REG-121647-10

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April 25, 2012

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

Re: Notice of Proposed Rulemaking and Request for Comments Regarding Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities

Dear Sir/Madam:

White & Case LLP is a global law firm. We represent over 200 financial institution clients worldwide, including sovereign-related banks, investment banks, funds, insurance companies and financial centers. We welcome the opportunity to submit comments in response to the Notice of Proposed Rulemaking regarding Regulations Relating to Information Reporting by Foreign Financial Institutions ("FFIs") and Withholding on Certain Payments to FFIs and Other Foreign Entities (the "Proposed Regulations").

The Proposed Regulations were issued by the Treasury and the Internal Revenue Service (the "Service") on February 8, 2012 under Sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended (the "Code"), commonly referred to as the Foreign Account Tax Compliance Act ("FATCA"). We recognize that the Treasury and the Service are attempting in good faith to effectively implement the Congressional goals of FATCA without imposing excessive burdens on the business community, and we are pleased to have the opportunity to comment on the Proposed Regulations.

The comments and recommendations below address certain aspects of the Proposed Regulations regarding foreign non-profit organizations and foreign retirement funds that are deemed to comply with FATCA reporting requirements or that are exempt from FATCA withholding under Section 1471 of the Code.

## I. Comments and Recommendations under Section 1.1471-3 Regarding the Identification of a Payee

### A. Documentation Requirements for Qualifying Retirement Funds

Section 1.1471-3(d)(6) of the Proposed Regulations identifies documentation that a withholding agent may generally rely on to treat a payee as a "certified deemed-compliant FFI." The specific documentation required to be submitted to the relevant withholding agent varies depending upon the category of certified deemed-compliant FFI at issue. For instance, a non-profit organization may submit a letter from counsel to the relevant withholding agent concluding that the non-profit organization qualifies as a certified deemed-compliant FFI. In contrast, a retirement fund[1] is required to provide the relevant withholding agent with its organizational document that generally supports the claim that the fund qualifies for certified deemed-compliant status.[2]

Section 1.1471-3(d)(8) of the Proposed Regulations identifies the documentation required for a withholding agent to treat a payee as an "exempt beneficial owner." Similar to the documentation requirement discussed above concerning a retirement fund that qualifies for certified deemed-compliant status, a retirement fund that wishes to qualify as an exempt beneficial owner generally is required to provide the withholding agent with its organizational document that generally supports its claim that it is a qualifying retirement fund.[3]

Various issues are raised by the requirements noted above that retirement funds generally must provide their organizational documents to the relevant withholding agents in order to be treated as certified deemed-compliant FFIs or exempt beneficial owners with respect to payments made by such withholding agents. First, retirement funds will be reluctant to submit their organizational documents to every withholding agent in connection with their U.S. investments. Retirement funds invest in hundreds of U.S. equity instruments, U.S. debt instruments or other similar U.S. instruments. Such funds may be reluctant to invest if they will be required to disseminate their organizational documents to each applicable withholding agent. Second, it is not practical to expect withholding agents to review all organizational documents provided to them. Each retirement fund's organizational document likely would be lengthy and reviewing such document to determine whether it generally supported a retirement fund's status as a certified deemed-compliant FFI or an exempt beneficial owner would impose a substantial administrative burden on the retirement fund and each withholding agent.[4] In addition, a significant portion of the information contained in a retirement fund's organizational document

[1] For purposes of this letter, the term "retirement fund" includes a "retirement plan" referenced in Section 1.1473-3(d)(6)(ii).
[2] Section 1.1471-3(d)(6)(ii)(A) of the Proposed Regulations.
[3] Section 1.1471-3(d)(8)(iv)(A)(2) of the Proposed Regulations.
[4] Section 1.1471-3(d)(6)(ii)(A) of the Proposed Regulations provides that an organizational document will generally support an entity's status as a retirement fund if, for example, the organizational document indicates that the entity qualifies as a retirement fund under the laws of the jurisdiction in which the entity was organized and if no information in the organizational document contradicts the entity's claim that it qualifies for certified deemed-compliant status. Withholding agents will be required to review each organizational document received to make such determinations, and any such review process would likely impose a substantial administrative burden on withholding agents.

