

The Honorable Douglas Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20006

Ms. Emily McMahon  
Acting Assistant Secretary of Tax Policy  
Department of Treasury  
1500 Pennsylvania Ave., NW  
3120 MT  
Washington, DC 20220

Mr. William Wilkins  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20006

CC:PA:LPD:PR (REG-121647-10)  
room 5205  
Internal Revenue Service  
PO Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

Basel, 20 April 2012

**FATCA – Proposed Regulations – Reg-121647-10 Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities**

Dear Sirs and Madam:

The Swiss Bankers Association (SBA) appreciates the United States goal of achieving optimal compliance with its tax laws and the general aim of FATCA. The SBA notes that the information reporting requirements applicable to U.S. persons identified pursuant to the applicable account identification provisions of FATCA are comprehensive and more than sufficient to achieve these goals, and in many instances could be more appropriately tailored to minimize burdens associated with complying with these rules. That being said, the SBA respectfully requests that the regulations promulgated under FATCA should not extend beyond these limited requirements and impose substantial,

costly and burdensome requirements that are not related to reporting accounts belonging to U.S. persons to the IRS. The SBA believes however, that the proposed regulations (REG-121647-10) continue to pose profound implementation difficulties to non-U.S. banks. In this submission, the SBA identifies those issues that are particularly significant to the SBA, generally which will result in excessive implementation costs and practical implementation challenges.

The SBA therefore takes the opportunity to submit the following comments and proposals regarding the proposed regulations (REG-121647-10). The SBA considers the issues mentioned below as essential in order to properly implement FATCA. We have subdivided these comments to first address those issues that we consider particularly relevant and which have not been addressed in our prior comment letters. The second and the third sections of this letter are dedicated to issues we have previously raised and which had not been addressed in the proposed regulations.

## **1. Particularly Relevant Issues**

### **Expiration of Documentary Evidence and Resulting FATCA Withholding**

*(Proposed Regulations – Executive Summary I.4, page 17; 1.1471-3(c)(6)(ii)(C), pages 164 - 165)*

The Executive Summary of the proposed regulations poses the principle that “[...] for new accounts, the proposed rules rely extensively on an FFI’s existing customer intake procedures [...]” (page 17). The document stipulates further that “[...] as a general rule, documentary evidence is valid until the earlier of the last day of the third calendar year following the year in which the documentary evidence is provided to the withholding agent or the day on which a change in circumstance occurs that makes the information on the documentary evidence incorrect. However, documentary evidence that contains an expiration date will be valid until the end of the expiration period, regardless of whether that expiration date occurs before or after the last day of the third calendar year following the year in which the documentary evidence is provided to the withholding agent. [...]” (pages 164 - 165).

Under Swiss KYC/AML rules, the expiration of documentary evidence (e.g. in a passport) has no effect on the prior identification of the client. In other words, once a client is identified under applicable KYC/AML rules, the later expiration of the documentary evidence on which such identification was based does not call such prior identification into question or otherwise require the Swiss financial institution to obtain updated documentary evidence, unless the financial institution later has reason to doubt the veracity of the original identification. The FATCA requirement to renew such documentary evidence as prescribed under the proposed regulations is a significant departure from well-established Swiss and international KYC/AML rules for FFIs, in particular banks. Such a requirement further creates additional, ongoing and burdensome complexity, requires additional IT upgrades, leads to higher personnel costs and results in administrative burden outside the ordinary course of business and outside local KYC/AML rules. In as much as this requirement would only impact those customers that are non-U.S. individuals who have already “proved” themselves to be non-U.S. persons under FATCA’s account identification procedures, which would confirm that the individual has no connections with the United States, the rationale of this rule is difficult to understand. As a general principle, obtaining required FATCA account documentation at account opening is manageable. However, imposing requirements to obtain updated documentation after the account is opened creates practical operational difficulties, and would yield limited, if any, information that would bear on U.S. tax compliance and would do so at a disproportionate cost.

We are unaware of any law that links the expiry date of a passport or other government-issued identification with the expiration of such individual’s citizenship in such country. A passport is a travel document and the fact it includes an expiration date reflects this primary purpose. Some countries have concluded that the expiration of a passport is not sufficient to bar its use as a travel document. See, European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe (<http://conventions.coe.int/Treaty/EN/Treaties/Html/025.htm>) (individuals can even travel across country borders with expired passports pursuant to local rules identified in the appendix).

The consequence of expired documentary evidence under the proposed regulations is quite harsh. The proposed regulations would treat an individual with expired documentary evidence as a recalcitrant account holder, resulting in FATCA withholding particularly when there has never been any indicia of U.S. status.

#### SBA Proposal

The risk that a client would become a recalcitrant account holder (in the absence of any U.S. indicia) solely because of expired documentary evidence substantially outweighs any benefit derived by Treasury and the IRS under this rule. In addition, the operational implementation of this rule would not be consistent with current KYC/AML procedures, create excessive administrative and operational costs and severely disrupt the ordinary course of business with non-U.S. person clients.

This provision should be removed in its entirety. If Treasury and the IRS retain this provision, an account holder that has already been properly identified as a non-U.S. person but who has not renewed expired documentary evidence upon which such classification was based should not be considered a recalcitrant client for purposes of subjecting payments to such client to the 30 percent FATCA withholding tax.

