

FINANCIAL INFORMATION FORUM

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Electronic Delivery and FedEx

John Sweeney
CC:PA:LPD:PR (REG-121647-10)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station,
Washington, DC 20044

Re: Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities [REG-121647-10]

Dear Mr. Sweeney,

The Financial Information Forum (FIF)¹ would like to take this opportunity to offer feedback to the notice of proposed rulemaking published by the Internal Revenue Service, U.S. Department of the Treasury (IRS) on February 15, 2012 regarding regulations relating to information reporting by foreign financial institutions (FFIs) and withholding on certain payments to FFIs and other foreign entities. Representatives from FIF plan to attend the public hearing scheduled on May 15 where we look forward to presenting our members' positions on the topics highlighted in this letter.

While the proposed FATCA regulations did provide some clarification and additional insight into several of the open issues, they have also served to amplify our concerns regarding the expected implementation timing. FIF requests that IRS postpone publishing final regulations given the unsettled state of the industry and until all inconsistencies have been resolved so the industry has adequate time to digest the full ramifications of the proposed regulations. Specifically, we request that the IRS consider the following:

- Allow the industry sufficient implementation time to resolve open issues:
 - Reopen FATCA comment period and obtain crucial FATCA deliverables such as draft FFI agreement and new or revised Forms W-8 and W-9 to allow the industry sufficient time to analyze the impact on their systems and processes and provide thoughtful and more thorough feedback to the IRS.
 - To make implementation more efficient and effective, harmonize and delay the following implementation dates for US Withholding agents and PFFIs:

¹ FIF (www.fif.com) was formed in 1996 to provide a centralized source of information on the implementation issues that impact the financial technology industry across the order lifecycle. Our [participants](#) include trading and back office service bureaus, broker-dealers, market data vendors and exchanges. Through topic-oriented working groups, FIF participants focus on critical issues and productive solutions to technology developments, regulatory initiatives, and other industry changes. The FIF FATCA Working Group includes broker-dealers, service bureaus and other vendors responsible for implementing the new FATCA regulations.

- Extend new account opening procedures deadline currently January 1, 2013 for US withholding agents and July 1, 2013 for PFFIs to January 1, 2014.
- Extend initial FATCA withholding for US FDAP income from January 1, 2014 for US Withholding Agents and FFIs to January 1, 2015.
- Ensure no change in existing treatment of Delivery Versus Payment/Receive Versus Payment (DVP/RVP) transactions.
- Retain existing “eyeball” test under Chapter 61 to reduce the burden of identification for an exempt recipient to be treated as domestic (rather than as foreign as proposed regulations intend) if a withholding agent has appropriate information to rationally determine it is domestic, for example US indicia such as a TIN that does not have a “98” prefix (non-98 TIN) or US mailing address.

These critical issues are expanded in the following sections which offer observations that support the need for delaying the implementation dates and commentary on IRS requests for comments in the proposed regulations.

Allow the Industry Sufficient Time to Resolve Open Issues

The complex nature of FATCA highlights the interrelationships between systems, operations, project management, systemic planning, strategic planning, and client-facing staff. With so much to absorb, the industry still has not determined all FATCA implications or unintended consequences with their ability to comply with Chapters 3 and 61. FIF requests extending the comment period and accelerating the publication of the draft FFI Agreement and new or revised forms to allow firms sufficient time to analyze these and consequently submit constructive feedback to the IRS. It is imperative that the layout of the revised forms in the W-8 series, particularly the Form W-8 BEN, accurately reflect the content of final regulations and instructions to recipients.

On August 27, 2010, IRS published Notice 2010-60² which provided preliminary guidance involving the implementation of FATCA. The notice stated:

Treasury and the IRS intend to issue proposed regulations incorporating the guidance provided in this Notice and addressing other matters necessary to implement chapter 4. In future guidance, Treasury and the IRS intend to publish a draft FFI Agreement and draft information reporting and certification forms.