likely would be irrelevant for purposes of making a determination as to whether the retirement fund qualifies as a certified deemed-compliant FFI or an exempt beneficial owner. Finally, it does not appear to be necessary for retirement funds to be subject to more burdensome documentation requirements than non-profit organizations that qualify as certified deemed-compliant FFIs. Like qualifying non-profit organizations, both certified deemed-compliant retirement funds and exempt retirement funds qualify for their respective exceptions because they present a low risk for tax evasion. Accordingly, the Proposed Regulations should permit qualifying retirement funds to establish their status as certified deemed-compliant FFIs or as exempt beneficial owners, as the case may be, by each submitting to the relevant withholding agents a letter from counsel concluding that such fund qualifies for certified deemed-compliant status or exempt beneficial owner status, as the case may be. Consistent with this change, qualifying retirement funds should not be required to submit their organizational documents to withholding agents in order to be treated as certified deemed-compliant FFIs or exempt beneficial owners.

## II. Comments and Recommendations under Sections 1.1471-5 and 1.1471-6 Regarding Qualifying Non-Profit Organizations and Retirement Funds

### A. Certified Deemed-Compliant Non-Profit Organizations

Section 1.1471-5(f)(2)(iii) of the Proposed Regulations provides that, in order for a non-profit organization to be treated as a certified deemed-compliant FFI, such organization must, among other things, be an FFI that is established and maintained in its country of residence "exclusively for religious, charitable, scientific, artistic, cultural or educational purposes." This language closely tracks the language of Code Section 501(c)(3), which provides an exemption from tax for organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes...."[5] Consistent with the approach taken in Code Section 501(c)(3), the Proposed Regulations also should provide that entities established and maintained exclusively to support religious, charitable, scientific, artistic, cultural or educational organizations also qualify as certified deemed-compliant FFIs.

For instance, non-profit organizations that are established and maintained exclusively to hold title to property, collect income therefrom, and turn over the entire amount of such income (less expenses) to religious, charitable, scientific, artistic, cultural or educational organizations should qualify as certified deemed-compliant FFIs.[6] Likewise, non-profit organizations that are established and maintained exclusively to hold real property for their shareholders or beneficiaries that are organized exclusively for religious, charitable, scientific, artistic, cultural or

[5] Although the language in Section 1.1471-5(f)(2)(iii) of the Proposed Regulations closely tracks Code Section 501(c)(3), importantly it does not require certified deemed-compliant non-profit organizations to qualify as exempt both under the laws of its country of residence and under Code Section 501(c)(3). We applaud the Treasury and the Service for not requiring certified deemed-compliant non-profit organizations to satisfy all requirements applicable to Code Section 501(c)(3) organizations.

[6] The purposes of such an organization are the same as those of an entity that would qualify for tax exempt status under Code Section 501(c)(2).

educational purposes should qualify as a certified deemed-compliant FFIs under the Proposed Regulations.[7]

Moreover, non-profit organizations frequently establish subsidiaries or related entities to hold and invest their endowments, separate and apart from the activities of the non-profit organizations. A non-profit organization may hold its endowment in one or more related entities separate from its non-profit activities in order to protect the endowment from potential claims or legal actions arising from the activities conducted by the non-profit entity. Conversely, a non-profit organization may choose to organize its investment activities in one or more related entities separate from its non-profit activities in order to protect its non-profit activities from potential claims or legal actions asserted against the investing entities that hold investments on behalf of the non-profit organization. If a non-profit organization establishes and maintains one or more subsidiaries or related entities to hold its endowment or specific investments made by the endowment, each such subsidiary or related entity should qualify as a certified deemed-compliant FFI, provided that all income and gain (less expenses) is payable to the religious, charitable, scientific, artistic, cultural or educational non-profit organization.