#### **Treatment of non-operating entities – Passive NFFE vs. Owner-documented FFI** *(Proposed Regulations – Executive Summary, B.1.c., page 24; 1.1471-5(e)(1), pages 293 ff., 1.1471-3(d)(7), pages 179 ff.)*

An entity that is considered an FFI – even if the entity qualifies as a registered deemed-compliant FFI – will be subject to substantially increased administrative costs, ongoing monitoring and compliance costs, including costs associated with maintaining the FFIs participating or deemed compliant FFI status. Consequently, due to these increased costs, it would be appropriate to limit FFI status only to those professional financial market participants like banks, brokers, custodians, investment funds or certain insurance companies. Other passive investment vehicles that are not professionally managed or widely held should not be treated as if they are a financial institution. It is more appropriate to treat these entities as NFFEs.

The proposed regulations do not clearly enough distinguish passive NFFEs from FFIs when the entity is not engaged in an active trade or business (sometimes referred to in practice as a domiciliary company or passive investment companies). We are of the view that such non-operating entities should not be treated as FFIs and believe that it is more appropriate to treat such entities as passive NFFEs. Treasury seems to share this view as well in the executive summary of the preamble, where it is stated that passive investment entities are referred to in the regulations as passive NFFEs.

Furthermore, we have serious concerns regarding the practical treatment of owner-documented FFIs. We have identified the following critical issues:

#### General rule

As a general matter, an owner documented FFI is obligated to annually provide an owner reporting statement (as detailed in 1.1471-3(d)(7)(iv)). This annual requirement places an onerous burden on a participating FFI that is willing to treat the FFI as an owner-documented FFI. Moreover, the requirement to provide detailed ownership information relating to non-U.S. person owners of the FFI and an owner reporting statement indicating each owner's percentage ownership over the FFI appears to require information that is irrelevant for purposes of chapter 4. For instance, it is not clear how detailed information transmitted to the IRS that relates to non-U.S. person owners of the FFI would facilitate the purposes of FATCA – namely, ensuring that U.S. persons comply with applicable U.S. federal income tax laws. The collection of such information is likely to be inconsistent with privacy and data protection standards in many jurisdictions. We further note that the preparation or collection of an owner reporting statement that provides an allocation of ownership on a per person basis is not required under Swiss KYC/AML due diligence. Additionally, we note that the application of the owner-documented FFI rule is limited further, without good reason, by including the limitation contained in Prop. Reg. § 1.1471-5(f)(3)(ii)(C) (FFI may not issue non-regularly traded debt in excess of \$50,000). We maintain that such a rule overly limits the application of the owner-documented FFI category for clients that would otherwise satisfy these general requirements and unnecessarily complicates refinancing alternatives available to such owner-documented FFIs.

#### Auditor's letter substitute

We believe the requirements associated with the renewal of the auditor's letter are unclear and should be clarified. Similarly, the requirement that the auditor must have a location in the United States makes this option unattractive for many FFIs that could otherwise satisfy the owner-documented FFIs provisions. The SBA notes that the effect of that provision is to require the use of U.S. auditors.

#### Exception for preexisting obligations

The SBA welcomes the opportunity for FFIs to use, for purposes of complying with FATCA account identification requirements, existing documentation collected pursuant to local KYC/AML due diligence. However, we again note our concerns regarding the requirements contained in the proposed regulations that relate to documentary evidence renewal procedures. The expiration of such documentation after four years is not consistent with the Swiss KYC/AML due diligence. It adds additional complexity and precludes – depending on the timing and frequency of a withholdable payment – a significant number of the preexisting owner-documented FFI population from qualifying under this exception.

#### SBA Proposal

We request IRS and Treasury to clarify Prop. Reg. §§ 1.1471-5(e)(1)(iii) and 1.1471-5(e)(4) to provide that closely held passive investment entities (sometimes referred to as non-operating or domiciliary companies) are treated as passive NFFEs and not as FFIs. This clarification could be accomplished by explicitly treating such closely held FFIs as passive NFFEs and by distinguishing a closely-held passive investment entity from an FFI that would otherwise satisfy the requirements of Prop. Reg. §1.1471-5(e)(4) by limiting the application of that paragraph only to those FFIs that have more than 20 owners and which is regulated as investment fund under the laws of its country

of incorporation or organization. The documentation requirements designed to identify substantial U.S. owners of passive NFFEs are, in our view, sufficient to prevent abusive schemes and adequately address related documentation efforts on the FFI level.

In addition, within the category of owner-documented FFIs we request the following changes:

#### General rule

Rather than require an owner-documented FFI to provide an owner reporting statement every year, an updated owner reporting statement should be provided to the participating FFI whenever there is a change in circumstances relevant under Chapter 4, i.e. which either leads to changes in reporting or withholding under Chapter 4.

Moreover, the owner reporting statement should not require an allocation of ownership unless:

- The owner-documented FFI is a partnership, simple trust, or grantor trust and provides the owner reporting statement in lieu of a NWP withholding statement that would otherwise be required for Chapter 3 purposes; or
- One or more of the owners of the owner-documented FFI is a U.S. specified person. If the owner reporting statement does not provide an allocation of ownership with respect to the specified U.S. person(s), it would be appropriate for the participating FFI to report all payments as if made solely to such specified U.S. person(s) or fully subject to withholding under Chapter 4.

It is not clear what additional information, provided by the owner-documented FFI, would be necessary to permit a participating FFI to comply with its information reporting and withholding obligations. Accordingly, we request that Prop. Reg. § 1.1471-3(d)(7)(iv)(C) be removed, as it creates unnecessary uncertainty.

