INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

By Electronic Delivery

June 9, 2014

John Sweeney
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

RE: FATCA Issues Facing the U.S. Fund Industry

Dear John:

The Investment Company Institute (the "ICI")[1] supports strongly FATCA's tax compliance objectives and encourages the continued refinement of administrable rules that implement, consistent with Congressional intent, the Chapter 4 reporting and withholding regime. We are grateful for the Internal Revenue Service (the "IRS") and the Treasury Department's diligent attention to our FATCA concerns and the steps that you have taken already to address many of them.

In particular, we appreciate the Treasury Department and the IRS issuing Notice 2014-33, which provides further guidance on the implementation of FATCA and related withholding provisions. The investment fund industry is working extraordinarily hard to update all of the necessary systems and processes to implement FATCA fully. We believe that the transition relief provided by the Notice will help ensure that this changeover will be more orderly and less difficult.

The transition relief provided by Notice 2014-33 is also a great relief to the industry, as all of the rules and instructions necessary to implement FATCA are not yet in place. Attached to this letter, we provide a memo describing a number of outstanding issues regarding FATCA that we believe require additional guidance. These points affect a broad range of withholding agents and will determine how they finalize their registration, due diligence, withholding, and reporting processes.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $16.8 trillion and serve more than 90 million shareholders.

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Again, we thank you for your attention to our issues and would welcome the opportunity to meet at your earliest convenience to discuss our recommendations. Please feel free to contact me at any point. My direct dial number is 202/326-5826.

Sincerely,

Ryan Lovin
Assistant Counsel – Tax Law

Enclosure

cc:
Tara Ferris
Quyen Huynh
Steven Musher

ICI Memorandum: Outstanding Issues Regarding FATCA Registration, Due Diligence, Withholding, and Reporting

I. REGISTRATION ISSUES

A. The Sponsored Entity Rules

#1 Clear Registration Rules for Sponsored Entities

The fund industry appreciates greatly the inclusion of the sponsored entity rules in the final FATCA guidance. The ICI recognizes and appreciates that many registration questions already have been addressed in FAQs and that the IRS is working to finalize guidance for registering as a sponsoring or a sponsored entity. We recommend that the IRS provide certainty regarding FATCA registrations for sponsoring and sponsored entities in an FAQ for the registration portal and in the FATCA Registration Online Users Guide. In particular, sponsoring entities will need to know how to fulfill their reporting responsibilities when they sponsor entities located in Model 1 IGA partner countries, Model 2 IGA partner countries, and in jurisdictions not covered by an IGA. These details will be particularly important if there are disparities in implementing rules and deadlines in different jurisdictions.

In advance of guidance for registering sponsoring and sponsored entities, fund complexes have taken two separate approaches to registering for FATCA. Some complexes have registered fund management companies as sponsoring entities and will provide a sponsoring entity's GIIN for the sponsored funds until the sponsored entity registration rules are finalized and all of the sponsored funds register and obtain their own GIIN. Other complexes have registered all of their funds in order to obtain a GIIN and will need to roll up those individual registrations with a sponsoring entity when that registration procedure becomes available. Complexes that registered all of their funds have done so in response to some withholding agents stating that they would apply withholding unless each fund had its own GIIN. As the FATCA registration portal is readied to accommodate sponsored entity registrations, procedures should be provided to accommodate both of these fact patterns.

#2 Coordination with the Expanded Affiliated Group Rules

If an asset manager uses the sponsoring entity rules, we believe that it is appropriate to call off the application of the expanded affiliate group ("EAG") provisions. The percentage threshold for determining if an entity is affiliated can make the analysis complex in certain situations. For example, if an investor owns greater than 50% of a fund—either as an anchor investor or because the fund is a

"fund-of-one" that was established for such investor—then such fund will be in the EAG of the investor if the investor is a non-U.S. entity. This may cause a fund that one U.S. investment manager wishes to treat as its sponsored entity to be in an EAG with funds at other financial institutions. In such a situation, as a passive investor, the fund's client is not empowered to undertake FATCA compliance tasks on behalf of the fund. Additionally, such client may be unaware that it owns greater than 50% of the fund.