Publishing the draft FFI Agreement and reporting and certification forms (e.g., Form W-8) in advance of or at the latest, at the same time as issuance of proposed regulations, would have enabled the industry to better determine implementation challenges and provide more detailed concerns and constructive feedback to the IRS. With the first effective date of January 1, 2013 fast approaching, we still do not have clear and unambiguous guidance to facilitate our design, development, testing and education efforts. At a high level, based on what we have distilled to date from the proposed regulations, there are

² See IRS Notice 2010-60 at www.irs.gov/pub/irs-drop/n-10-60.pdf

significant modifications that will be necessary to make our systems and processes compliant with FATCA. However, with more specifics, revised drafts of documents, clarity and sufficient time, it might be possible for us to design and develop more efficient and cost effective solutions. In the absence of such definitive guidance, we can only expect, at a minimum, the following to be true:

- Gross proceeds withholding effective 2015 represents a shift from the existing end-of-day batch reporting standard that currently exists and will require PFFIs to build new systems which will operate in real-time to deduct withholding on a transactional basis. Even for Withholding Qualified Intermediaries (QIs) that will be required to become PFFIs, reporting for gross proceeds was historically never required.
- Withholding/reporting systems require extensive bandwidth for the vast multitude of FATCA account classifications and sufficient time is needed to engage in extensive internal and client testing for the layering of Chapter 4 on top of Chapters 3 and 61. Initial FIF member feedback regarding Chapter 4 withholding indicates changes to systems and processes for handling inclusion of gross proceeds, monitoring the status of grandfathered obligations, the design of refund and rebate processes and asset classes with varying settlement processes. In order to support these and additional Chapter 4 requirements, modifications to rules in Chapters 3 and 61 may be necessary.
- Systems will need to be built to track issue dates for purposes of grandfathered debt obligations, Anti-Money Laundering (“AML”) / Know Your Customer (“KYC”) documents and issuance of specified notional principal contracts (equity swaps) for purposes of Section 871(m). These various payment systems will need to be enhanced, modified and augmented to accommodate FATCA parameters for multiple income and product modules within the firms such as dividends, fixed income, equities, mutual funds and proceeds payment systems.
- In many cases, systems will need dual processing for pre-existing accounts vs new accounts according to the criteria in the regulations causing significant increases in development and testing time.

Based on the reasons above and absent guidance and further relief, the industry is currently unable to establish a clear understanding of the ultimate functional and technical requirements. Absent IRS timely guidance and industry dialogue, firms will be forced to retrofit systems for multiple scenarios which will lead to increased development costs and further confusion. FIF is gravely concerned that the industry will not have sufficient time to modify systems as required between the publication of final regulations and the effective date, thus we are requesting an extension of one year from the existing January 1, 2014 deadline to January 1, 2015 for initial FATCA withholding on US FDAP income for US Withholding Agents and PFFIs. Harmonizing and extending the date to January 1, 2014 for new account opening procedures, which currently are effective January 1, 2013 for US Withholding agents and July 1, 2013 for PFFIs, will ensure the industry has one set of processes developed in light of feedback received and no duplication of efforts occurs. It is important to recognize the industry is not only fully committed to a successful implementation of FATCA but also continues to devote considerable time and the same finite financial and human capital resources towards the following essential and complex projects:

- Developing systems and reporting for the first time adjusted basis on covered equity and mutual fund securities as per new Cost Basis reporting regulations and dealing with a surge in customer apprehension and confusion over the changes in 2011 Form 1099-B reporting and the annual tax reporting deadlines.
- Preparing for upcoming cost basis reporting for fixed income and options beginning January 1, 2013.
- US withholding on dividend equivalent payments on swaps over US equities beginning January 1, 2013.

Ensure No Change to DVP/RVP Transactions

In DVP/RVP arrangements today, payment for securities purchased is made to the selling customer's agent and/or delivery of securities sold is made to the buying customer's agent in exchange for simultaneous payment at the time of settlement. Most DVP/RVP transactions are bypassed for any type of withholding or reporting today since the final broker/custodian that receives the gross proceeds from the sale against delivery of securities sold is required to report the sale. If the broker's customer is another broker that is an exempt recipient, only the second-party broker (final broker in the chain) is required to report the sale.