Prop. Reg. §§ 1.1471-3(d)(7)(i)(F) and 1.1471-5(f)(3)(ii)(C) preclude owner-documented FFI status in the event that the owner-documented FFI issues debt in excess of \$50,000 that constitutes a financial account to any person. While it is unclear what would constitute issuing debt for this purpose, we understand this term to generally mean borrowing funds upon the promise to repay the lender. This rule is unduly restrictive as it is virtually certain that such debt will not be regularly traded on an established securities market and would be considered a financial account. This rule would effectively prohibit the owner-documented FFI from borrowing funds, mortgaging assets, or otherwise purchasing assets on margin. We would suggest eliminating this rule as it is unduly restrictive and does not have any impact on the identification of specified U.S. persons that hold a financial account with respect to such owner-documented FFI, which presumably would include any specified U.S. person that has a debt interest in such owner-documented FFI that exceeds \$50,000.

#### Auditor's letter substitute

The restriction limiting the provision of an auditor letter to a U.S. based accounting firm should be deleted without replacement. However, if an audit requirement is retained, it should be able to be satisfied by obtaining an audit from a locally qualified firm or accountant. Further, the requirement to renew the letter should not be less than three years after the date of a relevant payment.

#### Exception for preexisting obligations

Payments made to an owner-documented FFI relating to a preexisting obligations for which the withholding agent has collected documentation pursuant to local KYC/AML due diligence that is sufficient to satisfy the KYC/AML due diligence requirements of such jurisdiction should be valid without any time limit, unless the participating FFI becomes aware of information that indicates that the original documentation was not accurate. The limitation that requires documentation having been collected within four years from the date of payment should therefore be deleted without replacement. In order to address possible concerns on the part of Treasury and the IRS, a relationship manager inquiry (if one has been assigned) could be applied for accounts in excess of \$1,000,000, as described in Prop. Reg. § 1.1471-4(c)(8)(ii).

#### Additional Suggestion for New Obligations Paid to Owner-Documented FFIs

Any documentation (including from the owner-documented FFI, itself, and its beneficial owners) is not required to be periodically renewed if the participating FFI agrees to take the following additional steps:

1. Beneficial owner documentary evidence must relate to citizenship (e.g. passport);
2. The owner-documented FFI has 20 or fewer owners;
3. PFFI performs electronic search for U.S. indicia (under the enhanced search criteria if payee's account is in excess of \$1,000,000);
4. For offshore obligations, only documentary evidence of the entity (e.g., organizational document, which would not expire) is required, not a Form W-8; and
5. The relationship manager provides periodic (every 3 years) certification regarding actual knowledge regarding the beneficial owner's status.

#### **Identification and Documentation Procedures for Individual Accounts – Curing of U.S. indicia**

*(Proposed Regulations – 1.1471-4(c)(4)(i), pages 236-239)*

Prop. Reg. § 1.1471-4(c)(4)(i)(B) provides several rules designed to “cure” the presence of U.S. indicia, generally by obtaining from a non-U.S. person a valid W-8BEN, signed under penalties of perjury, and a non-U.S. passport, and in some cases additional information rebutting the particular U.S. indicia associated with the non-U.S. person.

Prop. Reg. § 1.1471-4(c)(4)(i)(B)(2) provides the requirements to cure the presence of a U.S. birthplace and requires the participating FFI to “obtain a copy of the individual's Certificate of Loss of Nationality of the United States or Form I-407, or a reasonable explanation of the account holder's renunciation of U.S. citizenship or the reason the account holder did not obtain U.S. citizenship at birth.”

Certain U.S. indicia, such as the prior documentation of the client as a U.S. person or the client having a U.S. place of birth, provides a presumptive basis to conclude that such person is a U.S. person. In such case, the clients must provide clear evidence that they are no longer a U.S. person, for example by providing the FFI with a Certificate of Loss of Nationality. In particular, where the client presents documents with a U.S. place of birth, it is not entirely evident why the proposed regulations require a combination of documents, a W-8BEN, a non-U.S. passport and a Certificate of Loss of

Nationality of the United States (a “CLN”). In our view, there is no need to obtain Form W-8BEN if the participating FFI obtains a CLN and a non-U.S. passport. Any redundancy (in this case, by requiring a Form W-8BEN) should be avoided in order to reduce a PFFI’s operational expenses relating to collecting, reviewing and processing client-provided documentation.

On the other hand, other U.S. indicia only raise the question of whether the account holder might be a U.S. person. For these non-presumptive U.S. indicia, such as a U.S. mailing address, U.S. telephone number, standing instructions, signatory power to a U.S. resident or a hold mail address as the only address identified for the account holder, the proposed regulations permit such U.S. indicia to be cured by the presentation of documentary evidence issued by a non-U.S. government (e.g., a non-U.S. passport). In many cases, a non-U.S. person might have such U.S. indicia in connection with their ownership of U.S. vacation property, the client’s use of a U.S. accounting firm for purposes of properly reporting U.S. investments, a U.S.-based investment advisor, or a client may directly or indirectly conduct certain business activities in the United States, etc.

We regard the requirement to collect a W-8BEN from customers with U.S. indicia that would be cured by the presentation of non-U.S. government documentary evidence as extremely burdensome and likely to create confusion amongst clients. This is particularly the case because the additional requirement to obtain a W-8BEN is, in effect, a belt and suspenders approach to ensuring the client is doubly documented as a non-U.S. person, first by reference to the documentary evidence already collected by the FFI and then by this additional requirement to obtain a W-8BEN. Such an approach presumes that the FFI uses the Form W-8BEN as primary documentation for such individual. It is our experience that, more often than not, an FFI will use documentary evidence, such as a non-U.S. passport, as the primary means to satisfy applicable KYC/AML documentation requirements and will not collect a Form W-8BEN unless necessary for the client to obtain benefits under an applicable U.S. income tax treaty. Accordingly, requiring the collection of a W-8BEN under such circumstances would be considered burdensome and duplicative since the FFI already would have evidence of the client’s non-U.S. citizenship or resident resulting from having already collected appropriate non-U.S. government documentary evidence from such client. Non-U.S. person clients that have not been obligated to provide a W-8BEN previously because, for example, they hold no U.S. investments will not understand the need to provide this document. Moreover, if the additional documentation requirement is viewed in conjunction with the requirement to refresh withholding certificates every three years and documentary evidence as it expires, this rule creates additional complications from an operational standpoint by requiring the FFI to track two different timelines to periodically obtain refreshed documentation.

