also refers to regularity (i.e., it says “regularly”). It is unclear how “regularity” would be measured and what is considered to be “regular”. It would also be advisable to include a bright line test in this case based upon a percentage of gross income derived from those activities.
2. **§1.1471-1(b)(10).** There is a reference to “foreign individual” but there is no defined term for “foreign individual”. It would be advisable to include a defined term so that there is no ambiguity as to such term.
3. **§1.1471-1(b)(12).** The Section considers that this should also include the primary files of an owner-documented FFI.
4. **§1.1471-1(b)(17).** The definition of “entity” provides that an entity is any person other than an individual. Treas. Regs. §301.7701-2(a) provides that a business entity is any entity recognized for federal tax purposes that is not properly classified as a trust under Treas. Regs. §301.7701-4 or otherwise subject to special treatment under the Internal Revenue Code (the “Code”). Generally, a trust would not be considered an “entity” for other purposes of the Code, or under general trust law. Therefore, the Section considers that it would avoid confusion if the definition clarifies that trusts, including “grantor trusts” are included in the definition of “entity” for purposes of Prop. Regs. §1.1471-1(b)(17).
5. **§1.1471-1(b)(33).** There is no definition of what “insurance” is and the definition of “insurance company” is based, among others, on issuing “insurance”. It would be advisable to include a definition of “insurance” given that the definition of “insurance company” depends on that term. In addition, the definition says that insurance company

FATCA Proposed Regulations

Page 6

April 30, 2012

---

is “a company more than half of the “business.” It is unclear what “business” means. Does it mean income and/or assets? It would be advisable to make this definition consistent with the others which are based on income or asset tests. Also, providing for a bright line test would facilitate the implementation of chapter 4.

6. §1.1471-1(b)(48).

- a. The definition should also include any account, instrument or contract maintained or executed at an office or branch of the withholding agent at any location outside of the United States or in any location in a possession of the United States (i.e., an offshore obligation) as of January 1, 2013. This would make clear that offshore obligations can also be preexisting obligations.
- b. In the case of registered deemed-compliant FFIs, the date will be the earlier of the date the FFI registers or the date the FFI implements its required account opening procedures. It is unclear how the latter would be determined. Would it be determined by certification of the compliance officer? It appears that there should be a clearer standard.

III. §1.1471-2.

1. §1.1471-2(a)(2)(v). The provision states that when multiple withholding agents that are brokers are involved, each must determine if it is required to withhold. It appears that this may cause over withholding as a withholding agent would probably withhold if in doubt in order to eliminate exposure for failure to withhold. The payee should have the possibility of certifying in a withholding certificate that the payment was (or will be) subject to withholding by another broker and indemnify such withholding agent for failure to withhold based on such withholding certificate.
2. §1.1471-2(b). The Section considers that it would be helpful to include additional rules in connection with documentation by the FFI or withholding agent of grandfathered obligations in order to clarify the procedures that the payor of a grandfathered obligation is required to do in connection with a payment made under a grandfathered obligation. Moreover, the determination of a material modification is made based on facts and circumstances. If a withholding agent and/or FFI makes recurrent payments in connection with grandfathered obligations, it is unclear how these payors can monitor on a practical basis whether a material modification took place.

IV. §1.1471-3.

1. § 1.1471-3(d). This paragraph contains the documentation requirements necessary to establish a payee’s chapter 4 status. With respect to treating a payee as a nonregistering local bank (a certified deemed-compliant FFI), the withholding agent must: 1) reliably associate the payment with a valid withholding certificate that identifies the payee as a

foreign entity that is a nonregistering local bank, 2) the withholding certificate contains a certification by the payee that it meets the requirements to qualify as a nonregistering local bank under 1.1471-5(f)(2)(i), and 3) the withholding agent has either a current audited financial statement, or if the payee does not have an audited financial statement, an unaudited financial statement or other similar financial document that supports the payee's claim that it is an FFI that operates solely as a bank and does not contradict the payee's claim that it is eligible for certified deemed-compliant status as a nonregistering local bank.

We respectfully suggest that the third requirement relating to financial statements be deleted as overly cumbersome. If the financial statements requirement is to be retained, we suggest that more guidance be provided with respect to financial statements for purposes of certification. In other words, guidance should be provided as to whether the financial statements presented for certification must be on a calendar year basis or, if the bank operates on a fiscal year basis, fiscal year-end financial statements are permitted. Moreover, guidance should be issued as to how financial statements reported in a foreign currency are properly translated and whether the accounting standards of the local jurisdiction can be used or whether the financial statements must be in conformity with U.S. generally accepted accounting principles. All of these issues are important because assets in excess of \$175 million reported on the financial statements will invalidate the certification of the payee.

