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**Re: Comments on Foreign Account Tax Compliance Act Provisions Incorporated In the
Hiring Incentives to Restore Employment Act ("FATCA")**

Dear Ms. Corwin and Messrs. Shay, Danilack, and Musher:

The European Banking Federation ("EBF") and the Institute of International Bankers ("IIB") welcome the opportunity to provide the U.S. Treasury and the Internal Revenue Service ("IRS") with initial comments on the regulations that will be needed to implement the Foreign Account Tax Compliance Act ("FATCA") provisions that are included in section 501 of the recently passed Hiring Incentives to Restore Employment Act ("HIRE Act"). We fully appreciate both the complexity of the task facing Treasury and the IRS as well as the need for quick regulatory action given the effective date of January 1, 2013. The EBF and IIB stand ready to provide the government with both information and suggestions as to how the regulations can strike the appropriate balance between the compliance goals of FATCA and the inevitable costs and administrative burdens on the financial industry as they make efforts to comply with the new rules.

The EBF is the voice of the European banking sector (EU and EFTA countries). The EBF represents the interests of some 5,000 European banks, and encompasses large and small, wholesale and retail, local and cross-border financial institutions. The IIB represents internationally headquartered financial institutions from over 30 countries, including Europe, the Americas and Asia, with banking and securities operations in the United States. Together, the EBF and IIB represent most of the non-U.S. banks and securities firms around the world that are affected by the FATCA provisions.

OVERVIEW

The EBF and the IIB appreciate and support the compliance goal of FATCA to provide tools to the IRS to combat offshore tax evasion by U.S. individuals and U.S.-owned entities. We have worked closely with the Treasury and the IRS for over a decade in the creation and implementation of the current

U.S. withholding tax system that came into effect in 2001 and included the Qualified Intermediary (“QI”) system. The new system has led to a significant improvement in U.S. withholding tax collections as well as information reported to the IRS on payments to both non-U.S. persons and U.S. persons invested in U.S. securities offshore. We believe that a substantial component of those improvements resulted from the significant efforts made by our member banks to implement systems and procedures to comply with the new rules and to remain in compliance.

It is crucial to recognize that FATCA does not simply modify the current U.S. withholding tax system; it creates a new U.S. withholding tax system. As a result, financial institutions and non-U.S. entities worldwide will be assessing whether or not to participate in the new regime. We strongly believe that the United States is most likely to achieve FATCA’s compliance goal of identifying U.S. persons investing offshore to the extent that the vast majority of “foreign financial institutions” (“FFIs”) and non-financial foreign entities (“NFFEs”) participate in the new system and supply the data identifying their U.S. customers and owners. For most FFIs and NFFEs, the decision whether or not to participate will be based on a purely commercial decision as to whether the profits from their U.S. sourced investments and operations outweigh the costs, burdens and risks of complying with FATCA.

The government should consider the regulatory options in that light. We recognize that there are many different ways that the government conceivably could implement different key provisions of FATCA. We urge Treasury and the IRS to make the choice among those options as pragmatically as possible and by weighing such factors as implementation costs, administrative burdens, risks associated with FFI and NFFE characterization, and the inevitable limitations of available technology, systems and procedures. We offer our comments in a constructive spirit to help the government understand these issues so that it will make its choices among the various regulatory options with as much information as possible as to the realities faced by the financial industry in seeking to comply.

DETAILED COMMENTS

1. A Key Threshold Issue: FFI, NFFE or Possible New FFE And SFIE Status

We believe that a key threshold issue for the regulations to address is whether a non-U.S. entity should be treated as an FFI, an NFFE or some hybrid of these concepts under the new withholding tax regime. To briefly recap, under new section 1471, an FFI must enter into an agreement with the IRS to provide an annual FFI report and presumably undergo some sort of check of the accuracy of the information contained in that annual report. By contrast, under new section 1472, NFFEs must simply identify their substantial U.S. owners to either a compliant FFI or a U.S. withholding agent, which then provides that information to the IRS.

The FATCA definition of FFI is quite broad and includes not just banks and broker/dealers but also virtually every type of investment vehicle, including hedge funds, private equity funds, widely held as well as private investment funds, and a myriad of other financial structures (such as securitization vehicles, pension funds, and insurance company accounts), that invest in U.S. securities. We believe that there could be potentially tens of thousands, and perhaps even hundreds of thousands, of foreign entities defined as FFIs under the FATCA statutory definition. This presents two significant problems that the regulations must take into account.

First, the administrative burden on the IRS from having a direct relationship with so many new entities could be overwhelming. Worse yet, a diffusion of IRS administrative resources among such a large population could prevent the IRS from focusing its efforts on those FFIs that would have the greatest amount of U.S. taxpayer information and draw scarce resources away from the existing

withholding tax system and QI regime that have realized substantial gains in U.S. withholding tax compliance since 2001. This IRS resource issue should not be underestimated. At present, the QI program only includes about 5,500 foreign financial institutions, many of which are under QI audit waivers because of the reality of scarce IRS resources to effectuate more substantial oversight. The IRS has stated on many occasions that its compliance efforts with respect to both the QI community and the U.S. withholding agent community have been hampered by the lack of sufficient resources. Treasury and the IRS should think carefully before adopting an overall regulatory regime that substantially exacerbates this situation.

Second, we are quite concerned that many FFIs, particularly smaller ones or those with minimal U.S. investments or U.S. customers, will opt out of U.S. securities rather than enter into a direct contractual agreement with a foreign tax authority (the IRS) that imposes substantial new obligations and the significant reputational, regulatory, and financial risks of potentially failing those obligations, or may disinvest their U.S. customers in order to reduce their compliance burdens under an FFI Agreement. If a sufficient number of entities opt out of the new withholding regime or push their U.S. customers out of the regime, the EBF and IIB are concerned with both the commercial implications of participating FFIs (i.e., FFIs that enter into FFI Agreements) competing with non-participating institutions, and U.S. persons having a large pool of non-participating institutions potentially available (wittingly or unwittingly) to facilitate U.S. tax evasion. Our concern about non-participating FFIs is not an abstract one but based on the history of the U.S. withholding tax system since 2001. The QI program initially included about 6,500 QIs but a substantial number dropped out because they simply did not have a sufficient level of U.S. investment activity to justify the compliance burdens of QI status. Even of the 5,500 remaining, we understand from public IRS statements that most are under some sort of QI external audit waiver that makes it worthwhile for them to participate. Many more institutions never even entered the QI program because the level of their U.S. investments simply could not justify it. In Europe, Canada and other countries most of these “Nonqualified Intermediaries” (“NQIs”) have supplied Forms W-8IMY, allocation and withholding statements, and underlying beneficial owner documentation to either QIs or U.S. withholding agents, in compliance with applicable law and IRS guidance. We have heard U.S. government officials characterize NQIs as uncooperative and potential havens for U.S. tax evaders. Our experience has been quite different. This history of NQI compliance is, we believe, relevant in determining which entities should be required to take on full FFI compliance responsibilities and what sort of alternative system might be developed for other FFIs.

We believe that there are three primary ways that the government can reduce the FFI population to a manageable size that the IRS can effectively oversee and maximize its resources to ensure that U.S. persons investing offshore are identified. The first two approaches are already envisioned by the statute and simply need regulatory detail, that is: (1) identify which FFIs present a low risk of being vehicles for U.S. tax evasion because they likely lack direct U.S. customers; and (2) provide a relatively easy election and verification regime for an FFI to certify that it has no U.S. accounts. The third approach is based on the premise that more non-U.S. entities are likely to provide information on U.S. persons invested offshore if they are not required to comply with the full scope of FFI duties envisioned in section 1471(b)(1) but instead are subject to a regime that is closer to that for NFFEs under section 1472. We accordingly offer some ideas on how such a “hybrid” approach might be fashioned. However, we stress that we are only in the first stages of considering and developing these concepts and believe that it is particularly important to assess how those entities affected by such a hybrid regime might react to such a concept, including whether such entities indeed would agree to abide by such a hybrid regime rather than simply disinvesting from the U.S. We would appreciate the opportunity to continue assessing these concepts and to provide Treasury and the IRS with additional thoughts on the commercial practicability of the options outlined below.

We discuss each approach in turn. We later comment on suggestions on how the IRS can maximize its resources with respect to those entities that it does wish to treat as FFIs.

A. FFIs That Present a Low Risk of Serving as Vehicles for U.S. Tax Evasion

A number of offshore vehicles present little risk of tax evasion by U.S. taxpayers and should be explicitly carved out of the FFI definition and not subject to FATCA withholding. We discuss herein several such categories and are continuing to consider whether others should be included.

Statutory Exceptions: Section 1471(f) provides exceptions for certain payments made to FFIs for the benefit of enumerated beneficial owners. We assume that regulations will incorporate this exempt beneficial owner concept; it would also be helpful if it were clarified that any payments made to such beneficial owners through a participating FFI are exempt from FATCA altogether. In addition, we believe that the regulations should also state that the following entities will not be considered FFIs nor will accounts owned by such entities be considered “U.S. accounts”:

(1) foreign governments or their subdivisions and wholly-owned agencies or instrumentalities; (2) international organizations and their wholly owned agencies or instrumentalities; and (3) foreign central banks of issue. With regard to the third category, the regulations should recognize that a foreign central bank might also have an “agency or instrumentality” that should receive relief parallel to that for foreign governments and international organizations. Treasury and the IRS should also extend to the FATCA context the same presumption rules and eyeball tests that currently apply with regard to such payees in order to ensure that overwithholding does not occur. We discuss below additional reasons for robust presumption rules and “eyeball” tests.

Pension Plans: Pension plans appear to fall within the FFI definition given the breadth of section 1471(d)(5)(c). However, most non-U.S. pension plans should present little opportunity for U.S. persons to evade U.S. taxes. Accordingly, we request that the regulations carve out pension plans, pension trusts and equivalent entities from the FFI definition. We assume that Treasury and IRS would either adopt a FATCA specific definition or cross reference to another regulatory definition to specify which pension plans are “bona fide” pension plans covered by the carve out.

Pension Pooling Vehicles: There are many vehicles that have been established either totally or largely on behalf of pension plans to pool their resources to maximize investments and exempting such pooling entities would help facilitate substantial flows of capital into the United States while not compromising FATCA’s compliance goals. For example, in the E.U., many such vehicles are established under the European Union’s “Undertaking for Collective Investment in Transferable Securities” (“UCITS”) directive. We believe that such pension pooling vehicles inherently present little possibility for U.S. persons to evade tax where the participating pension plans meet the definition of pension plans advocated in the prior paragraph and particularly where the pension plans are qualified treaty residents typically accorded reduced withholding rates. However, Treasury and the IRS should consider exempting even those vehicles that include non-treaty resident pension plans, provided that they are “bona fide” pension plans under the regulations.