The proposed regulations appear to change the arrangement described above into possibly requiring every broker in the chain to withhold and report on these transactions. The industry is concerned that the potential change in treatment of these instantaneous DVP/RVP transactions in the proposed regulations will disrupt straight through processing and require a multitude of changes to systems to break transactions and identify the relevant payee for every individual trade, possibly resulting in significant market disruption. Typically, these transactions occur between custodians that will ultimately become PFFIs, therefore FIF requests that the proposed regulations eliminate any change from the existing treatment of DVP/RVP transactions under Chapter 61.

Preserve the "Eyeball" Test to Identify Exempt Recipients

Currently, under Chapter 61, a US Payor may exempt certain recipients from backup withholding and Form 1099 reporting on the basis of the commonly known "eyeball" test, allowing the US payor to rely on a scannable word in the client account registration as an indication of the client's status as a bank, mutual fund, broker, etc. The "eyeball" test, when applied, replaces the need for the client to provide a Form W-9 in order to be exempt from backup withholding and Form 1099 reporting. The proposed regulations seek to eliminate the "eyeball" test by requiring all clients to provide a Form W-9 or else be treated as foreign thereby causing a reversal of the status quo.

If this aspect of the proposed regulations is allowed to stand, it would result in contradictory statuses between systems: on the one hand when a form is missing in the backup withholding system, it will be treated as US, whereas when it is missing in the FATCA withholding system, it will be treated as foreign. Complex procedures exist today for onboarding staff to use the "eyeball" test and presumption rules to

determine whether a new account is US or foreign in the absence of valid tax documentation. In most onboarding scenarios in the industry today, systems are set up automatically to withhold (US/non-exempt recipient) if there is no Form W-8 or W-9 on file. Onboarding staff perform visual inspections following very specific steps to determine if any evidence for exemption is present in the electronic records.

FIF requests that the IRS allow the industry to retain the use of the “eyeball” test for identifying exempt recipients unless foreign indicia exists, and not to treat recipients automatically as foreign if they have US indicia³. It is important to note that final Cost Basis Regulations⁴ retained a limited “eyeball” test for insurance companies and foreign corporations and retained current rules that allow brokers to determine that a customer is a foreign corporation by relying upon the name of the customer.

FIF FATCA WG Response to IRS Request for Comments

FIF identified the following questions in the proposed regulations and has provided responses to most of these albeit somewhat abbreviated, and five that we were unable to provide a response due to insufficient time. Ensuring an efficient FATCA implementation requires further dialogue among industry participants especially given the global nature of the project and we look forward to participating in this dialogue with the IRS.

1. With respect to scope and ultimate implementation of withholding on foreign passthru payments, Treasury and IRS request comments on approaches to reduce burden, for example, by providing a de minimis exception from foreign passthru payment withholding and a simplified computational approach or safe harbor rules to determine an FFI's passthru payment percentage.

FIF appreciates IRS delaying passthru payments application after 2017. FIF views passthru payments as quite complex and laborious to implement and intends to comment on this issue after addressing more urgent FATCA priorities. FIF recommends a deferral for passthru payments until a date following the one-year anniversary of the first day in which withholding under FATCA is in place. We feel this will give the industry sufficient time to more clearly develop the appropriate level of criteria around the de minimis rules, as well as devise a well-thought out process for deriving a methodology for passthru payments that may be subject to FATCA withholding.

³ U.S. indicia include: (1) identification of an account holder as a U.S. person; (2) a U.S. place of birth; (3) a U.S. address; (4) a U.S. telephone number; (5) standing instructions to transfer funds to an account maintained in the United States; (6) a power of attorney or signatory authority granted to a person with a U.S. address; or (7) U.S. “in-care-of” or “hold mail” address that is the sole address the FFI has identified for the account holder.

⁴ See 4. Returns of Brokers, (j) Reporting of Sales by S Corporations at http://www.irs.gov/irb/2010-47_IRB/ar08.html

2. Treasury and IRS request comments regarding scope and content of review of determining a PFFI's compliance with its FFI Agreement, and the factual information and representations FFIs should be required to include as part of such certifications.