We recommend guidance provide that the EAG provisions do not apply where an organization registers as a sponsoring entity and has voluntarily identified and registered all of its affiliates/funds. The sponsoring entity has fulfilled the purpose of the EAG rules by registering all of its affiliates and funds and could certify that it has no unregistered affiliates.

B. FFI Agreement Revocation

Legal advisors to fund companies are not comfortable leaving FFI agreements in place if such FFI agreements are later superseded when an entity becomes subject to home country reporting under an IGA. We recommend that FFIs be permitted to deregister via the portal and obtain a certification from the IRS that their obligations under the former FFI agreement have been terminated. Legal teams desire to have some formal confirmation that the obligations under the FFI agreements have terminated.

C. Umbrella Funds

The appropriate method for registering seperate funds (also referred to as "sub-funds" in other jurisdictions) with segregated portfolios of assets that are structured under a multi-class mutual fund corporation (also referred to as an "umbrella" fund) is not clear. Each U.S. fund in a series trust is treated under §851(g) of the Internal Revenue Code as a separate corporation. We recommend that each non-U.S. sub-fund be treated as a separate FFI. First, it seems most appropriate for individual sub-funds to qualify under one of the deemed-compliant FFI categories as separate FFI entities, to the extent they are eligible. Second, if foreign passthru payment rules are introduced in the future, it seems most appropriate to charge any FATCA withholding taxes at the level of the relevant sub-fund.

D. FATCA Classifications for Certain Entities Covered by IGA

A Model 1 IGA FATCA partner financial institution that is a nonreporting financial institution (*e.g.,* a financial institution that is treated as an exempt beneficial owner or as deemed-compliant under either the regulations or under the IGA) is treated as a certified deemed-compliant FFI under the regulations, and is therefore not required to register with the IRS.

An unresolved issue appears to be how to properly characterize an FFI that is a nonreporting financial institution under a Model 1 IGA because it otherwise qualifies as a registered deemed-compliant FFI under the regulations. To illustrate, the Model 1 IGA specifically provides that the definition of a nonreporting FATCA partner financial institution includes any FATCA partner financial institution that qualifies as a deemed-compliant FFI under relevant U.S. Treasury regulations. A FATCA partner FFI may satisfy the requirements of being a restricted fund under §1.1471-5(f)(1)(i)(D), so that it would be deemed-compliant under the regulations if it registered. However, because it can qualify as a nonreporting FATCA partner financial institution, it is specifically exempted from being required to register.

We recommend that the IRS clarify the proper characterization of an FFI that is a nonreporting financial institution under a Model 1 IGA because it otherwise qualifies as a registered deemed-compliant FFI under the regulations. Such clarification might be provided in a footnote to the Model 1 IGA, in an FAQ, or in the instructions to the Form W-8BEN-E. In particular, it may be helpful if the IRS provides clarification as to what FATCA status such FFI should indicate on its form W-8BEN-E.

E. Certain Operations Concerns Relating to the Registration Portal

First, when registrants receive an email notice from the IRS (*e.g.,* a notice of rejection of a registration), the email only shows the last four digits of the account number. Because many account numbers may be handled through a single portal log-in, it would be useful to receive the full account number in any email notices received from the IRS.

Second, we understand that the IRS is considering expanding the 40 character limit on entity names in the portal. This would be extremely useful to the industry, as many fund names significantly exceed that length. Additionally, discrepancies regarding the funds name could make verifying the GIIN on the FFI list considerably more difficult. When evaluating the ability to expand character limits in the portal, funds have also noted exceeding the character limit for addresses.

Third, the registration portal is designed as a dynamic system and may require funds to update their registrations as new procedures are developed (such as the sponsored entity registration procedures) or new IGAs are signed. It would be useful if the portal tracked any such changes, so that both the funds and the IRS would have a record of the prior state of the registration.