In addition, there are some pension pooling UCITS structures that also include either other entities exempt from tax under treaties or public charities or publicly traded corporations (or their subsidiaries). We ask that any regulatory exemption be drafted broadly enough to include such vehicles since the inclusion of such investors also poses little risk of tax evasion by U.S. persons.

Investment Vehicles Set Up For Publicly Traded Corporations, Entities Exempt Under Treaties, Or Charities: For the same reasons as those given for pension pooling vehicles,

investment vehicles established for the benefit of publicly traded corporations, entities exempt under treaties, and/or public charities (or in combination with pension plans) should be carved out of the FFI definition and not subject to FATCA withholding. Again, U.S. persons are unlikely to be able to use such vehicles for tax evasion purposes.

Widely Held Investment Vehicles: The legislative history suggests that widely held investment vehicles should be carved out of the FFI definition. We support that view.

We believe that the regulations should carve out any vehicle with more than a specified number of investors and non-concentrated ownership, perhaps 100 investors or more, so long as five or fewer more-than-10% investors do not own more than 50% of the vehicle, or some other number that might give the IRS and Treasury comfort that a U.S. person has not established the vehicle for tax avoidance purposes. We believe that a threshold based on 100 investors or more would be reasonable given that this number of investors/shareholders currently determines under U.S. tax law whether (1) a partnership is a publicly-traded partnership; (2) an entity qualifies as a Real Estate Investment Trust ("REIT"); and (3) a corporation cannot qualify for "S" corporation status. We believe that the determination of whether the vehicle satisfies these numbers should be reasonably determined by either the vehicle itself or the withholding agent if it has sufficient information regarding the vehicle's ownership structure. However, we accept that further consultation between Treasury, the IRS and the fund industry would be quite helpful in developing an appropriate approach as to how both funds and withholding agents would determine if a numeric investor and ownership concentration test were met and how any changes in either factor might be monitored.

In addition, we believe that the exemption should also apply both to funds that are regularly traded on an established securities market and to open-ended funds that are publicly offered in a regulated market and issue and redeem interests from investors.

We believe that there are strong pragmatic administrative reasons for these exemptions. Non-U.S. mutual funds or other regularly traded investment vehicles may not even know the identity of their investors since such information typically is held by transfer agents for the entity and the investor base itself is subject to frequent change as investors move in and out of investments in the fund. In addition, the heavy burden that would be required to identify any U.S. investors would likely be vastly disproportionate to the number of U.S. persons who would be identified. Moreover, an investor typically would need to hold his interest in the investment vehicle and/or transfer funds to acquire his interest or receive distributions through a securities firm, bank or other FFI, which would be obligated to report U.S. accounts. Finally, in many situations, there are already prohibitions on actively marketing such vehicles to U.S. persons to avoid U.S. security law obligations.

If Treasury and the IRS are concerned about potential abuse in situations in which a U.S. investor is not making his investment in the vehicle through another FFI, consideration might be given to treating widely held investment vehicles that are carved out of the FFI definition as FFIs for the limited purpose of imposing on them the requirement that they disclose any U.S. accounts with whom the vehicle has direct privity and whom the vehicle knows is a specified U.S. person (including through a known nominee or other agent of such person). Again, we believe that the fund industry should weigh in on such issues and we offer these ideas simply as preliminary concepts that should be fully developed and modified as necessary to strike a balance between FATCA's compliance objective and administrability.

In the event that Treasury and the IRS determine that the exemption should generally be limited to vehicles that are regularly traded on an established securities market, they will need to provide clear and easily administrable definitions as to what is an “established securities market” (and/or to issue a list of qualifying markets) and what “regularly traded” means, which have proven difficult in other contexts. Having clear and easily administrable definitions (and liberal presumptions) is very important so that FFIs and other withholding agents can readily make a determination without the risk of being second-guessed by the IRS. It appears that the regulations can safely adopt an expansive definition and liberal presumptions regarding the “regularly traded” test since, as noted above, there should be a low risk of tax avoidance due to the fact that (i) an investor would typically need to hold his interest in the investment vehicle and/or transfer funds to acquire his interest or receive distributions through a securities firm, bank or other FFI, which would be obligated to report U.S. accounts, and (ii) subject to the caveat noted above, the investment vehicle could be required to report any direct U.S. interest holder with whom the vehicle has direct privity and whom the vehicle knows is a specified U.S. person (including through a known nominee or other agent of such person).

Insurance Companies and Products: We request that regulations provide guidance as to how insurance companies and products would be treated under the FATCA regime. We defer to the insurance industry to provide you detailed comments on this important issue, which we concluded was beyond the scope of our comment letter.

B. FFIs With No U.S. Accounts

Section 1471(b)(2) provides that a non-U.S. entity will be deemed to be a participating FFI if it “complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain United States accounts,” and “meets such other requirements as the Secretary may prescribe with respect to accounts of other foreign financial institutions maintained by such institution.” We believe that many FFIs, including many current QIs, will avail themselves of this provision either because they currently have no U.S. accounts or because they have minimal U.S. accounts and will close their accounts in order to fall under the exception. We have heard many anecdotal examples to date of just such account closures taking place in light of both the trend in U.S. tax law and restrictions under U.S. securities laws.

The section 1471(b)(2) exception will be of mutual advantage to both the IRS and the financial community, provided the procedures to meet the exception and to verify that the entity has no U.S. accounts are both sufficiently streamlined. The procedure ideally would be an electronic submission to the IRS that requires the FFI to do the following: (1) certify that it has no U.S. accounts; (2) agree to have its name published on an electronically available IRS list that it is an FFI that satisfies the section 1471(b)(2) exception; and (3) agree to implement internal procedures which maintain the absence of U.S. accounts. We recognize that the IRS and Treasury are likely to consider some sort of verification procedure with respect to those FFIs certifying that they meet section 1471(b)(2). As we discuss more fully below, we generally believe that Treasury and the IRS should consider the potential costs and burdens of any such verification requirements in light of the likely low potential for U.S. tax evasion through such entities. We assume that an FFI that is also a QI would continue to enjoy the benefits of Qualified Intermediary Agreement (“QIA”) status for Chapter 3 purposes. Any external audits to verify whether an FFI has met the section 1471(b)(2) exception should be conducted under an “agreed upon procedure” (“AUP”) approach that is substantially less complex than the QI external audit. We anticipate that the same AUPs would apply to both QIs and NQIs, although we assume that such procedures would be built into the QI external audit process and not treated as a separate auditable event for the QI in order to minimize costs to the QI.

The IRS should develop a list of the participating FFIs, including those satisfying the section 1471(b)(2) exception, on a current (at least monthly) basis so that the information on the list can be incorporated into the tax withholding and reporting systems of withholding agents making payments to such FFIs. Likewise, the IRS should develop a list of those FFIs that it believes should be treated as per se non-participating, perhaps because the IRS establishes that such FFIs have failed to cure any deficiencies relating to their FFI obligations. The regulations should further provide a reasonable grace period, say 3 months from the date the IRS updates the list, for withholding agents to code their systems with any updated information.

An FFI certifying under 1471(b)(2) should be allowed to establish that: (1) it has no FFIs as customers; or, (2) that any FFI customers are participating FFIs under either section 1471(b)(1) or (2). For all such customers, the certifying FFI would have no further obligations. However, with respect to any non-participating FFIs, the certifying FFI should be allowed either to: (1) withhold any amounts due under FATCA and remit those to the Treasury; or, (2) take advantage of the election to be withheld upon that is contained in section 1471(b)(3).

C. Proposed Hybrid Concepts

As discussed above, we believe that the overall FATCA construct is more likely to succeed if Treasury and the IRS allow the majority of entities technically defined as FFIs to comply with a less rigorous administrative alternative. We remain highly concerned from numerous industry discussions that many entities defined as FFIs under section 1471 simply will not become participating FFIs, not because they wish to be non-compliant, but because the costs, risks and complexities of taking on such responsibilities are simply too great and likely not justified by their level of U.S. investments. While we would welcome regulations that simply exempt as many entities as possible on some reasonable basis (many such ideas are discussed above and we recognize that you will receive comments from many others), we believe that the population of FFIs will remain quite significant even after such carve outs are adopted. We accordingly offer the following options of how Treasury and the IRS might consider a more nuanced approach than the FFI versus NFFE paradigm in the FATCA statute and instead consider ways to allow some portion of the FFI population to comply with a less comprehensive set of requirements more akin to the section 1472 rules.

We wish to stress again that these concepts are under active consideration by our members. We particularly want to assess whether both FFIs that would be treated as hybrids under these concepts and the FFIs that would have these entities as customers would find such a regime to be commercially and practically feasible. We will supplement this submission with additional views if necessary to provide Treasury and the IRS with more information on these concepts. We believe that both industry and the U.S. government need to explore all of the alternative solutions before arriving at a decision.

a. Proposed Hybrid Concept #1: Treat Smaller Investment Vehicles Under An NFFE-Like Approach

There are many smaller investment vehicles, such as family investment vehicles or other investment entities, that are swept under the FFI definition but that we believe should more appropriately be treated equivalently to an NFFE, wherein such FFI simply identifies any U.S. accounts or certifies that it has no such U.S. accounts, with such information then being included in the report of an upstream FFI or U.S. withholding agent. We believe that any FFI with (1) 25 or fewer investors, or (2) no investor with more than \$50,000 in investments measured at the end of the preceding year to which SFIE status (see below) would apply (similar to the exclusion for such low value bank accounts in section 1471(d)(1)(B)), should fall under this special category ("small foreign investment entity," or "SFIE"). In each case, these

numbers should be reasonably determined by either the entity itself and certified to the withholding agent, or determined by the FFI if it is in possession of information sufficient to make the determination (including account information). Also, in order to keep administration costs manageable, once an entity qualifies as an SFIE, withholding agents should be entitled to rely upon such status for an extended period absent actual knowledge of a material change in circumstances (such as additional capital being invested in the entity).

We read the FATCA statute to allow the Secretary to implement regulations to provide for such a result since section 1471(f)(4) provides the Secretary with authority to identify a class of FFIs as posing a low risk of tax evasion, and section 1472(d) defines an NFFE as “any foreign entity which is not a financial institution (as defined in section 1471(d)(5)).” We discuss in paragraph 1.D below a similar approach for larger non-U.S. financial institutions that are currently functioning as compliant QIs, NQIs or other investment vehicles. The exception we suggest here is distinct from that concept, however.

