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RE: Supplemental Comments on the Final FATCA Regulations

Ladies and Gentlemen,

The Securities Industry and Financial Markets Association ("SIFMA")[1] is submitting these supplemental comments on the final regulations implementing the provisions of the Foreign Account Tax Compliance Act ("FATCA") that were included in section 501 of the Hiring Incentives to Restore Employment Act.

SIFMA appreciates the substantial and thoughtful efforts that the Department of the Treasury and the Internal Revenue Service ("IRS") put into the development of the final regulations, as well as the consideration that was given to many of SIFMA's previous comments and suggestions. The remainder of this letter expands on three specific issues mentioned in

[1] SIFMA brings together the shared interests of securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

SIFMA's letter dated June 21, 2013 that are of particularly high importance to our members. If at all possible, we would like an opportunity to discuss these issues with you in person or via teleconference to allow our members to make the decisions necessary to prepare for FATCA implementation in the coming months.

COMMENTS

1. The "reason to know" standard is excessively broad and should be substantially revised or its implementation delayed. (§1.1471-3(e)(4))

Summary of the issue:

- A FATCA withholding agent is liable for up to the entire amount of FATCA withholding, plus interest and penalties, if the agent fails to withhold the correct amount. §1.1471-3(e)(1).
- Treasury has defined "reason to know" very broadly to include constructive knowledge of a wide variety of information that may be stored in paper or electronic files of the withholding agent, including documentation collected for anti-money laundering (AML) due diligence purposes, account opening or other customer account files. Id. -3(e)(4).
- Interpreting and relating such information to claims of FATCA status requires not only ready access to a large volume of information but a comprehensive understanding of the FATCA regulations and all of the relevant intergovernmental agreements and their respective annexes.
- The standard also requires that withholding agents exercise judgment in cases where information in the possession of the withholding agent might conflict with the payee's claim of FATCA status.
- Under an example provided in the regulations, withholding agents would be required to assess the significance of information contained in financial statements, credit reports, or other documentation that might be considered by a "reasonably prudent person" to be inconsistent with an entity's claim to be a non-financial foreign entity (NFFE) (such as documentation indicating the entity is an intermediary, rather than a beneficial owner). Id. -3(e)(4)(i).
- These new rules place an extremely high burden on withholding agents and represent a dramatic departure from the existing reason to know standards under Chapter 3 of the

Internal Revenue Code, which in the case of financial institutions are generally limited to address checks.

- Withholding agents can build processes around address checks. The final FATCA regulations go well beyond address checks and require withholding agents to perform detailed legal analysis of a substantial volume of documentation, which in many instances would be nearly unachievable, especially by account on-boarding personnel who lack legal and tax training.
- A similar problem arises with an address or payment to an entity that is outside the country in which the entity claims participating foreign financial institution (PFFI) or registered deemed-compliant foreign financial institution (RDCFFI) status. The final regulations require the payee to be treated as a limited FFI, and no cure is allowed. Id. -3(e)(3)(i).
- Consequently, because of this extremely burdensome new requirement, and the lack of time or resources to hire and train personnel, connect information systems, and develop protocols for handling and interpreting of large volumes of information under the still evolving standards of FATCA, and because of the size of penalties for which withholding agents are liable, it is likely that withholding agents will be compelled to withhold in many cases because of their inability to establish a payee's FATCA status with sufficient certainty.
- Excessive FATCA withholding will generate conflict between withholding agents and payees regarding the validity of FATCA representations.
- Even the prospect of such withholding could discourage foreign investors from buying United States assets.

Proposal:

- IRS should substantially narrow, abandon, or delay the implementation of the reason to know standard in the final regulations.
- In lieu of reviewing "any information" (i.e., the standard under the final regulations), the IRS should consider allowing withholding agents to rely on Standard Industrial Classification (SIC) codes or other similar classification information. Under such a rule, a withholding agent would have reason to know that a claim of NFFE status is incorrect

only in the case where SIC code or other similar classification information indicates the account holder is an FFI.

- In any event, withholding agents should not be deemed or assumed to have reason to know of information that is not contained in electronically searchable records of the "customer master file" defined in §1.1471-1(b)(23).
- In addition, the mere receipt of an address or payment instruction arguably inconsistent with a payee's FATCA status should not serve to invalidate a payee's claim of PFFI or RDCFFI status or put the withholding agent constructively on notice of an invalid claim of FATCA status.