2. §1.1471-3(d)(6)(i). The paragraph requires a foreign entity claiming status of nonregistering local bank to provide the withholding agent with, in addition to a valid withholding certificate, the current audited financial statement, an unaudited financial statement or other similar financial document for the payee that supports the payee's claim. Some foreign entities may not want to share financial information with a withholding agent for numerous reasons. If the financial statement requirement will be retained, it would be advisable to include also the possibility of providing the withholding agent with an auditor's letter substitute, as contemplated in Prop. Reg. §1.1471-3(d)(7)(ii) (in the context of owner-documented FFIs). If an auditor's letter substitute would be allowed, an unrelated and independent accounting firm, legal counsel or legal representative that has a location in the United States, could certify after having reviewed the financial statements, that the FFI: (i) operates solely as bank (within the meaning of §581, determined as if the FFI were incorporated in the United States); (ii) does not operate in more than one country; and (iii) has assets not in excess of \$175 million.
3. §1.1471-3(d)(6)(ii). This paragraph requires the payee to provide the withholding agent with organizational documents that would support the payee's claim that it is a retirement plan. In some cases, depending on the type of withholding agent, it may be difficult for the withholding agent to review the documents and make that determination (i.e., it may not have qualified personnel, the exercise may require understanding documents that may be from a different jurisdiction and in different languages, the timing of the review may delay the payment, etc.). As with the prior paragraph, our initial suggestion would be to

delete the organizational documents requirement as overly cumbersome. If it is to be retained, it would appear advisable to allow a payee to provide an auditor's letter substitute whereby an unrelated and independent accounting firm, legal counsel, or legal representative that has a location in the United States, could certify after having reviewed the organizational documents of the FFI that the FFI qualifies as a retirement plan under the laws of the jurisdiction in which the payee was organized.

4. §1.1471-3(d)(6)(iv). In this case, it appears also advisable to allow the payee to provide the withholding agent with auditor's letter substitute. If an auditor's letter substitute would be allowed, an unrelated and independent accounting firm, legal counsel or legal representative that has a location in the United States, could certify after having reviewed the financial statements, that the FFI: has no more than \$50 million in assets on its balance sheet (or, in the case of an expanded affiliated group, that the group has \$50 million or less in assets) and has financial accounts with a balance or value not in excess of \$50,000. Again, we reiterate our recommendation that there not be requirements to supply financial information relating to the foregoing \$50 million limitations. Rather, certifications by the payee signed under penalties of perjury, should suffice.
5. §1.1471-3(d)(7).
  - a. §1.1471-3(d)(7)(i)(C). It appears that the annual certification may become burdensome to monitor and to maintain if there are no changes in circumstances. It would appear advisable to allow for a three-year validity period, unless there is a change in circumstances. This would match the time period currently permitted for an IRS Form W-8BEN certification.
  - b. §1.1471-3(d)(7)(ii).
    - i. The auditor's letter substitute can be provided according to this subsection within one year of the date of the payment. According to Prop. Reg. §1.1471-2(a)(1) the obligation to withhold arises on the date a payment is made. It is unclear how the withholding agent should treat a payment made to an owner-documented FFI if the documentation proving that status could be provided up to a year after the date of the payment.
    - ii. It is unclear if the reference to "legal representative" includes any legal counsel of the FFI. In other sections of the Proposed Regulations, such as Prop. Reg. §1.1471-3(d)(6)(iii), there are references to "counsel" as opposed to "legal representative", so it is unclear if they refer to the same (i.e., an attorney representing the FFI) or if "legal representative" refers to someone that can bind the company, such as an officer.
    - iii. The paragraph appears to require withholding certificates of all owners, including owners that are not specified U.S. persons. Therefore, if all of the owners of an FFI are foreign individuals, they appear to have to provide a Form W-8BEN. In a scenario

in which an FFI is not owned by any substantial U.S. owner, the FFI should be able to certify to the withholding agent that it has no substantial U.S. owners, without having to provide Forms W-8BEN of the foreign individuals. The goal of chapter 4 is to identify certain U.S. beneficial owners behind offshore structures. Therefore, it appears that requesting withholding certificates of each owner of an owner-documented FFI (irrespective of whether they are U.S. persons or not) exceeds the scope and goal of chapter 4. A certification made under penalties of perjury by an authorized signatory of the owner-documented FFI that none of the owners of the FFI are substantial U.S. owners should be sufficient, unless the withholding agent knows or has reason to know that the certificate is inaccurate.

6. §1.1471-3(d)(8)(iv)(A). The identification process requires the withholding agent to look at the organizational documents associated with the payee to determine if the payee is indeed a retirement fund. In this case too, the payee should be able to provide the withholding agent with a self-certification (signed under penalties of perjury). If self-certification is not acceptable, then the payee should be able to provide an auditor's letter substitute from an unrelated and independent accounting firm, legal counsel or legal representative that has a location in the United States, certifying after having reviewed the organizational documents of the payee, that the FFI qualifies as a retirement fund under Prop. Reg. §1.1471-6(f).
7. §1.1471-3(d)(9)(i)(B)(2). The withholding agent is required to obtain a copy of the payee's organizational documents or consolidated financial statements that indicate that: (a) the payee is a foreign entity operating primarily as a holding company for a subsidiary or group of entities; (b) each of is not a financial institution; and (c) the payee is not a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle described in Prop. Reg. §1.1471-5(e)(5)(i). In many circumstances, the organizational documents or consolidated financial statements may not contain sufficient information to evidence this. We believe that self certification (under penalties of perjury) should be permitted in this case and that the requirement for organizational documents should be removed. Alternatively, if the foregoing documentary requirements are to be retained, it should be possible for the payee to comply with this requirement by providing a substitute auditor's letter from an unrelated and independent accounting firm, legal counsel or legal representative that has a location in the United States, certifying after having reviewed the organizational documents and financial statements of the payee, that the FFI qualifies as a nonfinancial holding company under Prop. Reg. §1.1471-5(e)(5)(i).
8. §1.1471-3(d)(9)(iv)(B). A withholding agent that makes a payment with respect to an offshore obligation may treat a payment as made to an entity described in Prop. Reg. §1.1471-5(e)(5)(iv) (i.e. a hedging/financing center of a nonfinancial group) if the withholding agent has documentary evidence (for example, a consolidated financial statement or company by-laws) or a third-party credit report associated with the payee that indicates that the payee is a foreign entity that operates primarily as a hedging or