We recognize that Treasury and the IRS may want to avoid creating a new category of FATCA entity (that is, the SFIE) by simply carving these entities out of section 1471 through a regulation issued under that section and then addressing how they fit into the section 1472 regime through regulations issued under that section. We would also support such an approach. We offer the concept of the SFIE to avoid the potential technical challenges of adapting the ownership concepts and definitions of section 1472 to FFIs, which have a very different relationship with their underlying beneficial owners than non-financial entities.

b. Proposed Hybrid Concept #2: Treat Certain FFIs Under An NFFE-Like Approach

Treasury and the IRS could consider limiting application of the full FFI regime contemplated in section 1471 to QIs that do not currently qualify for the QI external audit waiver option, and consider establishing a category of FFI that would be subject to rules that are similar to an NFFE type approach. We believe that Treasury and IRS have the authority to effectuate such a concept under section 1474(f) as well as section 1471(d)(5). We suggest the term “foreign financial entity” (“FFE”) for such entities. In brief, FFEs typically would be QIs eligible for a QI external audit waiver, institutions currently operating as NQIs and investment entities that are not SFIEs. An entity would be allowed FFE treatment provided:

1. It agrees to identify its U.S. customers or substantial U.S. owners (using the methods described in Paragraph 2 below for existing accounts and new account relationships), by choosing to file that information either directly with the IRS or instead with one designated FFI or U.S. withholding agent that in turn agrees to provide the information to the IRS as part of its annual reporting obligation;
2. It agrees to be listed by the IRS as an entity that has elected FFE status so FFIs and U.S. withholding agents can more effectively code their systems;
3. It agrees to a random audit procedure similar to that suggested above for FFIs that qualify under the section 1471(b)(2) exception. We stress that any FFE that fails to satisfy the IRS that it adequately identified and reported U.S. accounts could be listed with non-participating FFIs and subject to full FATCA withholding if the FFE does not cure any discovered deficiencies in its procedures; and,
4. It agrees to be fully compliant with the existing Chapter 3 rules.

As with FFIs subject to the section 1471(b)(2) exception, we recommend that the IRS allow FFE status to be elected electronically and in as streamlined a process as possible. In addition, because

FFEs would generally be of a smaller size and likely would have less comprehensive information systems, FFEs should be required to provide only the data that is likely to be readily available to them in their systems without building new systems to comply. This information would include, where available, the name, address and taxpayer identification number of U.S. account holders and substantial U.S. owners of NFFE account holders, as well as the account number and year-end balance or value of each United States account, subject to the limitations under local laws for providing such information that we discuss below in the section on identifying U.S. accounts. We believe that FFEs should not be required to also supply gross receipts and disbursements from an account over the course of a year given the likely need to make expensive systems modifications to accomplish such reporting (we make the same point below with respect even to full FFIs). Treasury and IRS might also consider if less comprehensive procedures for identifying U.S. accounts might be appropriate for this population, perhaps only requiring them to conduct periodic automated searches of their data for both direct U.S. account holders and substantial U.S. owners (rather than the alternatives discussed below with respect to identifying U.S. accounts for FFIs). Finally, we assume that FFEs would also be subject to the requirement to provide the IRS with additional information upon request as envisioned in section 1471(b)(1)(E).

We make the above recommendation based on our understanding of the reasons that non-U.S. institutions typically opt not to become QIs. The EBF and IIB are concerned that some in Treasury and the IRS may have the misimpression that all NQIs chose not to become QIs in order to foster U.S. tax avoidance. In the experience of many EBF and IIB members, institutions generally opted out of QI status because their investment in U.S. securities did not justify the expense of becoming a QI and implementing the costly systems and procedures that typically are required in order to comply with the QI rules. Many NQIs provide QIs and U.S. withholding agents with Forms W-8IMY, underlying beneficial owner tax documentation (including Forms W-9 for U.S. persons invested in U.S. securities), and withholding statements. There is a very real danger that such NQIs may opt to disinvest from U.S. securities rather than face the complications, burdens and risks of FFI status. We are similarly concerned that many investment entities that are not excluded from the FFI rules under our SFIE proposal, as discussed in Paragraph 1.C above, may decide to disinvest from U.S. securities due to the complications, burdens and risks of FFI status. A similar risk of disinvestment from U.S. securities may even exist for smaller QIs that have only been able to stay in the QI program due to the lower administrative costs, burdens and risks associated with the external audit waiver options.

2. Identifying “U.S. Accounts” And Associated Due Diligence Procedures

Section 1471(b)(1)(A) requires an FFI “to obtain such information regarding each holder of each account maintained by such institution as is necessary to determine which (if any) of such accounts are United States accounts.” Furthermore, section 1471(e)(1) specifies that, except where otherwise provided, an FFI must also identify the U.S. accounts of its worldwide financial institution affiliates that do not enter into separate FFI agreements (and are not otherwise exempted). Requiring an FFI to identify its direct U.S. customers and the substantial U.S. owners of NFFEs, FFEs and SFIEs on a worldwide basis is a monumental undertaking that requires the FFI to prove a negative proposition -- that its (and its affiliates’) non-U.S. customers are indeed non-U.S.

The difficulty of that task differs substantially depending upon three different, but interdependent, factual variables. We believe that the regulations should take these variables into account to fashion rules that have the best chance of reaching FATCA’s compliance goal of identifying U.S. persons while remaining administrable by FFIs. We lay out the three variables and then how we would suggest regulations might address these variables.

Variable 1: Pre- Versus Post-FATCA Account Relationships: The challenge of identifying U.S. customers in existing accounts differs substantially from that of identifying U.S. customers in new account relationships. An FFI conceivably could institute account-opening protocols to capture data pertinent to identifying U.S. persons and record this information into its systems to comply with FATCA on a prospective basis. For existing accounts, a financial institution would have to sift through enormous amounts of data that were not collected to comply with U.S. tax rules, but rather for other regulatory or business purposes and may not be in automated systems. We believe that the regulations should provide for different procedures for identifying U.S. persons in existing versus new accounts. By “new”, we mean account relationships established for new customers after implementation of final FATCA regulations. We note that the challenges of documenting existing accounts was addressed during implementation of the QI regime (see, e.g., QIA sections 5.03(C), 5.10(B)(2), 512(A), and 6.04).

Variable 2: Direct Accounts Versus Substantial U.S. Owners of NFFEs and SFEs: The challenge differs even with respect to existing and new account relationships depending upon whether an account is a direct account of an individual or, instead, is an entity account where the entity might have a “substantial U.S. owner.” We believe that FFIs will have a far better chance of identifying direct U.S. accountholders than substantial U.S. owners, although there will be many challenges in doing so as we discuss in more depth below. However, we also believe that there is a misperception that AML rules will largely allow an FFI to identify the “substantial U.S. owners” of entities. The impediments to using this AML information, particularly for existing accounts, are many and include: (1) different concepts of beneficial ownership for AML and U.S. tax purposes (e.g., AML typically would be unconcerned with identifying U.S. persons under U.S. tax principles); (2) different document collection and identification requirements given AML’s risk assessment approach (that is, no information may need to be collected if the overall situation does not pose a risk under AML); (3) a lack of automated AML information at many FFIs and a wide variety of ways of capturing information even where such systems are automated; (4) grandfathered accounts that were formed before applicable AML systems came into effect; and (5) substantial variation in country AML standards. To elaborate a bit on these points, we note that the standard in the E.U. (and in various other countries) for determining “substantial owners” applies to those who beneficially own 25% or more of an entity, although some countries then impose lower thresholds for a stricter approach. The 25% standard is obviously well in excess of FATCA’s 10% threshold (or zero for certain investment type entities). Accordingly, it is unlikely that many FFIs would have much, if any, data that would allow it to provide information to the IRS on 10% owners (or on every U.S. person who owns an interest in a lower-tier investment entity).

Likewise, some country AML systems distinguish between entities that are purely passive investment entities and those that are operating companies. The reason for the differentiation is based on a risk concept that passive investment entities are more likely to be used for money laundering than legitimate operating companies. In such countries, there may be information in existing systems on passive type entities but not operating companies.

Variable 3: Accounts Invested in U.S. Securities Versus Those in Non-U.S. Bank and Security Accounts: The third variable turns on whether an account is invested in U.S. securities or only in non-U.S. bank and security accounts. We believe that this variable is relevant as to how the regulations should be drafted because U.S. sourced payments give the FFI leverage to encourage customers to provide information on any U.S. nexus in order to avoid FATCA withholding. This leverage simply does not exist for non-U.S. bank and security accounts. This is a significant problem since the vast majority of an FFI’s accounts will be such accounts (since FFIs are predominantly servicing non-U.S. markets and customers). It is simply not feasible commercially (or in some cases legally) for FFIs to refuse to open

accounts or to close existing accounts for this population, and we encourage Treasury and the IRS to consider alternatives to deal with this difficult problem as discussed in greater detail below.

We lay out potential regulatory alternatives to provide a practical way to deal with the above three variables. We also attach diagrams showing how these regulatory alternatives would work in practice. See Attachment 1.

Regulation #1: Existing Direct Accounts: Many FFIs will have millions, if not tens of millions, of accounts with individuals around the world. One IIB member bank reports that it has 40 million accounts in just its home country location. Other banks report similarly daunting numbers worldwide. Given the sheer enormity of the task of determining if such customers are indeed not specified U.S. persons, we believe that the only feasible approach is to limit an FFI's obligation to an automated search of its systems and require no due diligence with respect to the results of such search other than to establish whether those accounts with "U.S. indicia" are indeed held by specified U.S. persons (e.g., a U.S. address on an account is not dispositive of U.S. taxpayer status and presumably taxpayer status would need to be confirmed). We do not believe that it is feasible to require any search of paper files.

We recommend that the search itself should be on a "best methodology" basis. By that, we mean that the regulations should allow an FFI to develop a search of its systems based on its particular system architecture and coding (which may well differ from affiliate to affiliate or even system to system). The regulations could specify that a reasonable "best methodology" search would consist of any of the following criteria, depending upon the facts pertinent to the system to be searched: (1) residence address; (2) citizenship, nationality, and/or residency code; (3) U.S. tax documentation indicators (that is, whether a Form W-8 or W-9 is on file); and (4) any other system indicators that might reasonably identify U.S. tax status.

If an FFI determined that an existing account holder is a specified U.S. person (after soliciting sufficient documentation to conclusively establish the person's tax status where the available data only gave rise to a reasonable belief of U.S. tax status), it would either (1) add that person to its FFI annual report, or (2) request a waiver from that person, if required under local law, to disclose that person's identity on the FFI annual report. For customers refusing to provide the waiver, the FFI would be obligated to close the account if allowed under local law. However, in those countries where such accounts could not be closed, the FFI would carry out any FATCA withholding according to the rules for "recalcitrant account holders." In addition, the FFI would add to its FFI annual report the number of specified U.S. persons who had refused to be disclosed or had simply not responded. We note that the IRS potentially could then have the ability to use any applicable treaty exchange of information provisions between the FFI's home country and the United States to get information about these persons.

We recognize that the proposed "best methodology" search approach would not find many U.S. citizens (particularly dual citizens), green card holders or those with "substantial presence" in the United States, since there would have been no reason to capture such information in the vast majority of cases for non-U.S. bank and security accounts. Instead, we would propose that if an FFI discovers through its normal course of business such U.S. tax status for an account that had been a part of its "best methodology" search in a prior year, then it would follow the procedure outlined above to either add that person to its FFI annual report or seek a waiver from such person and, if no waiver were forthcoming, close the account if allowed under local law.