II. DUE DILIGENCE ISSUES

A. Phone Numbers as U.S. Indicia

As other comment letters have pointed out, identifying a phone number's country of origin is a significant challenge in jurisdictions that share the same phone number format as the U.S. These jurisdictions include Canada, Puerto Rico, and the Cayman Islands. The operational burden of distinguishing these numbers would be significant because costly systems changes or substantial manual review would be required.

We recommend that phone numbers from countries known to have the same phone number format as the United States not be considered to be a U.S. indicia unless the U.S. country dial-in code is also provided by the client or counterparty. Materials prepared for audit teams to follow during reviews of FATCA compliance by FFIs and U.S. withholding agents should note that certain countries use an identical phone number format.

B. Payments to Accounts of PFFIs or Registered Deemed Compliant FFIs Outside Country of Residence

The FATCA regulations generally presume that if a payment is being made to a PFFI or Registered Deemed Compliant FFI outside the country of residence of such FFI, the payment is being made to an NPFFI unless the withholding agent is able to obtain documentation (including a GIIN) for the "branch" where payment is being made. Funds and other financial entities, however, may have accounts at locations (outside its country of residence) where they do not have a branch.

We recommend specifying that PFFIs and Registered Deemed Compliant FFIs are not required to obtain a GIIN for each country where they have a bank account or are receiving a payment. Such FFIs should instead provide the GIIN obtained when registering for FATCA in their country of residence.

C. FORM W-9

The ACLI and the ICI sent a letter[2] on issues pertaining to Form W-9 on January 6, 2014. Our letter requested certain guidance regarding transitioning to the new IRS Forms and drafting

[2] Attached to this memo and also available at: http://www.ici.org/pdf/27818.pdf

substitute forms. We recommend that the IRS adopt the recommendations of the January 6, 2014 letter.

D. Form W-8IMY

The Form W-8IMY does not contain a place in Part III for a QI to make the election to be withheld upon for U.S. source FDAP income and to confirm for the withholding agent that the QI meets the requirements referenced in the final regulations. We recommend including a specific checkbox indicating for the QI to make this election.

E. Setting a Uniform Sunset Date for Pre-FATCA Forms W-8 for Entities

The transitional period provided by Notice 2014-33 will likely be used by withholding agents to continue upgrading and testing their systems and processes to accommodate validation of new Forms W-8 for entities. During this transitional period, many withholding agents prefer to continue documenting entity account holders using Pre-FATCA Forms W-8. The use of Pre-FATCA Form W-8 during the transitional period, however, is complicated by the non-uniform sunset dates for the forms.

Additionally, given that instructions to Form W-8BEN-E and Form W-8IMY have not been issued, systems for validating the new forms are unlikely to be fully tested and operationally ready by August 31, 2014.

We propose that new W-8 Forms for entities not be required until December 31, 2014 to coincide with the end of FATCA's transition period. We understand that the IRS has discussed releasing such guidance.

F. Presumption Rules for Partnerships and Estates and Trusts

§1.1441-5T(d)(2) and -5T(e)(6)(ii), as issued earlier this year, removed the "foreign indicia" criteria for determining whether a partnership or estate or trust is U.S. or foreign. The presumption rule, prior to this amendment, generally provided that a partnership or estate or trust is presumed U.S. unless it has certain specified foreign indicia. We understand that the IRS has indicated that the removal of the "foreign indicia" criteria was not intended. During the transitional period, this presumption rule takes on special relevance since, while FATCA withholding may not apply to a payment, backup withholding rules will continue to apply. Presumption of foreign status would exempt a recipient from backup withholding; presumption of U.S. status for these entity types generally does not.

We urge Treasury and the IRS to confirm formally that withholding agents should continue to apply the foreign indicia rules (as applicable under prior §1.1441-5(d) and (e)) as of the effective date of the new temporary regulation.

G. Revision of Reasonable Explanation Provided by Individual

Notice 2014-33 states that Treasury and the IRS intend to amend the final FATCA regulations to adopt the description of a reasonable explanation of foreign status provided in the temporary coordination regulations. The Notice indicates that the FATCA rule under §1.1471-3(e)(4)(viii) limits the contents of a reasonable statement provided by an individual account holder to the explanations permitted on the checklist as set forth in that section, whereas the temporary coordination regulation under §1.1441-7T(b)(12) does not.