financing center for its affiliated group and establishes that the members of the payee's affiliated group are engaged in a business other than that of a financial institution. We again recommend that self-certification (under penalties of perjury) and without additional documentary evidence be sufficient for this purpose. If documentary evidence is required it should be advisable to include also, as another alternative, the provision of an auditor's letter substitute from an unrelated and independent accounting firm, legal counsel or legal representative that has a location in the United States, certifying after having reviewed the documentary evidence of the payee, that the FFI qualifies as a hedging/financial centers of nonfinancial groups under Prop. Reg. §1.1471-5(e)(5)(iv).

9. § 1.1471-3(e). The rules contained in § 1.1471-3(e) establish the standards of knowledge for when a withholding agent knows or has reason to know that a withholding certificate or other documentation is unreliable or incorrect. If a withholding agent fails to withhold the correct amount despite: 1) knowing or 2) having reason to know the amount required to be withheld then the withholding agent may be liable for tax, interest, and penalties as provided under § 1474 of the Internal Revenue Code and the regulations thereunder.

§ 1.1471-3(e)(4) contains a general rule that a withholding agent shall be considered to have reason to know that a claim of chapter 4 status is unreliable or incorrect if its knowledge of relevant facts or statements contained in the withholding certificate or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the claims made. Appearing after this general rule in § 1.1471-3(e)(4) are circumstances when a withholding agent has reason to know that a withholding certificate or documentation provided by a payee or beneficial owner is unreliable or incorrect.

We recommend that a "safe-harbor" be established in connection with the reason to know standard, as it applies to a withholding agent, by limiting such standard to one or more of the circumstances described in § 1.1471-3(e). By providing this "safe-harbor" it will provide more certainty and enable withholding agents to better establish due diligence procedures in determining the validity of withholding certificates and related documentation. A similar "safe-harbor" currently exists in § 1.1441-7 of the Chapter 3 regulations (withholding of tax on payments to foreign persons).

10. §1.1471-3(e)(3). The paragraph provides that if an FFI is removed from the list of participating FFIs and registered deemed-compliant FFIs published on the IRS database, the withholding agent knows that such FFI is not a participating FFI or registered deemed-compliant FFI on the earlier of the date that the withholding agent discovers that the FFI has been removed from the list or "the date that is one year from the date the FFI's name was actually removed from the list". This would require a withholding agent to annually run searches for all of its FFIs accountholder. The payee should be obliged to notify the change of circumstance to the withholding agent (i.e., the burden should be on FFI that became non participant and not on the withholding agent given that the former

has readily availability knowledge, whereas the latter would need to affirmatively look for the information).

11. §1.1471-3(e)(4)(i)(B). Under the existing provision, an FFI cannot rely on a withholding certificate that contains either a U.S. address or a telephone number. There are limited presumptions applicable solely to withholding agents, but not to FFIs. There are numerous foreign individuals that use mailing addresses in the United States for legitimate security and administrative purposes. This comment also applies in the context of foreign individuals with non-U.S. accounts. If a withholding certificate with a U.S. mailing address cannot be relied upon by an FFI, it could create a false positive. FFIs should be able to rely on the presumptions listed on Prop. Reg. §1.1471-3(e)(4)(i)(B).
12. §1.1471-3(f)(3)(i)(D). In addition to being on the per se list of foreign corporations contained in Treas. Regs. §301.7701-2(b)(8)(i), an entity should be presumed to be foreign if its suffix is that of a foreign entity and is not a suffix of a U.S. entity, such as S.A., Kft, S.R.L., C.V., etc. U.S. entities need to end with certain suffixes in order to be able to be incorporated or organized within one of the States of the United States (i.e., Corp., Corporation, Inc., Incorporated, etc.). Therefore, any foreign suffix that is not permissible in the United States, should constitute adequate evidence that the entity is a foreign entity.

#### V. §1.1471-4.

1. §§1.1471-4(c)(3)(ii)(B)(3), (4)(iii)(C) and (4)(iv)(B)(3). The current standard refers to “directly or indirectly owned, controlled, or established by the same person”. It appears that it should be further clarified what ownership percentage would be required, and also what “control” means for this purpose. It appears that if a “manager” acts on behalf of the entity it could be identified by a relationship manager as the “controlling” individual or, if the same manager acts on behalf of different unrelated entities those accounts could be identified as accounts established by the same person, even if that manager has no ownership in an entity or acts on behalf of several unrelated entities. Given that this standard will need to be applied by relationship managers (and not attorneys, auditors, etc.), it appears that a bright line test (through percentage of direct or indirect ownership) may be more practical.

In addition, it is unclear how FFIs should document that the inquiry to the relationship manager was made (i.e., should this be documented by a certification under penalties of perjury, an internal email, etc.) and what penalties would be associated with an incorrect certification (both negligent and willful) by the relationship manager. It would appear that the penalties applicable to both FFIs, and the relationship manager in all of these scenarios, should be expressly stated in the Proposed Regulations.