Regulation #2: Existing Entity Accounts: An FFI would first determine which of its entity accounts are NFFEs or SFIEs, on the one hand, or FFIs or FFEs on the other. We believe that an FFI should be allowed to use any reasonable method to make this determination, including relying on account

information, any presumption rules or “eyeball tests” incorporated in FATCA regulations, a published IRS list of participating FFIs or FFEs, or other easily available information.

For FFI and FFE customers invested in U.S. securities, the FFI would establish whether such customers are participating or non-participating FFIs and FFEs, and it would apply FATCA withholding to any “withholdable amounts” paid to non-participating FFIs and FFEs. For FFI and FFE customers invested in non-U.S. securities, we would ask that the regulations clarify that the FFI would not be required to take any further steps unless (1) such customers later invested in U.S. securities in which case the FFI would need to establish whether the customer was a participating FFI or FFE for FATCA withholding purposes; or (2) the FFI had actual knowledge that an underlying investor of the FFI or FFE customer were a specified U.S. person in which case such U.S. person would be added to the FFI annual report if allowed under local law of the FFI’s jurisdiction.

With respect to any account holder that is an NFFE or SFIE, the FFI would need to determine if the entity has any substantial U.S. owners, applying the methods described below. The regulations would need to address a threshold issue in this regard as to what realistically an FFI might be able to find in its existing data bases. As we discussed above, in Europe and elsewhere the common ownership threshold for AML purposes would be more than 25% beneficial ownership. That is, all EU (and most other) countries would at least need to have this information although a few have enacted stricter requirements. We think that for existing accounts, the regulations should take a “common denominator” approach given the realities of what information may currently reside in an FFI’s systems and only require information for more than 25% owners, unless the data on an FFI’s automated database systems are based on a lower threshold.

We appreciate that the 0/10% thresholds for NFFEs are incorporated explicitly in section 1473(a)(2). However, Congressional staff and Treasury have previously indicated to us that in their view, Treasury and the IRS have the regulatory authority to apply a higher threshold, presumably pursuant to the general regulatory authority provided Treasury in section 1474(f). We believe that adopting the 25%-or-greater threshold through regulations would meet the standard in section 1474(f) that the rule “be necessary or appropriate to carry out the purpose of, and prevent the avoidance of, this chapter,” given that such threshold would most closely correspond with prevailing AML standards in many countries containing some of the largest institutions considering FFI status. Treasury and the IRS should not underestimate the administrative difficulties of requiring a U.S. tax standard that simply does not correspond with the prevailing AML standard in many countries. We are concerned that such a decision by Treasury and the IRS to retain the section 1473(a)(2) thresholds could well prove a deciding factor as to whether many institutions opt for participating FFI status.

As a first step, we suggest that the regulations would require an FFI to conduct a search of any automated data, including AML data, associated with all SFIEs and NFFEs to determine if such data provides clear indicia of more than 25% U.S. ownership. This search would be fashioned in the same manner as the “best methodology” approach advocated above for direct accounts. Likewise, we would recommend the same approach for dealing with any U.S. person found through such search.

We are not confident that such an automated search will produce acceptable results to IRS and Treasury with respect to the number of substantial U.S. owners that would be identified, given the significant limitations noted above with respect to using AML data for U.S. tax purposes. In addition, some institutions simply will not have such automated data with respect to the owners of entities. We recognize, however, that this population of existing entity accounts is likely of great interest to the IRS given the publicized use of such entities to avoid U.S. tax obligations. Accordingly, we propose an approach designed to focus on the highest tax-risk entities while correspondingly addressing the

significant concerns of FFIs about the burden of trying to search their records on a non-automated basis for indicia of U.S. ownership. We think that the approach should differ significantly depending upon whether the NFFE or SFIE is invested in U.S. securities or only in non-U.S. bank or security accounts.

For those SFIEs and NFFEs that have investments in U.S. securities, the FFI would be required to solicit from such entities a new entity-specific Form W-8BEN that contains FATCA specific ownership certifications (we discuss below the need for substantially revised Forms W-8BEN in order to accommodate FATCA requirements). The FFI would check any certifications made to it against information in its automated databases under the “best methodology” described above. Any U.S. owners so identified would be treated under the same procedure suggested above for such newly discovered U.S. persons in existing direct accounts. Any recalcitrant SFIE or NFFE would be subject to FATCA withholding.

For those SFIEs and NFFEs that have investments only in non-U.S. bank and securities accounts of an FFI, the situation is more difficult because there would be no logical need for such an entity to provide a U.S. tax document like the Form W-8 (since these customers in most situations would have no nexus with the U.S.) and generally there would be a corresponding lack of FATCA withholding to allow an FFI to exert pressure to get the required information. Given these serious limitations, the FFI would need to conduct a far more burdensome non-automated examination of these accounts. We believe that the entities that should be the target of such a burdensome process on the FFIs should be those that present the highest tax risk to the IRS – that is, non-operating companies (i.e., SFIEs) formed in non-treaty jurisdictions as well as any categories of entities (such as trusts, foundations and other entities that are generally exempt from tax) in treaty jurisdictions that are specified by the IRS. We point to recent IRS enforcement actions that focused on exactly this population as the rationale for our suggestion to distinguish operating companies from passive investment structures, and those entities formed in treaty jurisdictions versus those formed in traditional tax havens. In addition, we think that it is the only feasible approach administratively for the FFIs since the subject population would be substantially reduced.

Any U.S. persons discovered through this investigation would be subject to the same procedure suggested above for direct account holders. If the regulations were to adopt this approach, we request an extended phase-in period for FFIs to search through the necessary non-automated data given the potential burden of doing so.

As discussed in greater detail below, we believe that Treasury and the IRS should exercise its discretion under section 1472(c)(1)(G) to exclude prospectively from FATCA those payments made to NFFEs established in treaty jurisdictions provided such NFFEs are operating companies. We believe that there is little potential tax evasion risk presented, for example, by a U.S. person forming a German company to conduct business operations in Germany.

Regulation # 3: Post-FATCA Direct Account Relationships: We believe that substantially different rules could apply to post-FATCA account relationships since FFIs could adapt their systems and procedures to collect relevant information. Nonetheless, the regulations should provide sufficient time for FFIs to make these alterations since the typical IT project can take 18 months or longer from inception to completion, and most FFIs would only be able to commit the resources to such an endeavor once they knew the final regulatory requirements. Additional time would be required to disseminate information, train personnel and implement the new account opening procedures.

We strongly believe that the regulations should not require FFIs to collect any specific U.S. tax document or even U.S. specific certification for non-U.S. bank and security accounts. Such a requirement would be akin to a U.S. bank trying to comply with a Chinese requirement to identify Chinese

tax residents by asking its new U.S. customers to sign a Chinese tax document or answer Chinese tax residency oriented questions during the account opening process for a U.S. bank or security account. Such an approach is commercially not viable.

Instead, we ask that the regulations allow the FFI to take reasonable steps to modify its account opening procedures to gather information that reasonably would identify U.S. tax residents, such as place of birth, citizenship, home address, TIN and country of tax residence. This information could be cross-checked against any AML and KYC information that might also be collected during the account opening process (e.g., passports, identity cards, etc). We also believe that adopting a non-U.S. centric requirement would allow the FFI to begin collecting information and coding its systems with information that ultimately might be required by the tax authorities of other jurisdictions. We also note that in the case of investments in U.S. securities, FFIs typically would collect either a U.S. tax document or an appropriate KYC-type document to establish status for Chapter 3 purposes and presumably could do the same for FATCA Chapter 4 purposes. In any event, we believe that FFIs should have the option of gathering U.S.-centric information instead where required or preferred in order to comply with local privacy laws that may mandate a compelling legal or regulatory requirement for collecting personal information from a customer or for other reasons.

If the information so collected conclusively established U.S. tax status (e.g. a U.S. passport were provided), then the FFI would solicit the U.S. person's TIN and code its system accordingly. If the information only gave rise to a reasonable believe of U.S. tax status (e.g. a U.S. address), then the FFI would gather additional information and/or documentation to conclusively establish U.S. or non-U.S. status.

Regulations #4: Post-FATCA Entity Account Relationships: As with existing accounts, we believe that the regulations should distinguish between those NFFE and SFIE accounts that hold U.S. securities and those that are non-U.S. bank and security accounts, and should also distinguish between treaty and non-treaty country NFFEs and SFIEs. For any new entity account in U.S. securities, the procedure would be the same as that recommended above for existing account relationships for entities invested in U.S. securities.

For those new entity relationships in non-U.S. bank and security accounts, the FFI would modify its account opening procedures to identify more-than-25% owners (or such lower threshold as appropriate) and use the same sort of process described for new direct account relationships to solicit information about such owners that could be used to satisfy the FATCA reporting obligations (with the exception of NFFEs that are operating companies formed in treaty jurisdictions, which we would propose to carve out of the NFFE definition).

3. Passthru Payments

Under section 1471(b)(1)(D), an FFI generally must agree to deduct and withhold a tax equal to 30 percent of "any passthru payment which is made by such institution to a recalcitrant account holder or another foreign financial institution which does not meet the requirements of this section." Section 1471(d)(7) defines "passthru payment" as "any withholdable payment or other payment to the extent attributable to a withholdable payment."

We understand that the passthru payment concept was added to the statute to address the concerns that where an investment entity or other FFI is not acting as a custodian or nominee and is not a partnership (or other tax transparent entity) receiving payments on behalf of its partners (or members), payments that it makes to account holders (including investors in its equity or debt instruments) would

generally be treated as non-U.S. source income of those account holders and therefore would not be “withholdable payments.” Thus, in the absence of a “passthru payment” concept, FFIs and their account holders would technically fall outside the scope of FATCA withholding.

We believe that the regulations should clearly define what is meant by the statutory definition of passthru payment. The regulations should provide that a payment may be considered attributable to a withholdable payment and thus a passthru payment only where there is a traceable link between the account holder and the withholdable payment. Such a traceable link might exist in the case of an investment entity or investment account in which the account holders are looking to an identifiable portfolio of securities (which might be actively managed in the discretion of the manager) that includes U.S. securities as the source of their returns. We recognize that there may be other such traceable situations that the regulations might want to address.

By contrast, payments that a bank or other financial institution makes from general funds (a “general funds payment”) – such as deposit interest or interest on general debt securities issued by the institution – should not be treated as passthru payments. If all or some proportionate share of such payments were treated as passthru payments, it would be extremely difficult for many financial institutions to become participating FFIs (or FFE) and to maintain their U.S. investment activities because they would consider the 30 percent withholding tax to be an unavoidable cost of doing business that, in many cases, would render such activities uneconomic. The numerous interpretive and administrative complexities in determining the amounts subject to withholding, and the operational challenges of implementing such withholding, may also discourage financial institutions from participating in the new system.

