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Re: Comments in Response to Notice 2011-53

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

The Clearing House Association L.L.C. ("The Clearing House"),[1] the American Bankers

[1] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org.

Association[2] and the Institute of International Bankers[3] appreciate the opportunity to submit these comments with regard to Notice 2011-53, 2011-32 I.R.B. 124-126, (the "Notice"), which describes the timeline for the implementation of Chapter 4 of the Internal Revenue Code of 1986, as amended, (the "Code") and discusses certain substantive and procedural matters that will be addressed in regulations by the Department of the Treasury (the "Treasury") and the Internal Revenue Service (the "IRS").

Executive Summary

We commend the Treasury and the IRS for recognizing the issues that our members face with respect to the requirements of the new Foreign Account Tax Compliance Act ("FATCA") information reporting and withholding tax regime. Specifically, we sincerely appreciate that Treasury and the IRS understand the significant operational and systems changes that our members face in implementing these new rules and, more importantly, the substantial amount of time it will take to undertake these changes. This understanding is most recently evidenced by the expeditious manner in which Treasury and the IRS released the revised Notice, which made clear that the withholding relief set forth in the original Notice also extends to payments to certain nonfinancial foreign entities.

While the Notice provides much needed relief in many areas, we believe that the goals of the Notice and of FATCA will be better achieved if Treasury and the IRS make certain modifications to the transition rules and adopt certain permanent rules promptly, as part of revised transition guidance. We respectfully request that Treasury and the IRS consider the comments and recommendations set forth below and provide such revised transition guidance. Specifically, we:

- *recommend* that the transition rules relating to the implementation of account identification, due diligence, withholding and reporting be tied to the date(s) that final regulations, final foreign financial institution ("FFI") Agreement(s) and related forms are released, rather than specific calendar dates selected in advance;

- *recommend* that the income subject to withholding in 2014 exclude amounts described in Treas. Reg. § 1.1441-1(b)(4)(ii) (bank deposit and similar types of

[2] The American Bankers Association represents banks for all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.

[3] The Institute represents internationally headquartered financial institutions from 39 countries around the world; its members include international banks that operate branches and agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States.

interest) and that such amounts be subject to withholding no earlier than the January 1, 2015 date applicable to gross proceeds;

- *recommend* that amounts described in Treas. Reg. § 1.1441-1(b)(4)(iv) (interest or original issue discount ("OID") on certain short-term obligations) be excluded from the FATCA rules in their entirety;

- *request* that guidance be issued promptly that makes clear that non-investment type payments made in the ordinary course of business, including vendor payments, payments for personal services and adjustments made under Section 482 of the Code, are exempt from the FATCA rules;

- *recommend* a January 1, 2014 effective date for all FFI Agreements entered into during calendar year 2013 (and that the reporting rules for calendar years 2013 and 2014 be modified to make clear that the reporting for each year will be limited to identified U.S. accounts maintained in that year);

- *propose* (1) a quarter-year schedule for depositing taxes withheld under FATCA during the initial two years; (2) a mechanism pursuant to which withholding agents can refund amounts withheld in error; and (3) a provision in the regulations or FFI Agreement that permits a participating foreign financial institution ("PFFI") that suffers inadvertent withholding under FATCA to utilize a streamlined refund procedure; and

- *request* confirmation of its understanding of the requisite dates for account identification, withholding and reporting as set forth in the series of examples at the end of this letter (specifically, that the timing relating to account identification, withholding and reporting must be read in conjunction with the provisions set forth in Notices 2010-60 and 2011-34), as well as *requests* specific guidance where the rules, to date, do not address those requirements.

DETAILED DISCUSSION OF RECOMMENDATIONS

1. **The relevant implementation dates for account identification, due diligence, withholding, reporting and applying for PFFI status should be set as a specified number of months following the issuance of the final regulations, final FFI Agreement(s) and related forms (together, the "Final Guidance"), as opposed to specific calendar dates selected in advance.**

The Notice provides that U.S. financial institutions ("USFIs") and PFFIs must undertake certain actions with respect to account identification, due diligence, withholding and reporting

(and, in the case of FFIs, applying to the IRS to become a PFFI) on specific calendar dates described in the Notice (together, the "Start Dates"). The Notice also sets forth timelines for when Treasury and the IRS anticipate releasing proposed regulations, proposed FFI Agreement(s), proposed reporting forms and the Final Guidance. The Start Dates were clearly set, based upon the timeline for the Final Guidance, with the intent that impacted entities have sufficient time to implement the necessary systems and process changes in order to carry out their obligations under the new regime.[4]

We are concerned that the use of fixed Start Dates for USFI and PFFI actions may be vulnerable to unforeseen circumstances that may arise with respect to the issuance of the Final Guidance. While we have no doubt that Treasury and the IRS will continue to devote significant resources to releasing timely FATCA guidance, there are potentially many factors beyond the control of Treasury and the IRS that could cause delays in the issuance of such guidance.