2. <u>Further clarification should be provided regarding reliance on documentation collected by or certifications provided by other persons (§1.1471-3(c)(9)) and the rules regarding electronic transmissions should be relaxed and expanded (§1.1471-3(c)(6)(iv)).</u>

Summary of the issue:

- The final regulations introduce a new requirement that the withholding agent confirm that the person furnishing a faxed withholding certificate, written statement or documentary evidence electronically is the person named on the document. Treas. Reg. §1.1471-3(c)(6)(iv).
- Further clarification is needed regarding reliance on documentation collected or certifications provided by other persons. It is unclear if under the "ordinary course of business" standard withholding agents may rely on an otherwise valid withholding certificate, written statement, or other documentary evidence that is electronically transmitted on behalf of the person signing the form when the form is submitted by an investment adviser, fund manager, introducing broker or other financial intermediary. Id. -3(c)(9).

Proposal:

- The new requirement under §1.1471-3(c)(6)(iv) is not workable and should be replaced with the "ordinary course of business" standard descried further below.

- It is critical that the procedures for electronic transmittal of forms and other documentary evidence (including by email or facsimile) be workable and consistent across Chapters 3, 4 and 61.
- The regulations under Chapters 3, 4 and 61 should provide that a withholding agent may rely on an otherwise valid electronically transmitted withholding certificate, written statement or documentary evidence received in a manner consistent with the receipt of other account documentation in the ordinary course of business.
- The regulations under all relevant Chapters should explicitly provide that this "ordinary course of business" standard allows withholding agents to rely on an otherwise valid withholding certificate, written statement or other documentary evidence that is electronically transmitted on behalf of the person signing the form by an investment adviser, fund manager, introducing broker or other financial intermediary (whether or not the intermediary transmitting the document is a withholding agent, and including nonqualified intermediaries, nonwithholding foreign partnerships and nonwithholding foreign trusts). Note that this provision should apply to documents that the transmitting party receives directly or indirectly through a chain of intermediaries from the person signing the form.
- In addition to electronic and paper documentation received in the ordinary course of business, withholding agents should be permitted to rely on transmitted Forms W-8 and W-9 obtained via an electronic system maintained by a USFI, PFFI or IGA Reporting Financial Institution (including nonqualified intermediaries, nonwithholding foreign partnerships, and nonwithholding foreign trusts) or its service provider to the extent that the electronic system has been approved by the IRS under an IRS Electronic W-8 Memorandum of Understanding ("EW-8 MOU") Program between USFIs, PFFIs, IGA compliant FFIs and/or other withholding agents or their service providers and the IRS.

3. <u>The "eyeball" test and documentary evidence for preexisting and new obligations should be expanded. (§1.1471-3(f)(3) and related provisions)</u>

Summary of the issue:

- The presumption rules of §1.1471-3(f)(3)(ii) provide that if a payment is made to an entity that is an exempt recipient under §1.6049-4(c)(1)(ii)(A)(1), (I). (M), (O), (P) or (Q)

the entity will be presumed to be a foreign person. §1.1471-3(f)(4) states that an undocumented foreign entity is presumed to be a nonparticipating FFI.

- Financial institutions have relied upon the "eyeball test" in §1.6049-4 to treat clients and counterparties as U.S. exempt recipients for many years without having a Form W-9 on file. If the conforming regulations harmonize the presumption rules in §1.1441-1 and §1.6049-4 with the FATCA regulations, these clients and counterparties may no longer be presumed to be U.S. exempt recipients without a Form W-9 or documentary evidence that they are U.S. persons. §1.1471-3(d)(2).
- It will be extremely time-consuming and expensive for financial institutions to collect new Forms W-9 from every category of U.S. exempt recipient with which they do business or to review their files to ensure that they have documentary evidence that establishes that their customers and counterparties are U.S. persons. In addition, in some cases, it may be difficult or impossible to obtain Forms W-9 (e.g., U.S., state and local governmental entities).
- The current rules could result in erroneous FATCA withholding for entities that can be clearly identified as U.S. persons other than specified U.S. persons but for which the withholding agent does not have a Form W-9 or other required documentation.

Proposal:

- Require financial institutions for FATCA purposes to obtain Forms W-9 (or documentary evidence of U.S. person status in conjunction with the eyeball test) from new clients and counterparties that fall within the list of exempt recipients in §1.1471-3(f)(3)(ii) (other than foreign governments, foreign central banks and international organizations) and grandfather the use of the previous eyeball test under §1.6049-4(c)(1)(ii) for payments to clients and counterparties that had established accounts or relationships prior to July 1, 2014.
- In addition, the eyeball test as currently written in §1.6049-4(c)(1)(ii) should continue in its present form for Chapter 3 and 61 purposes. The regulations should clarify that a withholding agent that receives a Form W-9 (to satisfy the FATCA requirement) may

presume that a U.S. entity is an exempt recipient even if it did not complete the "Exempt payee code" line.

SIFMA appreciates your consideration of our members' collective views and concerns on the regulations to implement the provisions of FATCA. Please do not hesitate to contact me at (202) 962-7300 or ppeabody@sifma.org if you have any questions about our proposals or to arrange a call or meeting on these important matters.

Sincerely,

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cc:

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