The proposed regulations make it clear that IRS is not expecting an accounting firm type QI-like audit but instead indicate that an Internal Audit review should be sufficient. What would make the PFFI compliant would be documentation (store required forms containing owner information designated by income and recipient type), reporting and withholding. FIF suggests applying easy to implement requirements from the QI to the PFFI regime. For example, the QI currently collects documents from its underlying clients and provides instructions to withholding agents with respect to how to allocate those clients among pools for withholding and reporting purposes.

The regulations mandate each PFFI having written, formal policies and procedures, personnel training and the ability to verify they are supplying, withholding and collecting appropriate documents. PFFIs will perform Form 1042-S reporting, and such proof of withholding and reporting would be on file. If a PFFI originally signs up and adheres to the agreement, loss of PFFI status is so detrimental to the sound condition of the PFFI that it will be an added incentive to the PFFI to adhere and be consistent with the PFFI agreement. The combination of client documentation, withholding, and reporting on Forms 1042-S/1042 should constitute the components of the Internal Audit review.

3. Treasury and IRS request comments regarding alternative due diligence or other procedures that should be required of FFIs unable to certify that no such practices or procedures were in place after such date in order to maintain PFFI status.

FIF suggests using recommendations from the response to Question 2 above.

4. Treasury and IRS seek comments on coordinating the Chapter 3 reporting requirements and existing withholding requirements of these entities under their respective agreements with the reporting and withholding requirements under Chapter 4 (including QIs that are foreign branches of USFIs).

Although Chapter 3 and Chapter 4 are independent withholding and reporting regimes, it is imperative that they be coordinated in their implementation to avoid duplicative or contradictory systems implementation. At a minimum, it is necessary that Chapter 3 and Chapter 4 be viewed as independent for withholding and reporting purposes. In other words, there must be separate boxes on Form 1042-S to indicate Chapter 3 withholding as separate from Chapter 4 withholding. Some level of coordination between Chapter 3 and Chapter 4 withholding needs to be built so that upon imposition of FATCA withholding at 30%, the NRA withholding system will automatically shut down to avoid excessive withholding. In addition, separate silos need to be built so that withholding, whether FATCA or NRA tax, is captured in the respective bucket even though a gross withholding amount will be deposited. Finally, the electronic funds transfer payment system (EFTPS) needs to create a new code for deposit of

FATCA withholding, which needs to be reported accurately on the IRS transcript for the relevant account.

5. Treasury and IRS are considering how to address specific organizations or classes of organizations that may not be deemed to comply with the requirements of Section 1471 (b) due to their use to circumvent purposes of Chapter 4. In addition, Treasury and IRS are considering how the conditions for deemed-compliant status should apply where an FFI is described in more than one subparagraph of Section 1471 (d)(5), for example, it accepts deposits in the ordinary course of a banking business, and as a substantial portion of its business, holds financial assets for the account of others.

No FIF response at this time due to insufficient comment period.

6. Treasury and IRS are considering if PFFIs should be required to use IRS on-line TIN matching program to ensure that its US account holders have provided the correct name and TIN combination prior to filing the form for reporting US accounts with the IRS.

FIF notes that in order to have a logon to access the TIN matching program today, employees have to provide US specific tax information and since many of the employees in PFFIs will not be US citizens, the rules would need to be relaxed.

In addition, there is also a limit to how many TINs can be matched online, the process has to be carried out in batches and when PFFIs will start matching in bulk, performance issues may arise.

7. Treasury and IRS are considering what refund procedures may be appropriate with respect to tax withheld on payments to Limited FFIs or Limited branches (including QIs that are Limited FFIs or that have Limited Branches), and request comments regarding the procedural safeguards that should be put in place to prevent abuse.

FIF suggests allowing a PFFI to make internal refunds under the reimbursement or set-of procedures currently available to withholding agents under Chapter 3. In the alternative, the IRS should consider allowing a PFFI to utilize the collective refund mechanism described in the QI agreement.

8. The regulations "reserve on coordination of withholding under Chapter 4 for payments subject to backup withholding under Section 3406, and Treasury and IRS seek comments on how these requirements should be coordinated in light of objectives of Chapter 4 withholding."