### SBA Proposal

Thus, we propose that in the case where a client presents with U.S. indicia described in Prop. Reg. §1.1471-4(c)(4)(i)(B)(3)-(5), rather than obtain a Form W-8BEN and documentary evidence, it would be less burdensome to clients and to the PFFI to obtain (1) either (A) a Form W-8BEN or (B) documentary evidence and (2) a written statement from the client providing a reasonable explanation of the presence of such indicia.

Such a client provided statement would be acceptable to cure the presence of the applicable U.S. indicia, if the PFFI has obtained in its files documentary evidence as per its KYC/AML rules establishing the client's non-U.S. citizenship, non-U.S. permanent residency and non-U.S. birthplace and received a "declaration of non-U.S. status" often used for purposes documenting a client's status for purposes of complying with a financial institution's QI Agreement. Such corroborative information, for example, could also be provided to a Swiss FFI on form A.

Only in case of reasonable doubt, the FFI would no longer be able to rely on documentation previously provided by the client and the client's written statement and be compelled to obtain a W-8BEN form.

Such a rule will allow the FFIs to reasonably rely on the written statements from clients, until such time when a change of circumstances may occur. Moreover, such a rule would not require FFIs to have to address the administrative complexity of periodically refreshing two different types of client-provided documentation at different intervals.

As for the specific treatment of the presence of a U.S. place of birth, as described in Prop. Reg. §1.1471-4(c)(4)(i)(B)(2), we request that the documentation requirement is modified as follows:

*"[...] or a Form W-8BEN or a non-U.S. passport or other government-issued identification evidencing citizenship in a country other than the United States. In addition, to establish the foreign status of any account holder with a U.S. place of birth, the participating FFI must obtain either (a) a copy of the individual's Certificate of Loss of Nationality of the United States (Form DS-4083, formerly FS-348), or (b) a reasonable explanation of the account holder's renunciation of U.S. citizenship or the reason the account holder did not obtain U.S. citizenship at birth and a Form W-8BEN."*

If Treasury and the IRS reject our comments and Form W-8BEN must be obtained in all circumstances to cure the presence of any U.S. indicia and thereby confirm the client's non-U.S. person status, we request that such W-8BEN remains valid until such time there is a change of circumstance or the FFI knows or has reason to know that the certification provided on Form W-8BEN is no longer valid. As a consequence, Form W-8BEN provided to an FFI to cure the presence of U.S. indicia will not expire upon the expiration of three years from the date of its execution.

**Address Requirement on Government-Issued Identification**  
(Proposed Regulations – 1.1471-3(c)(5)(ii), pages 162 - 163)

Passports, national identification cards or driver licenses might not contain any residence address information. None of the aforementioned documents issued today in Switzerland contain address information. Furthermore, a U.S. passport does not contain the address of the holder (apart from an address that can be voluntarily penciled in, changed or erased).

The requirement to only accept government issued identification if a (residence) address is contained therein goes far beyond local rules and creates an artificial threshold that substantially limits the types of documentary evidence that may be accepted by an FFI. The imposition of such a requirement directly contradicts the purpose of allowing this category of documentary evidence, particularly when this information is not included by many local jurisdictions.

#### SBA Proposal

We request the removal of the address requirement in Prop. Reg. § 1.1471-3(c)(5)(ii). Such a requirement is inappropriate and fails to consider the myriad of local rules that provide applicable guidelines pertaining to what data government issued identification must contain.

#### **Reporting and Withholding**

*(Proposed Regulations – 1.1471-4(d), especially 4(d)(4)(iv), pages 260 - 261)*

Prop. Reg. § 1.1471-4(d) provides guidance needed to address the challenges associated with an FFI's obligation to report payments to U.S. accounts. The nature of such payments are virtually infinite and include any payment of income or gross proceeds (whether or not U.S. source) made to such account. The information reporting contemplated by this paragraph is too burdensome and costly for any FFI in terms of the resources that would need to be mobilized to accomplish this task. In light of the individual information reporting requirements imposed on those U.S. persons that have a financial interest (or signature authority over) a non-U.S. financial account, this type of information reporting requirement is duplicative as this information should be provided by the holder of the U.S. account on IRS Form 8938 or T.D. F 90.22-1 (the "FBAR"). If such information is not required to be reported by the account holder on Form 8938 or the FBAR, there does not appear to be a compelling rationale for an FFI to provide this information to the IRS. A simpler solution is needed that will provide sufficient information to the IRS without imposing onerous burdens on FFIs.

#### SBA Proposal

A simplified reporting process will be more effective and can achieve the same goal as the process currently contemplated in the proposed regulation. In this regard, we propose that information reporting for any U.S. account should only include information pertaining to the name, address, account number, TIN of the specified U.S. person and the year-end account balance of such account. Such information is sufficient for IRS enforcement purposes. The IRS would be provided sufficient information to know of the existence of the account, where it is maintained, and, as ordinarily the case when the IRS conducts an audit to verify data reported on an income tax return, may request from the U.S. account holder any additional documentation or information to confirm the information the account holder has self-reported on Form 8938 or the FBAR. Such a rule properly places the information reporting burden on the party subject to U.S. federal income tax.