Moreover, if the passthru payment concept is to be applied to securitization vehicles (such as CLOs, CBOs, etc.) and similar structured finance entities, in which cash flow from U.S. securities may be used to make payments to senior creditors while more junior interest holders must report (phantom) taxable income, special care will need be taken in crafting clear and precise rules that ensure that the risk of withholding for noncompliance with the FATCA rules is borne only by the recalcitrant holder or non-complying lower-tier FFI and not by other holders of debt or equity interests in the entity or by the entity itself, since any shifting of such risk could adversely affect the commercial viability of such vehicles.

4. Tiered Entity Problems and Attribution Issues

The EBF and IIB are particularly concerned about how the section 1471 and 1472 rules will interact to require a withholding agent to identify U.S. persons behind chains of FFIs and FFEs under the “election to be withheld upon.” The essence of the problem is that gross payments can be made down the chain until the first non-compliant FFI appears, at which point the participating FFI would either have to collect the 30% tax on withholdable payments or provide allocation information up the chain to the first withholding agent that would be charged with such withholding. The EBF and IIB believe that many of the suggestions discussed above will address this serious problem. In particular, regulatory rules designed to exclude low risk FFIs from the FATCA withholding requirement and the FFE concept will go a long way toward resolving the difficulties presented by tiered entities.

However, one area that requires further consideration is how to address the situation in which a non-U.S. individual or an SFIE that is owned by non-U.S. individuals invests in, say, a fund of funds that in turn invests in an investment fund, and a small portion of the investment fund’s income is from U.S. sources. If and to the extent that different documentation standards apply for U.S. and non-U.S. investments (see Paragraph 2 above), the question would arise as to whether that determination should be made from the perspective of the upper-tier FFI or, instead, from the perspective of the lowest-tier FFI and its individual or SFIE account holder. We would expect that the lowest-tier FFI would encounter

resistance from its account holders if it were to seek to solicit U.S.-specific documentation in situations in which the account holder is not making an affirmative decision to invest in U.S. securities. Accordingly, we recommend that these situations be treated as if the SFIE or individual account holder is investing in only non-U.S. securities unless the percentage of U.S. investments made (directly or indirectly) through that account exceeds a certain percentage, say 20%, of the aggregate investments held in that account. It must be emphasized that this approach would not absolve the lower-tier FFI from performing due diligence to determine whether the ultimate investor was a specified U.S. person; it would simply mean that the due diligence would be performed under the less stringent standards that we propose apply to non-U.S. investments.

The regulations should make it clear that ownership attribution rules will not apply in determining “substantial U.S. owners.” We note that FATCA itself makes no mention of either section 318 or 958 applying to such determinations. We think that it would be inappropriate for the regulations to add such a requirement given that Congress typically states explicitly when such rules should be applied. In the alternative, the regulations should make it clear that a withholding agent would not be considered to have knowledge of such attributed ownership and place the burden on the U.S. owner to certify ownership correctly unless the withholding agent has actual knowledge of such attributed ownership. We believe that such circumstances will be rare, and likely limited to those structures where the withholding agent is either related to the entity or was involved in establishing such entity, and it would be helpful for the regulations to include examples of such actual knowledge circumstances. It would be helpful if the regulations contain some guidance on the limitations of any actual knowledge standard adopted in connection with an ownership attribution standard.

The withholding agent should only be responsible for confirming the status of the FFI or FFE that is its immediate customer provided it followed the due diligence criteria adopted in the regulations. A withholding agent should not be penalized if a customer that is an FFI or FFE fails to identify U.S. persons.

Finally, we urge Treasury and the IRS to consider how FATCA’s chapter 4 withholding relates to chapter 3 withholding in the context of tiered entities. For example, it should be clear that there should not be double withholding as a result of the interaction of the two regimes. For example, such a situation would arise where a U.S. withholding agent pays dividends and gross proceeds to a participating FFI in a non-treaty jurisdiction where only the dividends are subject to withholding under Chapter 3, and the participating FFI pays those amounts to a non-participating FFI. We believe that the participating FFI should have the option either (1) to apply FATCA withholding to only the gross proceeds (since the dividends were already subject to the Chapter 3 withholding rules); or (2) conversely to apply 30% FATCA withholding regardless of the upstream Chapter 3 withholding in order to avoid the expense of building systems to distinguish between the two regimes. Likewise, we assume that the regulations will clarify that once a payment is subject to FATCA withholding, there is no further FATCA withholding required – that is, there should be no cascading withholding. For example, if a U.S. withholding agent pays withholdable amounts to non-participating FFI #1 and withholds 30% under FATCA, then that same payment made from FFI #1 to non-participating FFI #2 would not be subject to an additional 30% withholding.

5. FFI Election Process (By a Non-U.S. Institution To Be an FFI) And FFI Agreement

The FFI agreement process should be made as simple as possible given the potential volumes involved, and particularly if Treasury and the IRS do not take the steps recommended above to reduce the potential population of FFIs to a manageable level. The FFI agreement process should be substantially simpler and more streamlined than the QIA application process. In particular, the process

should be self-implementing. That is, a non-U.S. financial institution would simply file a form electronically with the IRS whereby it agreed to undertake the FFI obligations, and provide an explicit release to the IRS to publish its name as a participating FFI.

We believe that it would be sensible for the IRS to issue a list of participating FFI taxpayer identification numbers (“TIN”), as it did for QIs, and publish those TINs along with the FFI’s name so that a withholding agent is better able to match the information on the IRS list against the information in its systems.

For QIs, the EBF and IIB believe that FATCA intends the process to be even simpler. A QI would be deemed a participating FFI and subject to those obligations unless it chose otherwise. Again, QIs opting to be a non-participating FFI should have a simple way of doing so.

We believe that the election itself should function as the “FFI Agreement” and there should be no need for a separate agreement similar to the QI Agreement. The tasks in section 1471 lend themselves to a series of discrete certifications as to what the FFI will do in order to be considered compliant. We would suggest that the IRS create a format for an FFI to make these certifications as part of its election to be a participating FFI. In other words, the tasks specified in section 1471(b)(1) could be reduced to a series of certifications to ensure that the FFI understands what it is agreeing to do for the IRS (e.g., FFI certifies that it will (1) obtain information regarding each holder of each account as is necessary to determine which if any such accounts are United States accounts; (2) comply with applicable verification and due diligence standards relating to such accounts (which must be clearly and publicly detailed in advance of such election being made); etc.). We suggest this approach because the QIA has proven to be a disincentive for an institution to opt for QI status given that it is a highly legalistic document with numerous cross references to the Treasury regulations. We believe that Treasury and the IRS should avoid this problem in the FFI context to avoid as many disincentives to participating FFI status as possible.

6. Consolidated FFI Election and Consolidated FFI Annual Report

We recommend that (1) an electing FFI should be able to specify at the time of its election whether the election extends to other members of its worldwide affiliated group, and (2) to the extent specified by the FFI, this election extend to any entities formed, controlled or sponsored by the FFI (such as investment funds or special purpose vehicles). If an FFI indicates that it will file a consolidated FFI annual report on behalf of its group, then all members of the FFI’s worldwide group would be presumed covered unless the FFI specifies which entities or categories of entities it does not intend to cover in its reports. The FFI would be responsible for ensuring that information on U.S. accounts held by those entities not so carved out are a part of its consolidated annual report. The guidance should also permit various entities, divisions or locations within the affiliated group to file separate annual reports and should not require the consolidation of information that is gathered from separate data systems onto a single report.

We further recommend that as part of a consolidated FFI annual report the FFI be allowed to specify which of its related affiliates and entities: (1) satisfy one of the explicit exceptions to FFI status; (2) have no U.S. accounts and thus fall under the exception in section 1471(b)(2)(A)(i); or (3) satisfy the criteria to be an FFE. In that way, a worldwide financial group could rationalize the many different FATCA requirements into one election and reporting requirement. We also believe that this allows such a worldwide group the flexibility to carve out those affiliates that themselves wish to become participating FFIs.

We assume that the regulations will also provide rules and examples as to how the affiliated group rules of section 1471(e) will work. Many multi-national FFIs are concerned about the breadth of the worldwide affiliation approach contained in FATCA and how Treasury and the IRS will expect such worldwide groups to meet their FATCA obligations in a sensible and administrable manner.

7. FFI Election To Be Withheld Upon

We realize and appreciate that section 1471(b)(3), which allows an FFI to elect to be withheld upon, was intended provide relief to those FFIs that might choose to be non-participating FFIs because of the expense of building systems to perform FATCA withholding. However, it is not immediately apparent how this election will have that effect. In many, if not most instances, the entity that would process payments for the electing FFI (either a U.S. withholding agent or another FFI that has built the systems to perform FATCA withholding) would not be in the position to know of the transactions giving rise to gross proceeds that could be initiated by the electing FFI's customer since such transactions would not necessarily be processed by the particular withholding agent. We recognize that this is a complicated issue and we ask that regulations specify how such an election works and what effect it is intended to have.

On a practical basis, we strongly recommend that the election not be made either automatic or mandatory. Instead, the FFI that wants to make the election should reach an agreement with the entity that would process the withholding that such election is practicable and can be made to work by both entities since it presents legal and operational challenges and costs for both parties (not to mention upstream withholding agents that might conceivably be several tiers away from one of the FFIs wanting to make the election). We do not believe that it would be fair or commercially reasonable to take a different approach to this election process. Once the two parties have reached such an agreement, we would propose that there be a relatively easy and automated way for the two parties to notify the IRS of their agreement.

Finally, we feel compelled to comment on a statutory requirement associated with this election although we recognize that Treasury and the IRS may lack regulatory authority to address our concern. We note that, in relation to the "elect to be withheld upon" provision, the electing FFI must waive any right under any U.S. tax treaty with respect to the amount to be deducted and withheld. We view this provision as rendering the election largely useless since it is difficult to conceive that an FFI can or should give up another person's entitlement to treaty relief. If this is not what is intended by that statutory language, we urge Treasury and the IRS to clarify their understanding through a regulation. If, however, this is what is intended by the statute, we do not expect this election to have much, if any, applicability.

8. FFI Annual Report

The EBF and IIB continue to believe that the regulations should require the FFI Annual Report to contain the minimum amount of information necessary for IRS compliance purposes. Each data element that must be captured will increase costs to the FFI. The EBF and IIB are particularly concerned with the obligation for the Annual Report to include the "gross receipts and gross withdrawals or payments from the account [of a U.S. accountholder]". The EBF and IIB believe that substantial systems changes may be needed by many FFIs to collect this sort of dynamic data as opposed to static data like name, address, TIN, account number, and account balance/value. In addition, the EBF and IIB question whether the information on gross receipts and withdrawals is crucial for IRS compliance efforts. We believe that the IRS should be able to adequately determine whether it should take further investigative steps based on the account balance/value, the location of the account relationship, or the complexity of the structure at issue. Finally, we note that the IRS would retain the authority to request more substantial account data

upon specific request to the FFI. We think that this targeted approach makes far more sense than a more systemic one of dubious compliance value.