We urge Treasury and the IRS to clarify this point and confirm that for purposes of both the FATCA regulations and the chapter 3 regulations, an individual is permitted to provide a written statement explaining its U.S. indicia based on a reason other than as set forth in §1.1441-7T(b)(12) and §1.1471-3(e)(4)(viii) and that such written statement would qualify as a reasonable explanation. For example, under traditional chapter 3 practice, a non-U.S. individual may be able to explain a U.S. address by stating that having mailings sent to the individual's home country may not be safe or may be slow and that receiving mail at the address of an attorney, accountant, or other advisor is preferable. We request that these types of explanations remain acceptable.

H. Reliance on "Eyeball Test" During Transitional Period

We appreciate greatly that §1.1471-3T(d)(2)(iii) provides that a withholding agent other than a participating FFI or registered deemed-compliant FFI may treat a payee of a payment with respect to a preexisting obligation as a U.S. person if it has previously classified the payee as a U.S. person and established (through documentation or the "eyeball test" under §1.6049-4(c)(1)(ii)) that the payee is an exempt recipient for purposes of chapter 61. The fund industry has a very large number of U.S. broker relationships that were documented using the "eyeball test." The ability to rely on previous applications of the "eyeball test" for existing broker relationships prevents the industry from undertaking a massive Form W-9 solicitation effort for no real compliance benefit.

Additionally, entity accounts opened during the transitional period are preexisting obligations, but application of the "previously classified" rule to accounts opened during the transitional period is not clear. We recommend that accounts opened at U.S. financial institutions during the transitional period should be treated consistent with other preexisting obligations maintained at those institutions (avoiding the need to create a new category of preexisting

obligations) and be eligible for the same relief provided that the accounts are classified prior to the end of the transitional period.

I. Direct Account Holders Documented before July 1, 2014

§1.1441-7T(b)(3)(ii) provides that a withholding agent that has documented a direct account holder with respect to a preexisting obligation prior to July 1, 2014 for chapter 3 or chapter 61 purposes may continue to rely on such documentation. Thus, there is no need to re-evaluate these accounts for new U.S. indicia (*e.g.,* place of birth). Notice 2014-33 states that this relief would apply even though documentation is subsequently renewed pursuant to §1.1441-1(e)(4)(ii)(A) and notes in particular that the withholding agent in such case is not required to apply new reason to know standards relating to a U.S. telephone number or U.S. place of birth until a change in circumstance. The notice does not refer to U.S. indicia arising from "classification as a U.S. person."

We request that Treasury and the IRS clarify whether this criteria (classification as U.S. person) is applicable under the Notice 2014-33 relief provision for accounts documented prior to July 1, 2014.

J. Transactional Payments During Transitional Period

Notice 2014-33 appears to provide that transitional relief for "preexisting obligations" applies to both account holders that are entities and one-time transactional payments to entities that are not account holders. We recommend that Treasury and the IRS confirm that this is the case and that, for such transactional payments made during the transition period, there will be no FATCA due diligence (or withholding and reporting) required, either during the transitional period or after.

K. Other Transition Period Issues

The transition relief provided by Notice 2014-33 leaves unclear whether certain aspects of FATCA should be effective this summer. We recommend that the IRS clarify that the new presumption rules, the new indefinite validity period, and the ability to accept faxed/electronic W-8's become effective on July 1, 2014.

L. GIIN Validation

We recommend that the IRS provide further information regarding GIIN validation, including instructions regarding name mismatches likely resulting from character restrictions within the FATCA registration portal.

We understand that there will not be a date on the FFI list. However, FFIs and withholding agents need to know when an FFI was added or removed for purposes of meeting their due diligence timeframes. In addition, we understand that the IRS will not be archiving the GIIN lists that are published monthly. This means that FFIs and withholding agents will not have proof of GIIN validation if required under audit unless the FFI or withholding agent has itself archived the list.