**QI Primary Withholding Responsibility under Chapter 3 and 4**

*(Proposed Regulations – 1.1471-3(c)(3)(iii)(E), page 160)*

Prop. Reg. § 1.1471-3(c)(3)(iii)(E) provides that a QI that does not assume primary withholding responsibility under its QI Agreement must elect to have a withholding agent withhold tax on payments to any account belonging to a non-participating FFIs or recalcitrant account holders. Accordingly, it is not possible to assume withholding responsibility for purposes of chapter 4 but not for purposes of chapter 3. The purpose or policy underlying this rule is unclear. A QI should have the ability to determine whether it wants to accept primary withholding responsibility for purposes of chapter 4 without limiting its ability to not take on such responsibility for purposes of chapter 3.

**SBA Proposal**

The election to be withheld upon for chapter 4 purposes should not be linked to the existing QI election under chapter 3.

**Information Return for Payment Reporting - Reporting Requirements for Certain Payments to Nonparticipating FFIs**

*(Proposed Regulations – 1.1474-1(d)(2)(ii)(A), page 364)*

Prop. Reg. § 1.1474-1(d)(1) would require an FFI to file an information return, on Form 1042-S, to report chapter 4 reportable amounts paid to a recipient, including a nonparticipating FFI. Such a report would necessarily include the identity of the recipient of the payment. In the case of a payment to a non-participating FFI, a chapter 4 reportable amount would, pursuant to Prop. Reg. § 1.1474-1(d)(2)(ii)(A), include “foreign reportable amounts,” meaning non-U.S. source FDAP income, as well as “other financial payments” the meaning of which has been reserved. In other words, an FFI would be obligated to provide information reporting on payments to a non-participating FFI that are not ordinarily subject to U.S. tax and which are not foreign passthru payments that would be subject to tax under section 1471. Putting aside the underlying issue of whether it is appropriate to conduct information reporting with respect to payments that are not subject to U.S. taxation, a Swiss FFI is unable to disclose the identity of a nonparticipating FFI under local law without first obtaining a suitable waiver from the nonparticipating FFI. It can be assumed that an FFI which is either not willing or able to become participating or deemed-compliant FFI is unlikely to provide the necessary waiver to allow recipient specific reporting to the IRS. In many cases, the nonparticipating FFI will have made the determination to not become a participating or deemed compliant FFI because it has no specified U.S. person owners and only derives income from non-U.S. investments.

The coordination rule provided in Prop. Reg. § 1.474-1(d)(2)(iv) that requires chapter 4 information be reported on the same Form 1042-S as any amounts paid to a FFI under chapter 3 seemingly conflicts with the information reporting rules under chapter 3 and a QI’s QI Agreement. Under chapter 3 and pursuant to an applicable QI Agreement, an FFI receiving FDAP income for its own account (not as intermediary) would not be reported on a namely basis but in the applicable withholding rate pool. For reporting purposes, payments of U.S. source FDAP must be differentiated depending on whether

the FFI is receiving the payment on its own behalf or as an intermediary and non-U.S. source payments should not be reported at all.

#### SBA Proposal

The requirement to report foreign reportable amounts with respect to nonparticipating FFIs should be replaced by an aggregate value (non-nominative basis) reporting similar to the reporting regarding recalcitrant account holders and be in line with the proposal contained in Notice 2010-60, Section IV., 'F. Reporting with Regard to Recalcitrant Accounts'.

#### **Request for Additional Information**

*(Proposed Regulations – 1.1471-4(a)(8) page 228)*

The proposed regulations provide that “[t]he FFI agreement will specify the participating FFI’s obligation to comply with requests by the Secretary for additional information with respect to any U.S. account maintained by such institution. The FFI agreement will require that the FFI provide responses to written requests from the IRS for information relevant to the participating FFI’s obligations under the FFI agreement.”. Pursuant to the proposed regulations, an FFI will have transmitted all required tax information to the IRS relating to a U.S. account. This information, even if our comments above are fully adopted, will provide all information necessary for the United States to ensure that a specified U.S. person has satisfied their U.S. federal income tax obligations. It is unclear what additional information the IRS would need to properly enforce U.S. tax laws.

The FFI task is to identify U.S. accounts and provide information pertaining to those accounts to the IRS, which will be accomplished by collecting Form W-9 and reporting identifying information and account-related data to the IRS. Once information has been transmitted to the IRS by the FFI, any further information the IRS determines it may require should be provided by the account holder and not the FFI.

The ability on the part of the IRS to request information from the FFI will conflict with the specific and limited waiver that will be need to be granted by the Swiss Government in order to allow FFIs to comply with the specific information reporting requirements set forth in section 1471.

If such requirement remains as part of an FFI agreement, the frequency of any such demands must be limited, to minimize the costs associated with responding to such demands and minimize the impact on the day-to-day business operations of such FFI.

#### SBA proposal

We request IRS and Treasury to strike the request for additional information, based on the fact that the FFI, by entering the FFI Agreement will in any case commit itself to provide full disclosure on U.S. accounts and that the type of information re-

quired to be reported will amply allow the U.S. tax authorities to reach the scope of the FATCA programme.

Should this requirement remain, guidance should be provided identifying an appropriately tailored list of additional information that may need to be provided by the FFI to the IRS, upon request. Such guidance should also place limits on the frequency of such requests and provide for a reasonable period of time to respond to such requests.