FATCA Proposed Regulations

Page 12

April 30, 2012

---

2. §1.1471-4(c)(6). Example 1. There is a reference to “CB” (“on the effective date of CB’s FFI agreement...”) that appears to belong to Example 2, not 1. There is no reference to “CB” in Example 1.
3. §1.1471-4(c)(6). Example 2. There is a reference to “FFI1” (“previously FFI1 was not required...”) that appears to belong to Example 1, not 2. There is no reference to “FFI1” in Example 2.
4. §1.1471-4(c)(10). The paragraph should provide that the certification can be done by any officer (at the election of the FFI) who has knowledge, supervision or control of these proceedings in order to be able to certify the completion of the identification procedures required. It would be advisable to include the penalties associated with an incorrect certification (both a negligent and a fraudulent one). It is unclear what penalties will be imposed on such officers in those scenarios. Also, it is unclear what penalties would be applicable, both to the FFI and the certifying officer, for failure or delay in the submission of the certification. In addition, the Section generally agrees and incorporates by reference herein the comments submitted by the ABA on April 13, 2012 regarding this point.
5. §1.1471-4(d)(3)(ii). This paragraph requires the participating FFI to report the name, address and TIN of each account holder that is a specified U.S. person, consistent with Code § 1471(c)(1)(A). There are circumstances in which a U.S. person may not have a TIN, particularly in the case of the so called “inadvertent” U.S. person (i.e., individuals that were born in the United States but never lived in the United States or individuals born outside of the United States with one or two parents that are U.S. citizen that recently learned of their U.S. status). In those scenarios, the FFI should not be penalized for not reporting a TIN associated with a U.S. account if, after diligent review and request, the account holder does not provide an TIN simply because the account holder does not have one.
6. §1.1471-4(d)(3)(iii). The same comment discussed in the prior paragraph should be applicable to this paragraph with respect to the requirement to provide a TIN of each account holder that is a specified U.S. person.
7. §1.1471-4(d)(5)(ii). The same comment discussed in items 6 and 7 above should be applicable to this paragraph as well.

**VI. §1.1471-5.**

1. §1.1471-5(a)(3)(i). The paragraph states that an account is held by the person listed or identified as holder, including in the case of a “flow through” entity. Examples list grantor and simple trusts as well as estates. Would that also be applicable to disregarded entities such as a single-member limited liability company holding an account?

## FATCA Proposed Regulations

Page 13

April 30, 2012

---

In addition, the provision says: “Except as otherwise provided in paragraphs (a)(3)(ii) and (iii), if a trust (including a simple or grantor trust) is listed as holder, the financial account shall be treated as held by the trust or estate itself rather than by its owners or beneficiaries. It is unclear in which situation a “grantor” trust would be covered under the general principle of (5)(a)(3)(i) and not by (5)(a)(3)(ii)? It appears that further clarification would be needed to clarify this.

2. §1.1471-5(a)(3)(iii). In some situations, such as the one listed on Example 1 under Prop. Reg. §1.1471-5(a)(3)(vi), how is the FFI/withholding agreement going to verify if there is an agency? It may not be apparent, particularly, in a case such as the one listed in Example 1. It appears that the FFI/withholding agent should be able to rely on a withholding certificate in order to shift the burden to the payee to disclose to the FFI/withholding agent the identity of the beneficial owner and the intermediary.
3. §1.1471-5(a)(3)(iv). Would the treatment provided in this paragraph also be applicable with respect to accounts that are titled in the name of one spouse only, but that are community property? If the title holder of an account is only one person, but there is joint ownership by virtue of the marital regime applicable to the assets, would that fall within this paragraph too? It appears that the determination should solely be based on title holders and not on who has rights over the account as it would be burdensome to go beyond that.
4. §1.1471-5(a)(4)(i)(c). For greater clarity, accounts held under grantor trusts pursuant to Prop. Reg. §1.1471-5(a)(3)(ii) also should be included here. Also accounts held by disregarded limited liability companies with an individual owner should be included here.
5. §1.1471-5(b)(3)(iv). There is a reference to “de minimis”, but it is unclear what would be considered de minimis.
6. §1.1471-5(b)(3)(v)(B). For purposes of calculating cash value, under (1), if the amount is in a different currency than the U.S. dollar, should it be converted to spot rate under Treas. Reg. §1.988-2(d) as of the end of each year?
7. §1.1471-5(e)(1)(ii). An entity that holds as a substantial portion of its business “financial assets” for the account of others is an FFI. There is no definition of what a “financial asset” is. A definition should be included considering it is a critical piece of the determination.
8. §1.1471-5(e)(1)(iii). A foreign entity will be a financial institution if it is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading in, among others, partnership interests. If a trust holds only one asset, which is an interest in a partnership that solely owns real estate, would that trust be primarily engaged in the business of holding partnership interests in view of the fact that its only asset is a partnership interest? All of the business/income under (e)(4) would come from holding that partnership interest. However, it appears that the intention of this paragraph is to

## FATCA Proposed Regulations

Page 14

April 30, 2012

---

refer to offshore funds that are organized in the form of partnership interests and not to any partnership interest. The Section considers that the definition of financial institution should be revised to clarify that only partnership interests that invest primarily in financial assets should be measured, but not other partnership interests (such as partnerships holding real estate, personal property or intangibles). The determination of whether a partnership interest holds primarily financial assets would be based on income and asset tests.