We believe that a better way to achieve the Notice's intent would be to set the various Start Dates as of the first January 1st following a specified number of months after the Final Guidance has been released. One significant benefit of this approach would be that, if there are delays in issuing the Final Guidance, Treasury and the IRS would not need to take the time and effort to develop another set of Start Dates and issue an additional notice (particularly when their primary focus will be on issuing the Final Guidance). The revised Start Dates should be the first January 1st following a minimum of 18 months after the issuance of the Final Guidance.

2. The definition of "income subject to withholding" in 2014 should not include payments of deposit interest.

Withholding agents currently do not have withholding systems in place that impose 30% withholding on payments of deposit interest. Without significant IT development, existing systems cannot be adapted easily to accommodate this requirement. Therefore, we recommend that Treasury and the IRS exclude these types of payments from the definition of U.S. source FDAP for purposes of withholding in calendar year 2014 and that such payments not

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[4] As stated above, we greatly appreciates that Treasury and the IRS have responded in this way to the concerns expressed by stakeholders regarding the challenging tasks of developing compliance, reporting and withholding systems, as well as taking other appropriate legal steps necessary to comply with the new chapter 4 regime and the implementing guidance issued to date. We also recognize that Treasury and the IRS have made significant efforts to understand the extent of these challenges, why stakeholders will need a significant amount of time following release of the Final Guidance and what that amount of time is. We believe, however, that Treasury and the IRS may not yet fully appreciate the difficulties faced by impacted entities with respect to these matters, including why the Final Guidance must be the touchstone and why more time than has been allotted is necessary. We look forward to being able to discuss these issues with you in more detail.

be subject to withholding earlier than the date that gross proceeds become subject to FATCA withholding (currently scheduled for January 1, 2015).

The Notice provides, in relevant part, that in calendar year 2014 USFIs and PFFIs will be obligated to withhold under Sections 1471(a) and 1472(a) of the Code only on payments of U.S. source FDAP. It is our understanding that the purpose of this relief is to permit withholding agents with existing systems designed to comply with the chapter 3 withholding regime to utilize those systems for 2014 FATCA withholding. This would also afford them an additional year to design, implement and integrate such FATCA withholding systems into their existing internal controls structure and fully test such systems before implementation is complete in order to permit the entities to make their required internal controls certifications.

Significantly, existing withholding systems do not currently impose withholding on payments of bank deposit and similar types of interest described in Treas. Reg. § 1.1441-1(b)(4)(ii) because withholding agents are not required to impose withholding on these payments under the current chapter 3 regime. The exclusion of gross proceeds from chapter 3 withholding appears to be the rationale for delaying FATCA withholding on such payments until 2015; the same approach should be taken with bank deposit and similar interest. Thus, we strongly recommend that Treasury and the IRS specifically exclude payments of bank deposit and similar types of interest from the types of income subject to FATCA withholding during calendar year 2014.

3. **The definition of "withholdable payment" should exclude payments of interest or OID on short-term obligations.**

Based on the nature of payments described in Treas. Reg. § 1.1441-1(b)(4)(iv) (interest and OID on short-term obligations) and the types of investors in such short-term obligations (most often large institutions), we believe that including these payments within the scope of the FATCA rules would result in a significant burden for impacted withholding agents while producing no discernible benefit to the government.

As outlined in The Clearing House letter dated August 13, 2010 (the "August 13, 2010 TCH Letter", copy attached) at pages 6-7, we continue to believe that these types of payments pose little risk of U.S. tax evasion. In its report, the Joint Committee on Taxation suggested that Treasury would use the grant of discretion in Code Section 1474(f) to exempt those types of payments that Treasury determined pose little risk of U.S. tax evasion giving as examples payments made with respect to short-term debt or short-term deposits.[5] To minimize the burden these new rules impose on impacted entities, we believe it is imperative that Treasury

[5] Joint Committee on Taxation, J.C.T. Rep. No. JCX-4-10.

and the IRS permanently exclude interest and OID on short-term obligations from the FATCA requirements, since the likelihood of tax evasion is negligible.

4. Non-investment type payments should be permanently excluded from the FATCA rules.

To date, Treasury and the IRS have not clarified the extent, if any, to which non-investment type payments made in the ordinary course of business (e.g., vendor payments, payments for personal services or adjustments under Section 482 of the Code) will be included within the new FATCA regime. While we understand that this issue is still under consideration, we believe that it is crucial that such payments be excluded from FATCA and that this exclusion be made express in guidance issued now.

In Notice 2010-60, Treasury and the IRS requested comments regarding the extent to which the FATCA regime should apply to vendor payments made in the ordinary course of the withholding agent's trade or business. With respect to these types of payments, it is significant that the Joint Committee Report[6] provides that the drafters expected Treasury and the IRS to "exclude certain payments for goods, services, or the use of property" made in the ordinary course of the payor's trade or business. As stated on page 7 of the August 13, 2010 TCH Letter, we continue to believe that this rationale clearly demonstrates that the drafters of the legislation were not concerned with non-investment type payments.