We request the IRS to delete or to clarify the last sentence of this paragraph to delineate the types of information requests to which FFI would be obligated to respond. Perhaps, this rule would contain a reference to the FFI Agreement and the requirements contained therein, rather than provide a rule that seemingly has no limitations.

#### **Certifications by the Responsible Officer**

*(Proposed Regulations – 1.1471-4(c)(10), page 251)*

As a preliminary matter, additional guidance must be provided regarding the certifications to be provided by the FFI's responsible officer.

Prop. Reg. § 1.1471-4(c)(10) provides for the responsible officer to provide an additional certification that, "to the best of the responsible officer's knowledge, after conducting a reasonable inquiry, the participating FFI did not have any formal or informal practices or procedures in place from August 6, 2011, through the date of such certification to assist account holders in the avoidance of chapter 4 of the Internal Revenue Code."

We are opposed to such a certification under the guidance published to date, primarily because of its retroactive nature and because what would constitute a formal or informal practice or procedure to assist account holders in the avoidance of chapter 4 is unclear to us. The sole example contained in the regulations, differs from the example provided in Notice 2011-34 and fails to inform responsible officers of what behavior is explicitly prohibited. How is it possible to conduct a reasonable inquiry if the responsible officer is ignorant of the behavior he would be asked to identify?

#### **SBA Proposal**

We reiterate our comments from our June 10, 2011 submission. It is imperative to provide further guidance relating to this certification requirement. As we previously stated, we recommend that a formal and adequate check-list be prepared by the IRS that would be used for undertaking this certification process. In which case there would be no need to obtain any additional certifications from the FFI's responsible officer.

If, however, there is a demonstrable need for a certification to be made by the responsible officer, such a certification must be made as to "the best of the responsible party's knowledge." Information outside the personal knowledge and control of the responsible officer may not be subject to complete verification. In any instance where doubt exists

on the part of the IRS, it may require an external audit of the FFI. Presumably, such external audit would be conducted pursuant to operational guidelines for which additional guidance is also needed.

The retroactive nature of the certification should be removed for sound reasons of tax administration. Any certification should only relate to the facts existing as of the effective date of the legislation (January 1, 2013), in the case of an FFI that seeks to become a participating FFI prior to July 1, 2013, or the date on which an application is made to become a participating FFI, if the effective date of the FFI Agreement is on or after July 2, 2013.

**U.S. account – U.S. Owned Foreign Entity – Beneficial Interest in a Foreign Trust**  
*(Proposed Regulations – 1.1473-1(b)(3)(iii), pages 351 - 352)*

Bank FFIs that maintain accounts for non-U.S. trusts are often not aware, after all required KYC/AML due diligence has taken place, of any subsequent internal and operational interactions among the trustee, the protector, the settlor and the beneficiaries unless the FFI or an affiliate has been engaged to participate in the administration of such trust. In case of a discretionary trust, FFIs are not in a position to know when distributions are made by a trustee, the amount of such distributions or to whom such trust distributions are made, or even if the trustee will make any distributions. FFIs are, therefore, generally unable to determine if whether the 10 percent threshold described in Prop. Reg. § 1.1473-1(b)(3)(iii) has been satisfied both in the case of a discretionary beneficial interest or a mandatory beneficial interest held by a specified U.S. person that may be a direct or indirect beneficiary of such trust. The inability of the FFI to have access to such data is further constrained if the trust maintains more than one bank account (particularly if such other account is maintained by another FFI).

Such system is not administratively feasible to monitor due to the lack of data regarding payments to beneficiaries by the trust and the complexity associated with determining whether any such beneficiary has received a payment that exceeds \$5,000 or otherwise has an in such trust that exceeds \$50,000.

Presumably, the FFI at which the trust maintains its bank accounts should not be obligated to report such information, in the case where such information is known and reported by another FFI, the Trustee or trust company that has a closer relationship to the trust.

**SBA Proposal**

We propose that the final rules clearly clarify that any trustee that provides services to a trust that has US persons holding beneficial interests in such trust should be obligated to conduct all information reporting relating to the trust's financial accounts and any information reporting associated with making payments to such specified U.S. person beneficiaries. The final rules should clarify that the FFI that maintains a financial account for such a trust would not be obligated to conduct any information reporting with respect to any specified U.S. person that is a beneficiary of such trust.

For complex trusts, which are irrevocable and discretionary, that have a non-US settlor, non-US trustee and US beneficiaries possessing beneficial interests in such trusts, we also propose that the FFI that maintains a financial account for such trust is only required to obtain a valid Form W-8BEN in the name of the trust and has no further obligation to conduct due diligence or information reporting with respect to any payments made to the U.S. beneficiaries of such trust. Such reporting obligations are properly placed on the trustee that presumably would be either a participating FFI, registered deemed compliant FFI or a certified deemed compliant FFI.

**Clarification of Treatment of Additional Accounts from Pre-existing Relationships**  
*(Proposed Regulations – 1.1471-4(c)(2)(iii), page 233)*

Prop. Reg. § 1.1471-4(c)(2)(iii) contains an example of a relevant change in circumstances that provides an FFI with actual knowledge of U.S. indicia associated with an account. This example suggests that any U.S. indicia identified in connection with the opening of an additional account under a preexisting relationship with the same account holder would require the FFI to obtain additional documentation to establish whether the new account and the preexisting account are U.S. accounts. This example appears to contradict the rules contained in Prop. Reg. §§ 1.1471-4(c)(3)(ii), (c)(4)(ii) and (c)(4)(iii), which generally exempt an FFI from having to document certain pre-existing accounts valued below certain thresholds and the holder of such account has not been documented by the FFI as a U.S. person for purposes of chapter 3 or 61. It is also unclear if the additional account is treated as a new account and, as such, requires the participating FFI to review all information relating to the preexisting relationship.