The regulations should specify that account balance/value information should be captured at the end of the year. We recommend against an averaging regime given that any such regime would increase both complexity and cost to determine and produce the annual report. With respect to account balance information of substantial U.S. owners, we recommend that the regulations permit an FFI to choose to report the entire account balance of the entity account, rather than the amount attributable to a substantial U.S. owner based on its ownership percentage (which would add complexity to the reporting process).

In addition, we strongly request that the IRS allow such FFI annual reports to be filed electronically rather than in paper form. We anticipate that the IRS would publish the specifications for such an electronic report to the extent that it agrees to allow for such submissions.

We assume that the FFI annual report will cover a calendar year, and we accordingly request a filing date of June 30 of the year following the end of such calendar year. We also request that with respect to bank account balances, the regulations specify that such balances may be stated in the currency in which they are denominated to ease the filing burdens on FFIs.

We believe that a more substantial problem exists with respect to reporting the value of a securities account since many securities may not be readily valued or are subject to frequent fluctuations in value. We request that regulations provide pragmatic rules on what an FFI is expected to report with respect to such accounts.

9. Form 1099 Election

Cost Basis Reporting Guidance: The EBF and IIB urgently request that Treasury and the IRS clarify the relationship between the proposed cost basis reporting regulations and the FATCA regime since many non-U.S. institutions are in the process of assessing whether they need to build costly systems to comply with the cost basis reporting rules. We believe that only those FFIs that make the election under section 1471(c)(2) to be subject to the same Form 1099 reporting requirements as a U.S. financial institution should be required to comply with basis reporting rules and other Form 1099 reporting concepts. The EBF and IIB believe that this point is obvious from the structure of FATCA, which provides two alternative reporting systems for FFIs: (1) the annual FFI report; or (2) Form 1099 reporting.

However, the EBF and IIB note with concern that the proposed cost basis reporting regulations state that basis reporting will be required of non-U.S. payors/middlemen to the extent provided in a QI or similar agreement with the IRS and the regulatory preamble requests comments on the usefulness of such information, the costs involved, and other potential effects. The EBF and IIB strongly believe that the proposed regulation is simply inconsistent with the development of FATCA. The Obama Administration's initial proposal was to treat all non-U.S. financial institutions, including QIs, as "U.S. payors," and therefore would have required them to comply with full Form 1099 reporting requirements, including cost basis reporting. Numerous U.S. and non-U.S. industry groups told Congress and Treasury that such a requirement simply would not work because it would require enormous investments in reporting systems and U.S. tax expertise. Accordingly, Congressional tax writers explicitly took a different approach, so that the FATCA legislation merely requires FFIs, which is defined to include QIs, to submit information about U.S. customers through a simplified annual reporting requirement that does not include basis reporting (or most other Form 1099 details for that matter). Only those FFIs electing to be treated as the equivalent to a U.S. payor would take on full Form 1099 reporting requirements. The EBF and IIB accordingly request that Treasury and the IRS clarify that QIs and other FFIs will not have to comply with

basis reporting unless they elect Form 1099 reporting equivalent to a U.S. financial institution. Even if such a clarification is made, we further respectfully request that the effective date of the cost basis regulations be extended beyond the effective date of FATCA with respect to those non-U.S. financial institutions affected by overall FATCA compliance preparations.

Other Form 1099 Related Issues: We also request that the IRS and Treasury clarify what kind of reporting is expected with respect to NFFEs. In the case of an FFI that elects to report as a U.S. financial institution, the statute seems to contemplate that a Form 1099 would be issued to both U.S. direct account holders and NFFEs. Section 1471(c)(2)(B) states that the FFI will report such information to “each United States account maintained by the such institution.” United States account includes those NFFEs owned by “substantial U.S. owners.” It strikes us as odd that a non-U.S. entity should receive a Form 1099 and we ask the IRS and Treasury to clarify if this is what is indeed intended.

We request clarification as to whether any current Form 1099 reporting that is being performed by a QI or a U.S. withholding agent receiving Forms W-9 from either a QI or an NQI would continue once such QI or NQI becomes a participating FFI. We believe that one way to read FATCA is that the FFI annual report would supplant such Form 1099 reporting. However, we recognize that this likely is inconsistent with the purpose of FATCA to expand information reporting with respect to U.S. taxpayers. Accordingly, it would be helpful if this were clarified. Likewise, it would be helpful if the regulations clarify that if an FFI assume Form 1099 reporting and a U.S. person refuses to provide a TIN, then the FFI would backup withhold on payments made to such account under section 3406 and FATCA withholding would not apply.

Finally, we believe that there generally will be a need for the QI community along with Treasury and the IRS to consider and rationalize the new FATCA rules with existing QIA obligations. For example, it is unclear how FATCA’s goal of identifying U.S. accounts relates to the QIA obligation to perform Form 1099 reporting based upon “where payment is made” and “where sales are effected” (similar changes are also warranted in the analogous section 6045 and 6049 regulations). Such rules act as an indirect way for a QIA to disclose U.S account holders invested in non-U.S. bank and security accounts under certain limited circumstances. These and other rules would benefit from a thorough reexamination.

10. \$50,000 Threshold for U.S. Account

FATCA provides that the definition of “U.S. Account” will not include depository accounts held by individuals that are valued at less than \$50,000 unless an FFI elects to include them as U.S. accounts. We are concerned that this exception may not be useful to many FFIs given the difficulty in annually identifying and aggregating all deposit accounts held in whole or part by an individual and determining whether the threshold applies. In any event, however, to ease administration for those FFIs that can and do wish to avail themselves of this exception, the regulations should simply deem such an election to have occurred if the FFI does not adopt and follow procedures to so identify such low-value accounts. We do not see the value to the IRS of requiring an affirmative election if the FFI as a matter of course supplies the IRS with information regarding such low value account holders in its FFI Annual Report. The simple act of supplying the annual report with this information should be treated as a deemed election to include them, and the regulations should explicitly allow for such a deemed election.

FATCA provides discretion to the Secretary to require the \$50,000 threshold to be measured on an affiliated group basis. This discretion should not be exercised given the systemic difficulties in making such a determination worldwide. Adopting a worldwide requirement would render this exception largely useless to most non-U.S. institutions. In terms of simple compliance risk, it is difficult to envision a U.S. person seeking to evade tax by opening scores of small value accounts simply to circumvent the \$50,000

threshold that would apply to the affiliate opening the account. We recommend that no regulations be drafted with respect to this potential requirement. Nonetheless, it may be desirable to incorporate some sort of “actual knowledge” standard to apply to any situations in which the business unit holding the account knows that a multitude of accounts are being opened throughout an FFI’s worldwide group to circumvent the \$50,000 limit. We think that such circumstances are unlikely to arise and any such actual knowledge standard should be narrowly drawn accordingly.

11. Payments to U.S. Branches of Non-U.S. Banks

The regulations should provide that U.S. branches of non-U.S. banks be treated as U.S. withholding agents rather than as FFIs for purposes of Chapter 4. This is fully consistent with the treatment of such branches currently for Chapter 3 withholding purposes. Language in the Joint Committee on Taxation technical explanation is sympathetic to this approach.

12. Exclusions from NFFE Status

We assume that the regulations will address the exclusions from NFFE status that are listed in section 1472(c)(1)(G). We agree that all of these exclusions are appropriate and appreciate their removal from the FATCA regime.

In addition, as discussed above, we believe that NFFEs that are formed in treaty jurisdictions and are operating companies should be excepted from FATCA withholding under the authority of section 1472(c)(1)(G). We believe that such entities present a low risk of U.S. tax evasion potential since their business operations would be subject to tax in such jurisdiction.

13. Exclusions from Definitions of Withholding Agent and Withholdable Payments

The Joint Committee technical explanation suggests that it may be appropriate to exclude some payment types from the definition of “withholdable payment.” The EBF and IIB strongly support this approach and recommend that the following payments should be excluded given their corresponding exclusion from Chapter 3 withholding under Treas. Reg. §1.1441-2(a). Including these payments for FATCA withholding but not Chapter 3 withholding presents serious operational and automated system difficulties that should not be underestimated: (1) short-term interest and original issue discount (“OID”); (2) payments under short-term securities sale-and-repurchase (repo) or securities lending agreements, whether or not such payments are OID; (3) certain derivative payments; (4) OID paid on the sale of an obligation other than a redemption; (5) interest accrued on an obligation sold between payment dates; and (6) market discount. We also believe that inter-financial institution transactions (and payments relating thereto) should be excluded.

We also believe that those payments that constitute miscellaneous FDAP not related to U.S. securities (e.g., fees for services, rent, royalties, etc.) should be carved out of the definition of withholdable payments. It appears that FATCA was meant to target offshore U.S. accounts and it makes sense to accordingly limit the kinds of payments subject to FATCA withholding to those associated with U.S. bank deposits or securities. Moreover, such miscellaneous FDAP payments are typically not necessarily made by withholding agents that are financial institutions or by the divisions of financial institutions that are charged with FATCA compliance, and it will be very burdensome to require them to set up the systems to handle such compliance.

For a similar reason, we recommend that for purposes of Chapter 4, the definition of “withholding agent” be limited to FFIs and other financial institutions, as well as to entities whose payments in the preceding taxable year, and that are anticipated in the current taxable year, of U.S. source dividends and

interest exceed a very high annual threshold (e.g., \$1 million, since that is also used as an appropriate QI external audit waiver threshold).

We also believe that the regulations should provide clear rules, perhaps illustrated by examples, of common situations where there may be multiple withholding agents potentially required to ensure FATCA compliance. Such examples might address, *inter alia*, multiple trustees of trusts; investment managers and custodians of securities, as well the various other parties engaged in securities sales, such as the executing broker-dealers, etc. We believe that in such circumstances, the regulations should provide a rule that the withholding agent actually paying a withholdable amount and in the position to perform FATCA withholding should have such obligation, and all other withholding agents are accordingly relieved of the obligation, unless they know or have reason to know that the paying withholding agent will not so comply (or agree otherwise among themselves).

14. Exclusions from the Definition of Financial Account

Section 1471(d)(2) states that, except as otherwise provided in regulatory guidance, a financial account includes any equity or debt interest in a FFI, other than interests that are regularly traded on an established securities market.

The Joint Committee technical explanation anticipates that Treasury may determine that certain short-term obligations, or short-term deposits, pose a low risk of U.S. tax evasion and may be excluded. We concur with this assessment, for the reasons stated above.