It should be noted that Section 1.1471-6(g) of the Proposed Regulations generally provides that entities engaged in the business of investing, reinvesting or trading in securities which are wholly-owned by one or more exempt beneficial owners are themselves considered exempt beneficial owners. Section 1.1471-5(f)(2)(iii) of the Proposed Regulations should contain a similar provision to make clear that wholly-owned investment entities of certified deemed-compliant non-profit organizations should themselves qualify as certified deemed-compliant non-profit organizations. Furthermore, the provision set forth in Section 1.1471-6(g) and the new provision set forth in Section 1.1471-5(f)(2)(iii) should not be limited to wholly-owned entities. Any related entity, including a trust or other similar entity, should qualify as a certified deemed-compliant FFI or exempt beneficial owner if such entity is required to transfer all income and gain (less expenses) to a religious, charitable, scientific, artistic, cultural or educational non-profit organization.

### B. Certified Deemed-Compliant Retirement Funds and Exempt Retirement Funds

The Proposed Regulations list a total of four categories of retirement funds that are treated as deemed-compliant FFIs or exempt beneficial owners: two categories of funds are treated as certified deemed-compliant FFIs[8] and two categories of funds are treated as exempt beneficial owners.[9] Certain of these categories appear to overlap in significant ways. In particular, the requirements for a retirement fund to qualify for certified deemed-compliant status under Section 1.1471-5(f)(2)(ii)(A)(1) of the Proposed Regulations appear nearly identical to the requirements for a retirement fund to qualify as an exempt beneficial owner under Section 1.1471-6(f)(1)(ii) of the Proposed Regulations. It is unclear from the language in the Proposed Regulations whether the Treasury and the Service intend for there to be a substantive difference in requirements

[7] The purposes of such an organization are the same as those of an organization that *would qualify for tax exempt* status under Code Section 501(c)(25).
[8] Sections 1471-5(f)(2)(ii)(A)(1) & (2) of the Proposed Regulations.
[9] Sections 1471-6(f)(1)(i) & (ii) of the Proposed Regulations.

between each category of retirement funds. Accordingly, the Treasury and the Service should clarify and explain any intended differences between the categories of certified deemed-compliant retirement funds and retirement funds that qualify as exempt beneficial owners.

Retirement funds qualify as certified deemed-compliant FFIs if the funds are organized for the provision of retirement or pension benefits under the law of the country in which they are established or in which they operate and fall into one of two categories. The first certified deemed-compliant category includes retirement funds in which (i) all contributions to the retirement funds (other than transfers of assets from retirement accounts or plans otherwise exempt from FATCA) are employer, government, or employee contributions that are limited by reference to earned income, and (ii) no single beneficiary of each retirement fund has a right to more than 5% of the fund's assets (a "Section 1.1471-5(f)(2)(ii)(A)(1) Deemed Compliant Fund"). The second certified deemed-compliant category, which is available to retirement funds that each have fewer than 20 participants, includes retirement funds where contributions to the funds (other than transfers of assets from retirement accounts or plans otherwise exempt from FATCA) are limited by reference to earned income.

In addition, there are two types of retirement funds that qualify as exempt beneficial owners: (i) retirement funds that are established in a country with which the United States has an income tax treaty in force under which such funds are entitled to treaty benefits and (ii) retirement funds that are formed for the provision of retirement or pension benefits under the laws of the country in which they are organized and, among other things, for which all contributions (other than transfers of assets from retirement accounts or plans otherwise exempt from FATCA) to the funds are employer, government, or employee contributions that are limited by reference to earned income and for which no single beneficiary has a right to more than 5% of each fund's assets (this second category is referred to below as a "Section 1471-6(f)(1)(ii) Exempt Fund").

There are several issues raised by the requirements noted above for certified deemed-compliant retirement funds and retirement funds that qualify as exempt beneficial owners. First, the Proposed Regulations provide that all contributions to Section 1.1471-6(f)(1)(ii) Exempt Funds or certified deemed-compliant retirement funds must be *limited by reference to earned income*. This limitation is not appropriate for certain categories of retirement funds. In general, retirement funds are organized into one of two categories: (i) traditional retirement plans often referred to as "defined benefit plans" and (ii) defined contribution or account plans. A defined benefit plan typically provides that a beneficiary's future retirement benefit is determined based on a set formula that considers factors such as the age of the beneficiary, the number of years worked, the position held by the beneficiary, and the particular vesting schedule of the plan. A beneficiary's future retirement benefit in a defined benefit plan likely does not reference his or her earned income. Accordingly, the Proposed Regulations would seem to exclude most defined benefit plans and any other plans where the benefits are tied to factors, such as the age of the beneficiary and the number of years that the beneficiary worked, that do not correspond to the beneficiary's earned income. Defined benefit plans and other similar types of retirement funds pose a low-risk of tax evasion and, thus, should be eligible to qualify as either certified deemed-compliant FFIs or exempt beneficial owners. Thus, the requirement that contributions to qualifying retirement funds reference earned income should be limited to defined contribution plans. With respect to defined benefit plans and other similar plans, the Service and the Treasury