**SBA Proposal**

Treasury and the IRS should clarify that any discovery of U.S. indicia during the account opening of an additional account pursuant to a preexisting customer relationship should be treated in the same way as any other discovery of change in circumstances as described in Prop. Reg. § 1.471-3(c)(6)(ii)(D). However, the customer relationship will remain a preexisting account and exceptions in Prop. Reg. §§ 1.1471-4(c)(3)(ii), (c)(4)(ii) and (c)(4)(iii) will continue to apply.

## **2. Additional Relevant Issues**

### **Identification of Non-profit Organizations**

*(Proposed Regulations – 1.1471-3(d)(6)(iii), page 177)*

The documentation requirements for non-profit organizations are in our view unnecessarily complicated. In principle, it should be sufficient for these purposes that the tax authorities of the country, under the laws of which the non-profit organization is formed or organized, issues a certification that such organization is a tax-exempt, non-profit organization formed for religious, charitable, scientific, artistic, cultural, or educational purposes. Treasury and the IRS should acknowledge that local requirements for non-profit status may not align with U.S. tax rules that govern U.S. tax exempt status. Accordingly, if the entity qualifies under local law as a non-profit organization, there should be no further limitations upon an FFI's ability to treat the entity as a deemed compliant non-profit organization.

#### **SBA Proposal**

The documentation required in Prop. Reg. § 1.1471-3(d)(6)(iii)(C)(1) (a letter issued by the tax authority of the country in which the payee is organized) should be accepted as evidence that the non-profit organization is a deemed compliant non-profit organization in all cases.

### **Closure of Recalcitrant Accounts**

*(Proposed Regulations – 1.1471-4(a)(5), page 226)*

It is difficult to terminate an account relationship and close an account if the bank is not provided with a suitable instruction from the client. As a general matter, a bank is not permitted to sell securities without authorization from a client. Moreover, it is not possible to transfer the proceeds from such a forced sale to another financial institution if it is not provided with suitable instructions from the client. It would seem to defeat the purpose of FATCA – to bring people within the U.S. tax system – to permit the closure of such accounts and return the proceeds to the accountholder's last known address; thereby, permitting such accountholder to remain undocumented and outside the U.S. tax system.

#### **SBA Proposal**

Where a forced sale and closure of account is not legally possible the FFI should be allowed to "freeze" the account, until such time it receives proper instructions from the client

### **Local FFIs in Switzerland**

*(Proposed Regulations – 1.1471-5(f)(1)(i)(A) pages 298 ff.)*

The Local FFI deemed compliant FFI rule is drafted in a manner that limits its application in Switzerland. In particular, the requirement that 98 percent of all accounts must be held by residents of the jurisdiction in which the FFI is organized and the subsequent provision that treats any resident of the European Union as a resident of the EU jurisdiction in which the account is maintained makes it virtually impossible for a substantial number of Swiss banks whose business model would otherwise fit this purpose to satisfy the requirements for Local FFI status. Switzerland is bordered by five other countries (four of which are members of the EU). Given Switzerland's size and its long history of providing safe and secure banking services to European clients resident outside its borders, the direct cross-border business with clients residing outside Switzerland but close to the border is substantial.

### **SBA Proposal**

The preamble to the proposed regulations indicates that Treasury and the IRS adopted this special pan-EU residency rule for FFIs established in EU Member States because financial institutions in EU Member States have common tax reporting or withholding obligations with respect to other EU residents. It should be noted that, Switzerland and other European countries outside the EU (Liechtenstein, San Marino, Monaco and Andorra) entered each into a bilateral international agreement with the EU and are equally or similarly participating in this EU tax reporting or withholding regime.

Therefore, we strongly request that an FFI organized in Switzerland (or for that matter in any of the jurisdictions that have agreed to the EU tax reporting or withholding regime) may treat account holders that are resident (including corporate residents) of EU member states as residents of the jurisdiction in which the FFI is incorporated or organized for purposes for the threshold calculation.

We further request that the 98 percent threshold should be lowered to 90 percent to reduce the risk that an FFI might not qualify for such status based on ordinary changes in the marketplace. We further request that that the 90 percent threshold must be met in terms of both, (a) number of accounts and (b) amount or value of the FFI's accounts.

Furthermore, an FFI should be permitted to maintain, uninterrupted, its deemed-compliant FFI status, if the required threshold is re-established by either increasing the domestic account holder population (which would include the residents in EU member countries) or by reducing the foreign account holder population within two calendar years following the calendar year in which the threshold was not satisfied.

We also request that the limitation contained in Prop. Reg. § 1.1471-5(f)(1)(i)(A)(8) (that all members of the Local FFI's affiliated group are incorporated or organized in the same country) be revised. If the Local FFI is a member of an affiliated group, it should be sufficient that all FFIs in such group are either participating or registered deemed compliant FFIs. There is no compelling reason to deny Local FFI status to an entity that serves a local market and whose customers are overwhelmingly residents of

such jurisdiction when other affiliates of such FFI are themselves participating FFIs or registered deemed compliant FFIs.

### **Passthru Payments**

*(Proposed Regulations – Explanation of Provisions A. 8, pages 20 ff. and 1.1471-5 (h) (1)/(2), page 318)*

The proposed regulations left unresolved multiple issues concerning the scope and definition of passthru payments, in particular:

- (i) Passthru payments and Passthru Payments Percentage (“PPP”) were retained, without further clarifications;
- (ii) the proposed regulations introduced the new concept of foreign passthru payment without defining it.