FIF believes the situation where financial institutions withhold Chapter 4 and backup withholding tax on the same client needs to be avoided, therefore the regulations should avoid this duplication or conflict.

9. Treasury and IRS invite comments on issues relating to Chapter 4 withholding in context of transactions described in Notice 2010-46.

No FIF response at this time due to insufficient comment period.

10. Treasury and IRS are considering, as an alternative to external audits, coordinating the audit requirements for QIs, WPs and WTs (including their Chapter 3 requirements) with verification

procedures described in Regulation section 1.1471-4(a)(6) applicable to other PFFIs. Comments are requested on these requirements, including reasonably objective standards under which such entities (and other PFFIs) would determine if they have found material failures in their compliance with the requirements of their respective agreements warranting disclosure to IRS (as referenced in Regulation section 1.1471-4(a)(6)).

FIF suggests utilizing section 10 of QI agreement for audits which give all the parameters for these audits. In other words, an Internal Audit review should focus on documentation for Forms 1042-S and 1042 filed, and procedures that are practicable and efficient. The determination of material failures should be the result of a stringent and extensive analysis process and a PFFI or other withholding agent should be allowed a grace period to remediate without penalty.

11. Treasury and IRS request comments regarding whether there should be additional categories of deemed-compliant FFI not addressed in the proposed regulations.

FIF has observed that Trusts are underrepresented and could be a possible addition to the deemed compliant FFI category.

12. Comments are requested on recommendations to ease compliance burden associated with foreign passthru payment withholding.

As mentioned in Question 1, FIF recommends a deferral for this until a date following the one-year anniversary of the first day in which withholding under FATCA is in place. We feel this will give the industry sufficient time to more clearly develop the appropriate level of criteria around the de minimis rules, as well as, devise a well-thought out process for deriving a methodology for passthru payments that may be subject to FATCA withholding.

13. Comments are requested regarding possible approaches to address the issue of FFIs using US Withholding Agents as "blockers" for foreign passthru payments made to NPFFIs.

No FIF response at this time due to insufficient comment period.

14. Treasury and IRS request additional comments regarding methods to determine amount of gross proceeds in cases that are administratively feasible and do not inappropriately favor investments in US assets through flow-through entities over direct investment with respect to the WH requirements of Chapter 4.

No FIF response at this time due to insufficient comment period.

15. Treasury and IRS request comments whether it is appropriate to treat as grandfathered obligations certain equity interests in securitization vehicles that invest solely in debt and similar instruments if such vehicles will liquidate within a specified time frame given the types of investments they hold and extent of their reinvestment in other assets, and, if so, the appropriate limitations on such treatment to prevent abuse.

No FIF response at this time due to insufficient comment period.

Summary of FIF position

The FIF and its members continue to be supportive of the IRS's initiative to implement FATCA and thereby enhance US taxpayer compliance. FIF believes an ongoing dialogue with the IRS is needed to fully address industry concerns especially given the level of cross-party global communication. An ongoing dialogue can bring clarity where confusion may exist in the understanding or application of the proposed regulations or industry practices. In addition to implementation issues described earlier in the letter, we have also included an appendix with questions that FIF members have raised which demonstrate the various challenges facing the industry.

FIF reiterates its recommendations on extending the comment period post April 30, 2012 to allow the industry more time to clearly understand how FATCA will ultimately work in practice. In addition, there is an urgent need for the immediate publication of critical draft information reporting forms and agreements. Furthermore, FIF requests extending the initial FATCA withholding date for US FDAP income and gross proceeds from January 1, 2014 to January 1, 2015 for US Withholding Agents and PFFIs. In addition, harmonizing and extending the cut-off date for new account opening procedures for US withholding agents and PFFIs to January 1, 2014 is essential for the industry to be able to effectively build systems and perform due diligence. Lastly, FIF urges the IRS to ensure there is no change in the existing treatment of DVP or RVP transactions, and that the IRS retains the existing "eyeball" test under Chapter 61 for the determination of a client's domestic or foreign status.

We appreciate the opportunity to interact with the regulators and industry participants in this forum in order to ensure that the final regulations can be implemented successfully. Representatives from FIF look forward to being in attendance at the public hearing scheduled on May 15 to present our members' positions on the topics highlighted in this letter.