9. §1.1471-5(e)(2)(i). It is unclear what “ordinary course of its business with customers” means. The Section considers there should be an income/asset test in this case too.
10. §1.1471-5(e)(3)(i). The determination of when an entity holds financial assets for the account of others as a substantial portion of its business is based on a gross income test. Gross income attributable to the holding of financial assets and “related financial services” is taken into account for this purpose. It is unclear what “related financial services” means. If a trustee charges accounting or bookkeeping fees in connection with the trustee’s services, would those services qualify as “related financial services” or are those “administrative services”? Those services would not enhance the performance of the assets held. A bright line test should be included here in order to eliminate ambiguities.
11. §1.1471-5(e)(3)(i) and (4). The gross income test is measured during the shorter of a 3 year period that ends on December 31 of the year in which the determination is made or the period during which the entity was in existence. If an FFI by January 1, 2013 (when the FFI registration period starts) does not meet the test, when would the entity be required to do a re-testing? What happens if it meets the income test in the following year? In addition, assuming that by December 31, 2014, the entity which did not meet the gross income test by the time FFI registration opened, has met the test for 2014, it is not apparent when, and if, an entity would be required to re-test its status and eventually register at a later time. In addition, if a test is done by end of year, if the entity met the test at such time with respect to a particular calendar year, would the status be effective as of the following year (i.e., January 1, 2015) or retroactive to 2014? Also, it is unclear what happens if an entity meets the test on year 1 but does not meet it in following year (i.e., income and asset allocation changed over the year and the entity invests in real estate or other non-financial assets instead of commodities). Would the entity become an NFFE or should it continue to be an FFI because it was at some point and it was registered as such? In the context of privately-held investment companies, it may not be unusual that the asset allocation may change from year to year. It appears that further guidance would be needed in connection with changes of circumstances of FFIs that become NFFE and NFFE that become FFI.
12. §1.1471-5(e)(5)(i).

FATCA Proposed Regulations

Page 15

April 30, 2012

---

- a. The paragraph says "...if it is a foreign entity". "Entity" is defined under the Proposed Regulations as a person other than an individual. Therefore, we interpret the foregoing to mean that a trust which holds subsidiaries that are engaged in a trade or business would qualify as well under this paragraph because, under the definition, a trust would be a "foreign entity." An express clarification of the foregoing interpretation would be helpful.
  - b. The paragraph should be expanded to include not only subsidiaries that are engaged in a trade or business, but entities that are not financial institutions. An entity could be considered not to be "engaged in a trade or business" (i.e., offshore entity holding passive real estate), without being classified as a financial institution. It appears that it is not the intention of the statute or the Proposed Regulations to make a trust or holding company an FFI if the underlying assets consist of stock of foreign entities that hold real estate or intangibles (i.e., patents). Therefore, it would appear that the requirement that the entity be engaged in a trade or business should be removed and the requirement that subsidiaries should not be financial institutions should be left.
  - c. In certain cases in which an entity falls within the FFI definition because it holds stock in a financial institution (i.e., a trust whose sole assets is stock in a portfolio holding company that holds solely a portfolio of investments), it appears that both the trust and the holding company would fall within the definition of FFI. In that case, where the FFI has solely one or few assets, the lower tier FFI should be able to apply a look through approach instead of having two levels of FFIs. If that exception is not contemplated, the top tier and the lower tier may fall within the definition of owner documented, but that category has limitations that may not be available in all cases.
13. §1.1471-5(e)(5). § 1.1471-5(e)(5) describes certain entities that are excluded from the definition of a financial institution. We recommend the list of excluded entities be modified as follows:
- a. Dormant Entities. There should be an exclusion for entities that are dormant. The start-up exclusion covers only 24 months from incorporation and the category of entities in reorganization or bankruptcy applies only in circumstances that are very limited and specific. There are circumstances in which entities not involved in the provision of financial services may become dormant or stop activities without being dissolved and without being in liquidation. It appears that those should be expressly excluded too.
  - b. Small Businesses. There is an exception from the definition of a financial institution for certain start-up businesses. We recommend that there also be an exception for certain small businesses. U.S. public policy supports small businesses and recognizes the importance of such institutions in society. The U.S. public policy also recognizes the financial burdens of over regulation of small businesses. As such, we recommend that a small business be included within the list of entities that are excluded from the

## FATCA Proposed Regulations

Page 16

April 30, 2012

---

definition of a financial institutions. A determination of small for this purpose could be based on gross income, number of employees, or other clearly defined threshold.