The absence of guidance relating to passthru payments highlights the very serious concerns raised by the SBA in its prior comments regarding Notice 2011-34.

### **SBA Proposal**

We would like to refer to the arguments and the suggestions already brought to the attention of Treasury and the IRS in our prior comments relating to Notice 2011-34.

### **3. Topics Not Covered in the Proposed Regulations**

#### **Documentation of Foreign Estates without Legal Personality**

In countries where estates do not have a separate legal standing, the account of a deceased account holder remains after his or her death in the name of the decedent (eventually added by “heirs”) and is blocked until the right to dispose of the assets has been conclusively settled by the heirs or executor. Once this is accomplished, either the assets may be distributed to accounts of the heirs or the heirs may replace the decedent as the holder of the account.

The death of a non-U.S. individual account holder could be seen as a change of circumstance, but does not lead to any relevant changes under FATCA until such time when the estate is settled and the assets may be distributed to the heirs. It is therefore imperative that an FFI is not obligated to undertake any additional due diligence following the time of the account holder’s death until such time when the estate is settled and the heirs are entitled to the assets.

#### **SBA Proposal**

We request that the IRS clarifies that an FFI may treat a foreign estate without its own legal standing as documented for purposes of chapter 4, provided:

- (a) the account has been documented as held by a non-U.S. person (prior to the death of the account holder) in accordance with applicable FATCA account identification procedures,
- (b) no change has occurred to modify the persons authorized to act with respect to such account (e.g., pre-existing power of attorneys or signatory authorities may remain in effect if so under local law), and
- (c) the right to dispose assets within the estate has not been conclusively settled.

To the extent that the right to dispose of assets within the estate has been conclusively settled, the account shall be treated undergoing a change of circumstances.

Additionally, the final regulations should clarify that any withholdable or passthru payments received by the estate of a non-U.S. person will not be subject to information reporting or withholding tax after the death of the account holder until such time when the above referenced change of circumstances is deemed to occur.

The above request is consistent with the existing rules under the QI regime (see IRS Memorandum for Industry Directors dated April 11, 2006, <http://www.irs.gov/businesses/corporations/article/0,,id=156094,00.html>).

#### **Dual Citizens Living outside of the U.S.**

According to Swiss KYC/AML standards (approved by the IRS pursuant to the Swiss QI attachment), Swiss banks, using existing documentation, can determine with certainty the nationality of clients. It is not, however, normally possible to determine the following (unless the beneficial owner of the account is identified for QI purposes as a non-U.S.

person that intends to hold U.S. securities): (i) U.S. citizenship held in addition to the declared nationality, (ii) possession of a green card, and (iii) persons who are considered to be residents of the United States based on the “substantial presence test.” The proposed regulations do not resolve this issue. Identifying existing clients that are dual citizens continues to pose a very serious challenge.

Developing an identification process that will accurately identify this category of citizens may prove to be impossible for future FFIs. There are many persons residing outside the United States that are considered U.S. citizens or residents of the United States. In many cases, these individuals are not aware of their status as a U.S. citizen or a resident of the United States. This is often the case with green card holders who have allowed their green cards to expire and no longer reside in the United States, individuals born within the United States to non-U.S. person parents and who departed the United States shortly thereafter, and individuals born outside the United States and one or both parents are a U.S. citizen. Aside from partially addressing the place of birth issue, the proposed regulations fail to provide guidance regarding the identification of these types of account holders or, more importantly, how to appropriately treat these persons for purposes of chapter 4.

#### SBA Proposal

The SBA proposes that the definition of specified U.S. person is modified to exclude from such definition:

- any dual citizen of the United States and another country who resides on a permanent basis outside the United States and has resided outside the United States for the last 10 years;
- any lawful permanent resident of the United States (e.g., a holder of a green card) that no longer physically resides in the United States, maintains a tax home outside the United States and whose green card has expired; or
- any individual that is a resident of the United States by reason of the substantial presence test but who maintains a closer connection to a foreign country under the rules provided in Treas. Reg. § 301.7701(b)-2 without regard to satisfying the filing requirements associated with notifying the IRS of such closer connection.

## Conclusion

We hope that Treasury and the IRS will consider the concerns identified in this letter and our proposed solutions. We maintain that our proposals are consistent with the objectives and purpose of FATCA. To the extent that the final regulations do not adequately address these implementation issues, many FFIs will not be able to comply with FATCA. Consequently, it would be more likely that such FFIs are treated as non-participating FFIs, which would not facilitate FATCA's goal of transparency.

We would welcome the opportunity discuss these matters in greater detail. Please do not hesitate to contact the undersigned if you have any questions regarding our submission or require any additional information.

Yours sincerely,  
Swiss Bankers Association



Dr. Jakob Schaad



Urs Kapelle

cc: Ms. Manal Corwin, Deputy Assistant Secretary (International Tax Affairs)  
Mr. Michael Caballero, International Tax Counsel  
Mr. Jesse Eggert, Associate International Tax Counsel  
Mr. Michael Plowigan, Attorney-advisor, Office of International Tax Counsel  
Mr. Michael Danilack, Deputy Commissioner (International) LB&I  
Mr. Steven Musher, Associate Chief Counsel (International)  
Mr. John Sweeny, Senior Technical Reviewer, Office of Associate Chief Counsel (International), Branch 2  
Ms. Danielle Nishida, Attorney-advisor, Office of Associate Chief Counsel (International), Branch 2