Regards,



Arsalan Shahid
Program Director, Financial Information Forum
On behalf of FIF FATCA Working Group

Appendix I – FIF FATCA WG Questions

No.	Paragraph/Page No.	Issue	Question (Q) / Comment (C)
1	1. Expanded Scope of “Grandfathered Obligations”, page 14	Grandfathered Obligation	Q: According to our understanding, a grandfathered obligation is an obligation outstanding January 1, 2013, with fixed maturity date. Is our definition correct and what is the criterion to define when something is materially changed in status where it is no longer considered an obligation?
2	3. Additional Categories of Deemed-Compliant FFIs, page 16	Deemed-Compliant FFI	<p>Q: Based on present knowledge, the deemed-compliant categories were expanded with two new definitions: “Registered Deemed-Compliant FFI” (for FFI from the five EU countries SP, DE, FR, UK, IT) and “Certified Deemed-Compliant FFI” (for local banks, retirement plans, etc.). Is the IRS going to use the same definition’s terminology? Are all FFIs included in these categories and will also be registered by the IRS?</p> <p>Q: What will the recertification requirements be?</p> <p>Q: What if a country drops out of the partnership?</p> <p>Q: Will the IRS and these five countries maintain the same EIN format? Will the EIN be structured in such a way as to give the industry a mechanism for identifying what country they are participating under?</p>
3	8. Pass-through Payments, page 20	Reporting of Pass-through percentage	Q: FFIs are obliged to report their Pass-through percentage. Does the IRS keep records of this FFI Pass-through percentage reporting? If yes, would this information be available similar to the way they report OFAC information?
4	A. Registration Process Preview, page 85	IRS will make available an online process for registration. The registration process starts on January 1, 2013.	Q: Contrary to previous notices, the proposed regulations are not setting registration deadline for FFI (unlike previous notices with dead-line set to 30 June, 2013). Is there any new deadline? Is the old date still valid? Or, is there no deadline?
5	2. Expanded Affiliated Groups, page 86	Each FFI member, including the Lead FFI, will be assigned a unique FATCA identifier (FATCA ID)	Q: The FATCA ID will be used by IRS as FFI identifiers. In order to ease the mapping process for data providers, could IRS add the LEI (Legal Entity Identifier) as proposed by the Office of Financial Research (OFR) as an additional FFI identifier?
6	ii. Identification of start-up companies, page 190	How to identify such companies?	C: A start-up company should provide its formation date confirming that it was organized less than 24 months prior to the date of payment and is not financial institution. For data providers the concern is - how to flag such companies?

No.	Paragraph/Page No.	Issue	Question (Q) / Comment (C)
7	3. Identification of NFFEs, page 196	Identification of NFFE	<p>Q: In cases where a participating FFI is fully owned by a NFFE (example: Toyota owns a FFI for its leasing business). What would be the NFFE's classification (i.e. is it still classified as NFFE or gets another status)?</p> <p>Do we have to distinguish between participating NFFE and non-participating NFFE; if yes, what are the criteria?</p>
8	9. Substantial U.S. owner, page 347	With respect to foreign corporation – substantial ownership is when U.S. person holds more than 10% of the stock	<p>Q: Is the limit still 10% US ownership to classify a NFFE as US owned with the effect, that payments to such a NFFE are considered withholdable payments?</p> <p>How is the status of an NFFE affected which has a holding of less than 50% in a participating FFI?</p> <p>How is the status of an NFFE affected which has a holding of less than 50% in a non-participating FFI?</p> <p>How is the status of an NFFE affected which has a holding of 50% or more in a participating FFI?</p> <p>How is the status of an NFFE affected which has a holding of 50% or more in a non-participating FFI?</p> <p>How is the status of an NFFE affected which has a holding of less than 50% in an US company?</p> <p>How is the status of an NFFE affected which has a holding of 50% or more in an US company?</p> <p>C: It is very difficult for us, as data providers to identify entities with substantial U.S. owners. The ownership percentage might vary, even on a daily basis.</p>