- c. Churches. There is an exception from the definition of a financial institution for certain Section 501(c) entities. We recommend that the proposed regulations clarify that a church is excluded from the definition of a financial institutions, whether or not it is a Section 501(c) entity.
  - d. Private Equity, Venture Capital and other Investment Funds. The proposed regulations specifically state that private equity funds, venture capital funds and other investment funds are not excluded from the definition of a financial institution. We recommend that these types of entities be included within the exclusion list as entities excluded from the definition of financial institutions. At a minimum, small (i.e., those funds under a certain investment threshold) private equity, venture capital, and other investment funds should be included within the exclusion list of entities excluded from the definition of financial institutions.
14. §1.1471-5(f). It is unclear what happens if an entity falls within one of these categories and after being either registered (if a registered deemed compliant entity) or after making a certification (if certified deemed compliant or owned documented), the entity falls short of one of the requirements. How long does the entity have to take remedial actions in order not to lose the status? How would the entity transition from deemed compliant to a participant FFI? How would the entity be treated between the time it is discovered that the FFI no longer meets one of the requirements that allows the FFI to fall within one of the categories of deemed compliant entities and the effective date of the FFI agreement?
15. §1.1471-5(f)(i)(A).
- a. The paragraph refers to “a bank or similar organization..., a securities broker or dealer, or a financial planner or investment advisor.” It would appear that it may be more suitable if, instead, the paragraph makes a cross reference to (e)(1)(i) and (e)(1)(ii). This way, it becomes clearer that entities that may otherwise fall within (e)(1)(i) or (e)(1)(ii), but meet the criteria of (f)(i)(A) could qualify as local FFIs.
  - b. It is unclear if entities that fall within (e)(1)(iv) would be able to avail themselves of this category. The Section considers that the issue should be expressly clarified.
16. §1.1471-5(f)(1)(i)(A)(3). The restrictions to advertise availability of U.S. dollar denominated deposit accounts or other U.S. dollar denominated investments does not appear to be conducive to achieving the goal of chapter 4. The paragraph already provides that the entity should not target U.S. customers. The fact that an FFI has U.S. dollar denominated investments should not be a reflection that the entity has U.S. customers. There are many customers in other countries that prefer to invest in U.S. dollar denominated investments because they perceive the U.S. dollar to be a stronger

currency than that of their own countries (and there are countries that generally use the U.S. dollar as their currency or accept it in the ordinary course of business). Therefore, requiring a local FFI not to offer those products appears to restrict the products that an FFI can offer to its resident clients. In addition, U.S. customers may not necessarily prefer to invest in U.S. dollar denominated investments, so the restriction may not necessarily correlate with the goal of restringing U.S. customers from investing through offshore banks, while the condition certainly would provide additional barriers to FFIs to offer products to their resident clients. Also, the last line of the paragraph should clarify “U.S. customers that are non residents of the jurisdiction”. If U.S. customers already reside within the jurisdiction, the FFI should still be able to offer services to residents of the jurisdiction who are also U.S. persons.

17. §1.1471-5(f)(1)(i)(A)(4). The obligation to either perform information reporting or withholding tax with respect to resident accounts also seems an additional burden in certain countries where deposits are exempt from tax or countries that may not have reporting obligations that are as sophisticated as the tax and reporting obligations as the United States. So long as an entity does not target U.S. customers and takes measures against that, requiring an entity to do this reporting/withholding to qualify appears to be a high standard without necessarily a correlation that such reporting would prevent the entity from servicing U.S. customers.
18. §1.1471-5(f)(1)(i)(A)(5). For purposes of the 98% test of resident account holders, the paragraph provides also that the percentage includes residents that are entities. The paragraph should clarify that in the case of resident entities, the owners/shareholders of those entities should also be residents of the jurisdiction, unless the entity is engaged in a trade or business in the jurisdiction.

Example 1 – Local bank in country Y has an accountholder that is an entity also incorporated country Y. The entity is a portfolio investment company (passive) without any trade or business. In order to qualify as a resident of country Y for purposes of the 98% test, the owners of the entity should also be residents of country Y (similar to the requirement in the Proposed Regulations regarding bona fide residents of entities formed in a U.S. possession).

Example 2 – Same as the facts listed above, but the company has manufacturing operations in country Y or is a subsidiary operating in country Y of a multinational group. The entity should qualify as resident of country Y for purposes of the 98% test even if no members/owners are residents of the country.

19. §1.1471-5(f)(1)(i)(A)(6). The paragraph requires the FFI to implement procedures to ensure that it does not open or maintain accounts, among others, of entities controlled, or beneficially owned by specified U.S. persons (as determined under the FFI’s AML/due diligence procedures). Currently, AML/KYC procedures generally look for 25% beneficial owners not 10% beneficial owners as defined in chapter 4. Therefore, if the search is solely based on AML procedures, a specified U.S. person than owns less than

25% and qualifies under chapter 4 as a substantial U.S. owner (because the person owns more than 10%), could be flagged as not a substantial U.S. owner, which would classify the entity holding the account as not controlled or beneficially owned by a substantial U.S. owner, which can create an incorrect result for chapter 4 purposes. It is unclear if this was intended.

20. §1.1471-5(f)(1)(i)(A)(7).

- a. The paragraph solely refers to “accounts held by individuals.” It appears that the same should apply to entity account holders if the entities are not residents of the jurisdiction of the FFI.
- b. The reference to accounts opened after December 31, 2011 should be replaced with February 8, 2012 (date the Proposed Regulation were released) or even the date of publication of the final Treasury Regulations. By December 31, 2011, FFIs had no reason to know of this restriction so they were not able to provide in the account opening documents for those possibilities. Many FFIs are still unclear as to the obligations under chapter 4 and may not have yet implemented procedures that could allow them to either close accounts or withhold.

21. §1.1471-5(f)(1)(ii)(E). How long does the chief compliance officer have to notify of a change in circumstances? Is there any time to cure/remedy the change to maintain the status? What happens between the time that the non-compliance/change of circumstances was identified and the time that the FFI enters into an FFI agreement or becomes otherwise compliant with Code § 1471(b)? It appears that there should be a period of continuity so that the entity can adjust proper procedures. It may take time to enter into an FFI agreement and implement enhanced procedures to comply with it.