In addition, the guidance should exclude non-deposit debt instruments and other obligations issued by banks and other financial institutions for general funding in the ordinary course of business, even where such debt instruments or other obligations are not regularly traded on an established securities market. Most debt instruments (even if denominated as securities), whether issued in the United States or overseas, are not regularly traded on an established securities market. Banks and other financial institutions issue substantial amounts of such non-public, non-deposit debt instruments for general funding purposes. Depending on the country and market practices, these debt instruments may be issued in bearer form, and in any event, systems may not be in place to track beneficial ownership.

We see no reason why such non-deposit debt instruments should be treated differently under FATCA than similar instruments issued by non-financial companies, and in particular we do not believe it necessary for U.S. tax compliance purposes to upset the capital markets practices in various countries for these issuances. These debt instruments do not afford investors the same regulatory and legal protections as deposits. Moreover, as in the case of similar debt instruments issued by non-financial companies, any FFI account through which an investor holds such debt instruments would be subject to the FATCA compliance requirements.

We would limit this exclusion to non-deposit debt instruments issued by banks and other financial institutions for general funding in the ordinary course of business. Thus, we recommend that debt instruments that represent investments in discrete pools of assets – whether issued by a securitization vehicle, an investment entity or a bank or other financial institution – not be covered by this exclusion.

15. Presumptions and Definitions

The FATCA regime potentially requires a non-U.S. financial institution to have a sophisticated understanding of complex U.S. tax law concepts. It is important for Treasury and the IRS to develop practical rules that a non-U.S. withholding agent can reduce to workable procedures and systems; for example, to identify which entities are FFIs or NFFEs, how an entity should be classified for U.S. tax

purposes, and what constitutes a specified U.S. person. These rules will also be crucial to resolve potential disputes between a withholding agent and a non-U.S. entity as to whether it is an FFI, NFFE, SFIE or other type of entity (such as an exempted entity) for FATCA purposes. In such instances, being able to refer to a regulatory rule of construction would allow both parties to ensure that they were appropriately complying with FATCA.

Further to this recommendation, the EBF and IIB recommend that clear presumption rules be provided in regulations to allow U.S. withholding agents and FFIs to treat non-U.S. entities as either an FFI or FFE (e.g., based on the name of the entity indicating FFI status, such as “bank”, “mutual fund”, “broker”, etc) and collect the appropriate documentation accordingly. Similarly, the regulations should provide presumptions to identify an entity as an NFFE or SFIE to the extent possible. Without such presumption rules, many withholding agents may have a difficult time determining the correct status of the entity.

Likewise, the EBF and IIB recommend that new FATCA presumption rules also apply to those entities carved out of either FFI or FFE status. This would include payments to foreign governments, international organizations, and central banks (the EBF and IIB believe that the existing presumption rules for these kinds of entities would suffice). Presumption rules should also address corporations the stock of which is “regularly traded on an established securities market” and affiliates of such corporations. The presumption rules should also apply to any other entities the IRS carves out of either FFI or FFE status.

Finally, the “eyeball” tests should be available to identify those entities excluded from the definition of “specified U.S. person” under section 1472 with respect to FFEs. FFIs and U.S. withholding agents should be able to rely on information in their records or reasonably available (or consistent with the concepts mentioned above) to identify the following owners of an FFE who would be deemed as outside the reporting requirement: (1) corporations regularly traded on an established securities market and affiliates of such corporations; (2) tax exempt entities; (3) U.S. governmental bodies; (4) U.S. states; and (5) banks.

16. Audit and Verification Standards

We believe that verification standards for FFIs, FFEs (to the extent adopted) and those FFIs certifying that they have no U.S. accounts under section 1471(b)(2)(A) should be kept as simple as possible while consistent with the government’s objective to ensure compliance with the FATCA requirements. We are particularly concerned that any verification approach more akin to a financial statement audit would likely prove too great a burden, cost and risk on many FFIs and lead them to disinvest U.S. securities. We accordingly urge Treasury and IRS to adopt an AUP approach to FATCA verifications to the extent that such procedures are contemplated.

Further to this request, we strongly recommend that the regulations should explicitly state that any “skilled person” who meets IRS qualifications may conduct the AUPs that would be developed for each category of FFI and FFE. We believe that the more qualified persons available to perform the compliance checks to the IRS’ satisfaction, the more likely that competition among potential service providers will help contain the costs of such checks. We note that the British have adopted exactly this approach with respect to ensuring compliance with the Financial Services and Markets Act 2000 (“FSMA”). The British Financial Services Authority (“FSA”), which regulates the FSMA, publishes a manual that describes the “skilled person” concept. Chapter 5 states: “A skilled person must appear to the FSA to have the skills necessary to make a report on the matter concerned. A skilled person may be an accountant, lawyer, actuary or person with relevant business, technical or technological skills.” We believe that the IRS should take a similar approach by allowing a similarly broad range of “skilled

persons” conduct compliance checks of FFIs and FFEs. However, we recognize that the IRS will want to ensure that any such person possesses the necessary understanding of the relevant U.S. laws and regulations, and we further recommend that any such person be approved by the IRS and that the IRS publish a list all such approved persons on its web site so that FFIs and FFEs know the full range of their choices to conduct any necessary compliance checks.

17. Refund Procedures

The EBF and IIB can envision many different situations that may give rise to over-withholding on “withholdable amounts” and a corresponding need to process refund claims from beneficial owners who would qualify for either statutory or treaty reductions on Chapter 4 amounts paid to them. In the simplest situation, the customers of a non-participating FFI may have no idea that their institution has opted out of participating FFI status and suddenly find themselves subject to withholding through no fault of their own notwithstanding that the customers themselves would not be subject to Chapter 4 (or Chapter 3) withholding. Another potential situation could arise through FATCA withholding that occurs in error and must be corrected.

However, tiered entities likely will present the most difficult refund situations. In such instances, a non-participating FFI may be interposed between participating FFIs, and the customers of a downstream participating FFI may find their payments subject to FATCA withholding even though their institution is a participating FFI and they themselves qualify for statutory or treaty reductions in Chapter 3 withholding.

The EBF and IIB accordingly urge the IRS to develop robust refund procedures that allow a beneficial owner to present specified proof to the IRS to establish that they qualify for the refund. Under current rules, the IRS typically requires the refund applicant to present a Form 1042-S but we believe that additional types of proof should be allowed at least in the FATCA context (and while outside the scope of these comments, documentation other than Forms 1042-S should also be accepted from a beneficial owner to prove their eligibility for reductions in Chapter 3 withholding). Likewise, we believe that an FFI should be allowed to apply for a collective refund in appropriate circumstances to reduce the burden on both non-U.S. investors and the IRS, as is currently allowed in the QI context.

The regulations should also address those circumstances in which an FFI can get a refund for its own account. We believe that there may be circumstances where an FFI is subject to inadvertent or erroneous withholding and must seek a refund. Likewise, it may be beneficial for the IRS and Treasury to allow a non-participating FFI to seek a refund in excess of what it is entitled to under a tax treaty provided that it agrees to substantiate its U.S. accounts, if any, and comply with the FFI regime prospectively.

We further recommend that the IRS develop a specialized unit to process FATCA refund claims, devote sufficient personnel to process the claims, and publish a Revenue Procedure that contains details as to what materials must accompany such a refund claim and how it must be submitted.

18. Summary: Prioritization of IRS Guidance and What the IRS Must Do Before FFIs and FFEs Can Comply Adequately With FATCA

Implementation of FATCA on a timely basis will be a monumental task for both the government and the financial community. As we have previously noted, the financial community will likely need at least two years from the issuance of comprehensive and final guidance to set up the systems and perform the due diligence to be able to comply with FATCA. It is desirable and tempting to talk about prioritizing the guidance, so that the financial community has more time to put in place those items that will require more time to implement. Unfortunately, however, so much of the guidance is necessarily and integrally interrelated, and thus it is unlikely to be practical for the financial community to begin to create

new systems, begin due diligence or train personnel until a substantial portion of the guidance is finalized. Nonetheless, we provide the following suggestions regarding the overall guidance project and its prioritization.

First, in terms of prioritization, it will be very helpful for the IRS at an early point in time to (i) indicate the overall architecture of the new regime it proposes to implement, focusing on the categories of FFIs (e.g., those that must enter into FFI agreements under section 1471(b), and those that will be eligible for alternative rules, such as the FFE and SFIE approaches that we propose herein, or that will be exempt altogether), and (ii) provide detailed guidance regarding what FFIs will be expected to do regarding the identification of U.S. accounts in the case of both existing and new accounts (i.e., the issues discussed in Paragraph 2 above). This guidance should be sufficiently precise so that FFIs can begin to set up their identification and due diligence systems.

Second, the guidance that is provided on a priority basis regarding the identification of U.S. accounts and related due diligence should stratify the population of business lines and existing accounts based on the likely risk of U.S. tax avoidance and burdensomeness of implementation, and should provide for extended, phased-in effective dates for those categories that are less likely to present a high risk of U.S. tax avoidance and/or raise serious implementation burdens. For example, we would expect that private banking and custodial securities investment accounts would have a higher priority than retail banking, and FFIs might prioritize their attention on such business lines first. Similarly, as discussed above, we believe that FFIs will need considerably more time to identify U.S. owners of entities than direct account holders.

In this regard, the government should specify what expectations it has for the financial community as of FATCA's effective date of January 1, 2013 and as of future phase-in dates. In addition to clear phase-in rules for various categories of business lines and accounts, we would also ask that Treasury and the IRS provide a sort of general safe harbor for "good citizen" institutions that make reasonable efforts to comply in time for 2013, even if not all systems are up and running because of the magnitude of the technological, procedural, control and training tasks presented by FATCA. We make these requests because we read the statute as immediately effective for payments made after December 31, 2012 with the exception of grandfathered securities, and we remain quite concerned that the financial community will be faced with the daunting task of trying to implement a comprehensive withholding tax regime within a potentially unrealistic time frame if regulations are not finalized fairly quickly.

Third, the EBF and IIB are concerned that Treasury and the IRS may view their immediate task as limited to publishing first proposed and then final regulations. However, we believe that substantial guidance in addition to the admittedly vital regulations are crucial if the FATCA withholding tax system is to operate reasonably well. We respectfully request that these items be published in draft form so that the financial community can provide comments to you to make the items more useful to the IRS and less burdensome to the industry. Specifically, we request that the IRS complete action on the following items by the end of 2010:

- A new Form W-8BEN for individuals that allows the beneficial owner to certify to non-U.S. tax status and that provides more relevant indicia of U.S. tax status through certifications related to such status (e.g., dual citizenship, place of birth, green card status, substantial presence, etc.). We believe that in conjunction with this change in the Form W-8BEN, the section 1441 regulation requiring a "reasonable explanation" in writing for a U.S. address be eliminated. The rule is largely meaningless in effect and the government's concerns regarding U.S. tax status should be more directly addressed by the Form.