We recommend that the IRS provide real-time updates of the GIIN list via a web-based data source, that the listing date be provided for each GIIN, and that the information for each GIIN is archived there until the applicable audit date has passed. In the alternative, we recommend that the FFI lists be dated and archived until they are no longer within the applicable audit period.

III. WITHHOLDING ISSUES

A. Scope of Withholdable Payments in the Final Regulations

It is not clear how selling agents of offshore funds (entities unrelated to account control or ownership) are impacted by FATCA. The Final Regulations identify investment advisory fees, custodial fees, and bank or brokerage fees as withholdable payments.[3] Must such fees be U.S. source to be withholdable payments? If not, funds will need to undertake major process changes. For example, funds would have to collect a Form W-8 for service provider payments made abroad, even though they are not U.S. source and, thus, are not subject to Chapter 3. Similar questions apply with respect to retrocession or rebate payments.

We recommend that the IRS and Treasury provide clarification that--absent promulgation of passthru payment rules--investment advisory fees, custodial fees, brokerage fees, and other similar fees are withholdable payments only to the extent that they are U.S. source.

[3] See the financial payments identified in Reg. 1.1473-1(a)(4)(iii).

IV. REPORTING ISSUES

A. Dual Reporting by Disregarded Entities

Some U.S.-based fund managers have disregarded entities and/or CFCs that will be subject to FATCA in addition to the existing U.S. information reporting requirements that apply to branches/CFCs. This type of duplicative reporting is inefficient and potentially will cause unnecessary audits to be triggered. Duplicative reporting is also unduly burdensome to fund managers that are already providing U.S. information reporting to investors.

Fund managers have found that the effect of these dual regimes is going to be more problematic than originally thought. Reporting under the FACTA Regulations will be more than simply 'putting the same information in a different envelope' because of the various country specific exemptions available under the IGAs as well as the differences between IGA country reporting requirements and U.S. information reporting requirements.

We recommend providing an exemption from reporting directly to the IRS for entities subject to reporting to a local country under an IGA.

B. Form 1042-S Reporting

With the transitional relief provided in Notice 2014-33 for entity account holders and counterparties, FATCA withholding is expected to be required in very few instances for calendar year 2014.

For U.S. withholding agents, we expect that the predominant pool of payees subject to Form 1042-S reporting in 2014 will be outside the scope of FATCA. With respect to participating FFIs, the recalcitrant account holders who may be subject to offshore reporting are expected to be very limited relative to the overall population of 1042-S recipients. Given that final instructions for Form 1042-S for 2014 have not yet been issued and the effort that is required to design, implement, and test an entirely new format for Form 1042-S, adopting new Form 1042-S reporting for 2014 on a time-compressed schedule risks creating errors in overall 1042-S reporting for a reporting population that will not be subject to FATCA in 2014 due to Notice 2014-33 with little, if any, informational gains on the part of the IRS.

We propose that Treasury and the IRS issue guidance to allow U.S. withholding agents to use either the 2013 version or the 2014 version of Form 1042-S. We understand that participating FFIs may still need to file Form 1042-S with respect to certain withholdable payments to recalcitrant account holders, but the need for FATCA codes in this instance is likely limited.

If it is necessary to have one uniform Form 1042-S for both U.S. withholding agents and participating FFIs, withholding agents could revert to the 2013 Form 1042-S framework with the FATCA codes applicable to recalcitrant account holders provided as an addendum. Alternatively, the 2014 Form 1042-S framework could be used with certain fields designated as optional.

It would also be useful to indicate whether reporting for individuals on a Form 1042-S (for the 2014 transitional year and for future years) would require FATCA codes. We propose that U.S. withholding agents should not need to provide codes with respect to individuals and that any FATCA code field should be left blank.

For the 2014 transitional year and for subsequent years, we request confirmation (in final instructions to Form 1042-S or in separate guidance) that substitute forms for Form 1042-S will continue to be allowed.