22. §1.1471-5(f)(1)(iii). It is unclear how long these entities have to make the notification.

23. §1.1471-5(f)(2)(i). The Section has the same comment as in §1.1471-5(f)(1)(i)(A)(3) regarding advertisement of U.S. dollars denominated investments and also regarding the possibility of targeting U.S. persons that are residents of the country where the local bank is organized or incorporated.

24. §1.1471-5(f)(3)(ii)(B). It is unclear if, for purpose of determining “affiliation” in this paragraph, the affiliation is based on Code §1504(a) (i.e., same concept as in 5(i)(i)) or if it is a lesser standard.

Example: Would a trust be considered “affiliated” to an FFI because the acting trustee is an FFI? We consider that it should not be, given that there is no common ownership between trustee and trust. The trustee of a foreign trust generally would be unrelated and independent to the beneficiaries of the trust and would be providing a service in exchange for a fee.

It becomes unclear if the trust instead of having an independent trustee has a private trust company (“PTC”) serving as trustee. A PTC generally would be owned and/or controlled by one or more beneficiaries and/or the directors generally would be related to the beneficiaries. In those cases, the PTC may be considered an FFI if it is an entity that is primarily holding the assets on behalf of the trust and/or the beneficiaries. The PTC probably would also be considered affiliated to the trust, if owned or controlled by the beneficiaries. In some of these situations, it would appear that a trust with a PTC would not be able to qualify as an owner-documented FFI under this classification. The Section considers that in this situation a PTC trust should be able to classify given that a different result would cause a very burdensome requirement on trusts managed by PTCs to enter into FFI agreements on an individual basis. It would also create a different standard for trusts depending on who the trustee is, which should not be practical.

## VII. §1.1472.

1. §1.1472-1(b)(1)(i). It also should be permitted that the beneficial owner be an owner-documented FFI so long as the information of the owners of the owner-documented FFI is provided to the withholding agent. In that case, the withholding agent would still be able to make the determination of (b)(1)(ii) and the reporting of (b)(1)(iii).
2. §1.1472-1(c)(1)(ii)(A)(2)(i). As mentioned above, it is unclear what “de minimis” constitutes. It would be advisable to include a bright line test.
3. §1.1472-1(c)(1)(v). There should be exceptions in cases of start-ups, entities that are going through reorganization, etc. (same as with FFIs) because there may be situations in which an NFFE may have income that is more than 50% passive income, but it is a company generally engaged in a non-financial business (i.e., start-up) that doesn’t meet the FFI definition because the composition of the passive income does not meet the FFI definition threshold, but meets the threshold of Prop. Reg. §1.1472-1(c)(v). For example, an NFFE that is primarily receiving rent from subleasing office space if the NFFE is not in the real estate business, but it is intending to conduct an active business and is subleasing an office space in the meantime would have passive income, but not income derived from financial assets.
4. §1.1472-1(c)(1). We recommend the list of excepted NFFEs be modified as follows:
  - a. Real Estate Holding Companies. Certain entities are listed as “excepted NFFEs”, including publicly traded corporations, “Active NFFEs,” and others. An Active NFFE means an NFFE if less than 50% of its income is passive or less than 50% of its assets are assets that produce passive income. Passive income includes rents, but not if such rents are derived in the active conduct of a trade or business conducted by employees of the NFFE. There are many real estate holding companies that own a

- single piece of real estate, often vacation homes. Sometimes rental income is earned from these properties. Often these real estate holding companies do not have employees. These types of real estate holding companies should be included within the list of excepted NFFEs or the list of excepted FFIs described in § 1.1471-5(e)(5).
- b. Planes, Boats and Automobiles. Similar to the real estate holding companies described above, certain entities are used to own a single plane, boat or automobile. These types of holding companies should be included within the list of excepted NFFEs.
  - c. Estate Planning Entities. Many entities are used in structures for estate planning purposes. These entities often serve as holding companies and do not have employees. We recommend that entities whose primary purpose is for estate planning purposes be included within the list of excepted NFFEs.
  - d. Holding Companies Without Income. If an entity (i.e., a holding company) does not earn income (i.e., no profits or losses), we recommend that such entity be included within the list of excepted NFFEs.
5. §.1472-1(e)(2). The same comment listed above in connection with disclosures by FFIs should apply to this paragraph too. There may be circumstances in which a U.S. person living abroad does not have a TIN (i.e., the individual just became aware of his U.S. citizenship). The NFFE should be able to provide information that U.S. substantial owner has applied or is applying for a TIN.

#### VIII. §1.1473.

1. §1.1473-1(a)(7). In the example, line 5, the first sentence after the period says “A pays...”. It should say “WA pays...”
2. §1.1473-1(b)(3)(i). The paragraph provides “a specified U.S. person will be treated as directly or indirectly holding a beneficial interest in a foreign trust if a specified U.S. person has the right to receive directly or indirectly... a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.” The paragraph should clarify that this is solely the case of beneficiaries of foreign non-grantor trusts, but not if the trust is treated as a grantor trust with respect to a foreign grantor. If a foreign trust is a grantor under Code §672(f)(2) (i.e., if it is revocable) and the foreign grantor is alive, the trust asset and income are treated as owned by the foreign grantor. If the trust has U.S. beneficiaries receiving a distribution from the trust, the U.S. beneficiaries would be subject to a reporting obligation (i.e., reporting the distribution on a Form 3520), but would not be taxed on the distribution (given that it would be a distribution from a foreign grantor trust). Therefore, the U.S. beneficiaries of a foreign grantor trust that has a foreign grantor should not be treated as substantial U.S. owners during the time the trust is grantor. Only the foreign grantor should be treated as the owner during the time the

trust is grantor. This is consistent with U.S. tax principles and is also consistent when the treatment of trusts that are grantor with the respect to a U.S. grantors.