- A new Form W-8BEN for entities (including a checkbox that would enable the entity to certify its nature for U.S. tax purposes, that it does not have substantial U.S. owners and/or that it satisfies an exception to NFFE status, and a way for an NFFE to provide information about its U.S. owners). It should also allow an FFI acting with regard to its own account to certify if it is a participating FFI or not. We urge the IRS to issue clear and detailed instructions in connection with such a new Form W-8BEN to help entities determine both the U.S. tax classification of their particular entity and how to determine and measure substantial U.S. ownership.
- Sample formats or an official form for an NFFE to provide information regarding substantial U.S. owners in the event that a Form W-8BEN cannot be collected.
- A new Form W-8IMY that includes a way: (1) for an FFI to certify if it is a “participating” FFI (that is, one that has an agreement with the IRS); (2) for an FFI to elect to have another withholding agent do the Chapter 4 withholding on any recalcitrant account holders and provide allocation information to accomplish this end; (3) for an FFI-type entity to certify that it should be treated as an FFE; and (4) for an FFI or an FFE to certify that it has no U.S. customers.
- The FFI Agreement and instructions on how to file it.
- It will be quite key that FFIs and FFEs understand any proposed audit requirements as soon as possible so that they can complete the cost/benefit analyses that will be necessary to ensure that being a participating FFI or FFE is commercially feasible.
- Forms (or amended versions of existing forms) for reporting taxes withheld under FATCA, as well as a revenue procedure or other guidance describing how taxes withheld under FATCA should be deposited.
- Sample formats (for electronic filing) or an official form for the FFI annual report regarding its U.S. customers.
- Sample formats (for electronic filing) or an official form for the U.S. account holder reports required under FATCA for FFEs.
- A revenue procedure or other guidance describing how a beneficial owner can establish that it is entitled to a refund of tax withheld under FATCA. As discussed above, it is particularly crucial that a robust refund mechanism be instituted, especially since gross proceeds will also be subject to withholding for the first time. The new requirements are likely to be relatively unknown to many FFIs, FFEs and NFFEs, particularly smaller entities.
- A web site listing (1) all participating FFIs and those deemed by the IRS to be non-participating FFIs, (2) those FFI-type entities electing FFE status, (3) FFEs that the IRS determines are non-participating FFEs, and (4) electing 1471(b)(2) FFIs (i.e., those without U.S. customers). We recommend that the IRS commit to updating this web site on a monthly basis so that withholding agents can code their systems with more accurate data.
- The EBF and IIB believe that FATCA’s effective date should be delayed until at least 18 - 24 months after all of these items are published so that systems and procedures can be developed to accommodate the new requirements. At a minimum, the IRS should provide

that no withholding liability or penalties will be imposed for failure to comply with FATCA before that date (and, as discussed above, likely a later date).

CONCLUSION


In closing, the EBF and IIB appreciate the opportunity to submit these comments and recommendations to Treasury and the IRS. Please do not hesitate to contact us with any questions you may have regarding our comments and recommendations. We look forward to working with you throughout the FATCA implementation process.

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EUROPEAN BANKING FEDERATION

INSTITUTE OF INTERNATIONAL BANKERS

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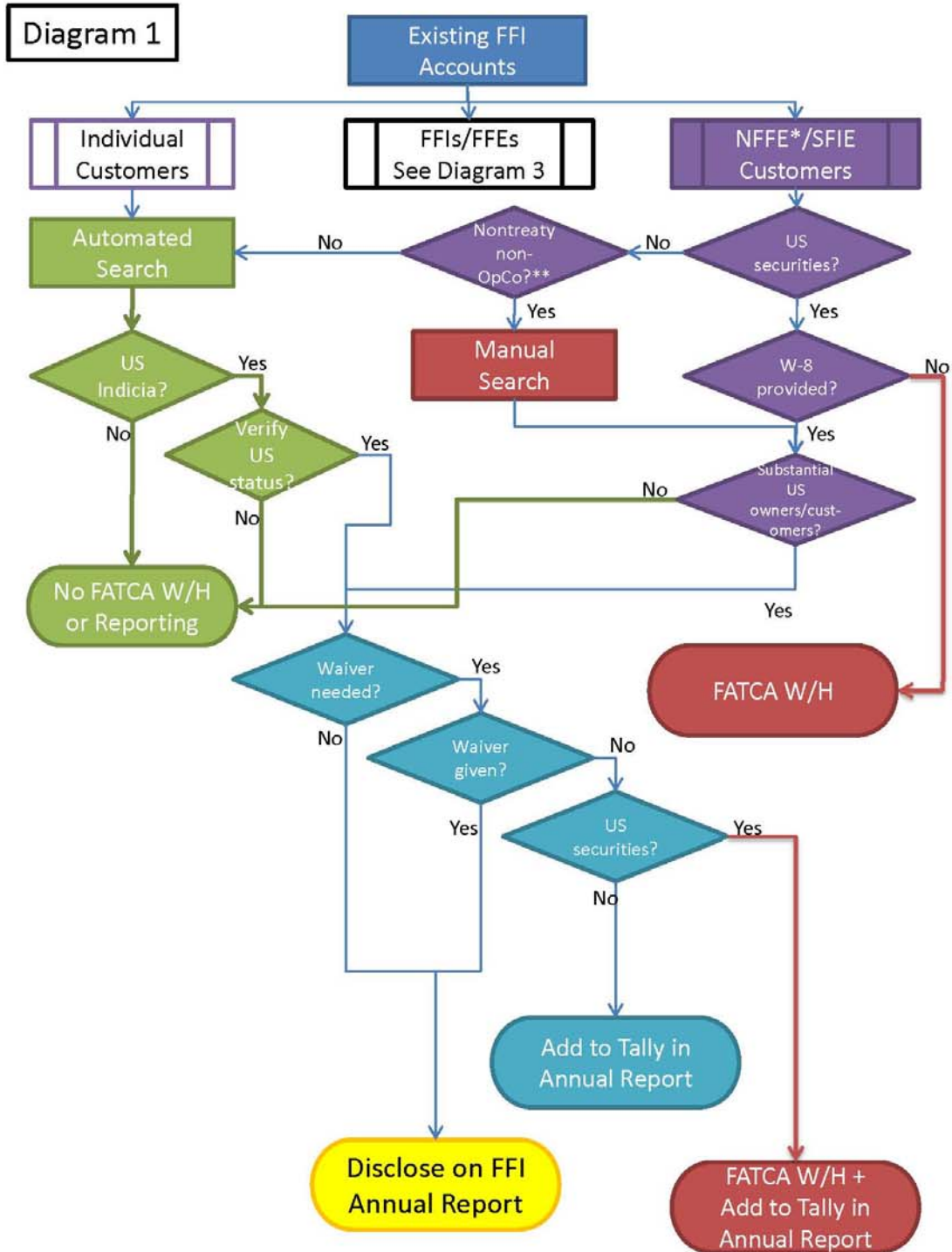
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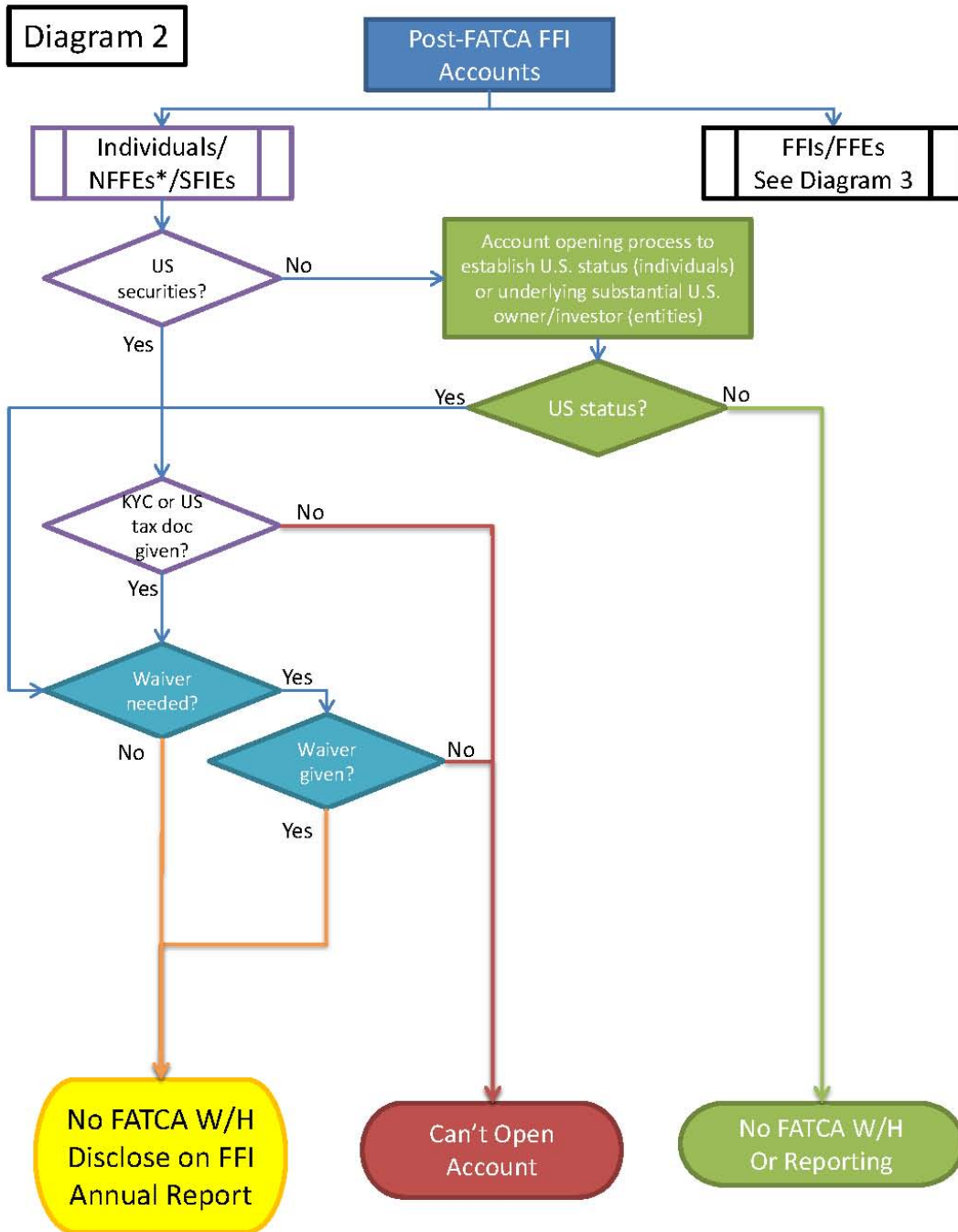
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*Does not include operating companies in treaty countries.

** May also include treaty country SFIEs (e.g., trusts, foundations, other non-taxed entities).



*Does not include operating companies in treaty countries.

Diagram 3