should rely on the limitation, discussed below, that contributions made by or on behalf of any individual must be an amount that the retirement fund, in its reasonable discretion, determines to be less than 5% of the fund's total contributions in order for the fund to be eligible for certified deemed-compliant status or exempt beneficial owner status (if such a requirement is included in final guidance).

Second, under the Proposed Regulations both a Section 1.1471-5(f)(2)(ii)(A)(1) Deemed-Compliant Fund and a Section 1.1471-6(f)(1)(ii) Exempt Fund must ensure that no single beneficiary has the right to more than 5% of the fund's assets. The Proposed Regulations do not provide guidance as to how this 5% limitation is calculated and questions arise as to the method that should be used to calculate the value of the beneficiary's future retirement benefits in relation to a fund's total assets. For instance, what assumptions should be taken with respect to a beneficiary's life expectancy and vesting schedule, as well as cost of living adjustments to future benefits? Furthermore, would retirement funds be required to incur the significant costs of retaining actuaries to perform analyses of each beneficiary's future retirement benefits? In addition, questions arise as to when and how often the beneficiary's future retirement benefits must be determined in relation to a fund's assets (e.g., annually) and whether the fund must provide a certification or other documentation to the relevant withholding agent indicating that the requirement is satisfied. Clearly, as currently proposed there is a tremendous amount of uncertainty as to how this test could be applied to retirement funds, and the administrative costs to the retirement funds may be high enough to discourage investment in U.S. markets.

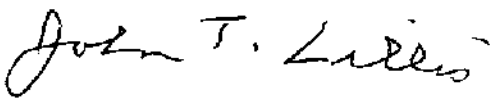
Given that almost all retirement funds will be able to satisfy the requirement that no single beneficiary has the right to more than 5% of the fund's assets, this requirement may be unnecessary in light of the administrative and costly burden it likely would impose on qualifying funds. The Treasury and the Service should consider amending this requirement to delete the currently proposed limit that references an individual beneficiary's right to assets of the fund and, in lieu thereof, provide that contributions made by or on behalf of any individual must be an amount that the fund, in its reasonable discretion, determines to be less than 5% of the total contributions (not assets) made to the fund.[10]

Finally, as discussed above, Section 1.1471-6(g) of the Proposed Regulations provides that entities engaged in the business of investing, reinvesting or trading in securities which are wholly-owned by one or more exempt beneficial owners are themselves considered exempt beneficial owners for FATCA purposes. Section 1.1471-5(f)(2)(ii) of the Proposed Regulations does not include a similar provision. As in the case with non-profit organizations, the Proposed Regulations should be amended so that wholly-owned entities of certified deemed-compliant retirement funds are eligible for certified deemed-compliant status. In addition, related investment entities other than wholly-owned entities, including separate pension trusts established to fund retirement plan obligations, also should qualify as certified deemed-compliant FFIs or exempt beneficial owners if such entities are required to transfer all income

[10] To the extent that the Treasury and the Service are not satisfied referencing the "reasonable discretion" of the retirement fund, an alternative approach could be to eliminate the reference to any 5% threshold and instead require that the fund offer a broad-based plan to the employees of the fund sponsor in a nondiscriminatory manner.

and gain (less expenses) to certified deemed-compliant or exempt retirement funds or their beneficiaries. We hope that the foregoing comments are helpful to your analysis in preparing the final FATCA regulations and we thank you for the opportunity to provide comments on the implementation of FATCA.

Best regards,



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