To illustrate this, if a foreign grantor trust has a U.S. grantor who set up the trust for the benefit of his U.S. descendants, under the Proposed Regulations, it would appear that the U.S. beneficiaries would not be deemed to have an interest in the trust during the time the grantor is treated as the owner. That appears to be the conclusion pursuant to Treas. Reg. §1.1473-1(b)(1)(iii)(A). However, it is unclear if the same conclusion would apply with respect to foreign grantors, given that Treas. Reg. §1.1473-1(b)(1)(iii)(A) solely refers to a “U.S. person treated as the owner” and not to “any person treated as the owner”. Therefore, if a foreign grantor trust has a foreign grantor with U.S. beneficiaries, it is unclear if the U.S. beneficiaries (having the right to receive distributions) would be considered to hold a beneficial interest under Treas. Reg. §1.1473-1(b)(3)(i). It would appear that they should not be considered to hold a beneficial interest given that, generally, for other purposes of the Code, the trust assets and income are treated as owned by the foreign grantor during the time the trust is grantor. Therefore, the U.S. beneficiaries of such trust should not be treated as holding a beneficial interest in the trust until such time that the trust becomes non-grantor. Moreover, it appears that there should not be a difference in the treatment of U.S. beneficiaries of a grantor trust by virtue of whether the grantor is a U.S. person or a non-U.S. person. In both situations, U.S. beneficiaries should be treated consistently while the trust is grantor, so no U.S. beneficiary in that case should be deemed to hold a beneficial interest until the time the trust becomes non-grantor.

This clarification should be critical given the substantial amount of foreign grantor trusts that are in place that are settled by non-resident aliens, and who have one or more U.S. discretionary beneficiaries.

3. §1.1473-1(b)(4).
  - a. The minimum threshold of \$5,000 for beneficial interests in discretionary trusts appears to be particularly low, which may be of a very limited use. We recommend increasing the value to \$50,000 to make it consistent with the other minimum thresholds. In addition, having a single standard (aside from that applicable to insurance products) would facilitate implementation.
  - b. Consistent with the comment listed above regarding U.S. beneficiaries of grantor trusts in connection with Prop. Reg. §1.1473-1(b)(3)(i), there should be an express exception that U.S. beneficiaries of grantor trusts (regardless of whether the grantor is a U.S. person or a non-U.S. person) are not considered to hold a beneficial interest in the trust until such time until the trust becomes non-grantor.
4. §1.1473-1(b)(5). It would be recommendable to include a provision clarifying how this rule applies in the case of a discretionary trust that qualifies as an FFI under Prop. Reg.

§1.1471-5(e)(1)(iii). Given that more than zero percent ownership would be deemed a “substantial interest” in the case of investment vehicles, it is unclear if a U.S. discretionary beneficiary, who did not receive a distribution during the calendar year would still be deemed to hold a beneficial interest by virtue of the fact that it is a discretionary beneficiary and under the trust document has the right to receive distributions. We would recommend that an actual distribution during the year be required for a U.S. beneficiary of a discretionary trust to be considered an owner for purposes of this special rule, but the mere fact that a U.S. beneficiary has the right to receive a discretionary distribution should not be sufficient to trigger an interest under the special rules of this paragraph.

5. §1.1473-1(d)(3). Generally, for other purposes of the Code, a grantor trust would generally be disregarded and the withholding agent making a payment would treat the payee as the grantor. For purposes of chapter 4, this paragraph requires a grantor trust to act as withholding agent even though the trust is generally disregarded for other U.S. tax purposes. This appears to create an additional burden in the implementation of chapter 4. In the case of grantor trusts, it would be advisable to require the withholding agent to bear the responsibility to withhold and/or report with respect to the owner of the grantor trust and not to require the grantor trust to act as the withholding agent.

#### IX. §1.1474.

1. §1.1474-6. Proposed Treasury Regulation Section 1474-6 provides a sensible rule for the coordination of withholding on amounts subject to withholding under sections 1441, 1442 and 1443 and under FATCA (i.e. Code Section 1471(a) (the “FATCA Withholding”). Under Proposed Treas. Reg. § 1474-6, a withholding agent may credit the FATCA Withholding against its liability for any tax due under Code Sections 1441, 1442, or 1443. The FATCA Withholding and Code Sections 1441, 1442 and 1443 withholding are both reported on Forms 1042 and 1042-S. Because Code Sections 1441, 1442 and 1443 and the FATCA Withholding each require withholding agents to withhold on payments of FDAP income, it is quite likely that both types of withholding (i.e. Code Sections 1441, 1442 and 1443 withholding and FATCA Withholding) will frequently apply to a single payment. Therefore, the Prop. Treas. Reg. 1474-6 credit will be frequently applicable. As such, we encourage the IRS and the Treasury to clarify and provide specific procedures for taxpayers (on the Forms 1042 and 1042-S or elsewhere) to demonstrate that the credit has been applied.