The issue is significant because accounts payable withholding and reporting systems maintained by USFIs and PFFIs are completely separate from their customer account withholding and reporting systems. Developing and implementing procedures and systems to apply FATCA reporting and withholding to non-investment type payments will entail considerable expenditures of resources, whereas excluding them, as suggested by the legislative history, could be done without compromising the goals of FATCA. Without clarification in the immediate future that such payments are not subject to these rules, USFIs and PFFIs will be forced to expend valuable (and limited) resources to modify both payment systems. To avoid these unnecessary expenditures, we urge Treasury and the IRS to make clear as part of their transition guidance that non-investment type payments will not be subject to the new regime.

5. The effective date of FFI Agreements should be the next January 1 following the signing date (not the signing date itself or any mid-year date); and reporting of accounts should not cross calendar years.

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[6] Id.

The Notice provides that FFI Agreements that are entered into between January 1, 2013 and June 30, 2013 will be effective as of July 1, 2013. It further provides that FFI Agreements entered into after June 30, 2013 will be effective as of the date entered. We believe that this approach presents unnecessary complexity. To alleviate this, we strongly urge Treasury and the IRS to delay the effective date of all FFI Agreements entered into during calendar year 2013 to January 1, 2014.

Historically, changes to information reporting or withholding requirements have been made effective as of January 1, or on a calendar year basis. Treasury and the IRS have recognized that it is extremely difficult from an operations perspective for withholding agents to implement mid-year changes. By way of example, the IRS issued Revenue Procedure 99-50, 1999-52 I.R.B. 757-760, to alleviate information reporting problems that arise where an acquisition of another withholding agent takes place midyear. Likewise, the IRS enters into qualified intermediary ("QI") Agreements retroactively to January 1 of the year in which the agreement is executed. One of the primary reasons for this is to alleviate systemic problems that may arise where the intermediary is required to separate, for purposes of information reporting, those activities it undertook as a nonqualified intermediary ("NQI") from those it undertook as a QI within the same calendar year.

We recognize that Treasury and the IRS may be concerned that this recommendation may delay FATCA compliance during the period between the date the FFI agreement is signed in 2013 and January 1, 2014. We believe that a January 1, 2014 effective date need not compromise the goals of FATCA (i.e., reporting of U.S. accounts), if our additional recommendation described below is followed. Treasury and the IRS have repeatedly stated that FATCA is not a withholding regime. Rather, the underlying intent is to obtain reporting on U.S. accounts held offshore. Following a reporting paradigm already established by the Notice for 2013, we recommend including a provision in the FFI agreement that will require the PFFI to report certain U.S. accounts that it maintained during the calendar year in which it entered into its FFI agreement when it files its first complete PFFI report.

The Notice already provides that a PFFI must report certain U.S. accounts (e.g., private banking accounts, new accounts, and existing accounts) documented with a Form W-9 on or before June 30, 2014 by September 30, 2014. Given the information required to be reported for these accounts (i.e., 2013 year-end account balances), it appears that Treasury and the IRS will consider these to be the reporting required for calendar year 2013. This is further evidenced by the Notice's reference to "Reporting with respect to Post-2013 Years," the definitive rules for which will be outlined in future guidance.

Given these requirements in the Notice, withholding agents trying to comply with the new rules face systemic problems resulting not only from the requirement to implement a new

reporting system mid-year but also the apparent overlap between calendar years in the initial year of reporting.

Thus, to alleviate the systemic problems where there are reporting overlaps between calendar years,[7] we recommend that the FFI Agreement contain a provision whereby the FFI will be required to report the year-end balance of U.S. accounts maintained during 2013 at the same time it is required to file its 2014 FATCA information returns (i.e., the reporting for U.S. accounts maintained in 2013 and 2014 will be reported separately, with both years' reporting due in 2015). This would resolve the issue described above with respect to reporting 2013 year-end account balances.

Further, to alleviate the systemic problems where there are reporting overlaps between calendar years, we propose that Treasury and the IRS limit the reporting required for 2013 to those accounts that were documented as U.S. accounts during 2013. Accordingly, any account identified as a U.S. account during 2013 should be reported on the 2013 information returns which, as we have suggested above, should be due on the same date as the 2014 returns (in 2015). Given that our recommendations result in only a slight delay in the reporting of the 2013 data, we do not believe that the recommendations compromise, in any way, the stated intent of the FATCA regime.

6. **The problem of erroneous or otherwise refundable withholding amounts should be addressed by rules that enable a withholding agent to refund amounts withheld in error and a streamlined refund procedure where the PFFI is not the beneficial owner.**

It is indisputable that there will be erroneous withholding under FATCA, particularly in the initial years after FATCA withholding becomes effective. For example, as the Notice itself points out, an FFI that enters into an FFI Agreement after June 30, 2013, but before January 1, 2014, will be a PFFI with respect to 2014. However, such an entity may not be identified as such by a withholding agent in time to prevent withholding on some payments made in 2014. This same pattern may be repeated every year for a PFFI that enters into its agreement during the latter part of the prior year.

[7] We note that the operational challenges with the 2013 reporting provided in the Notice are not just systemic ones for withholding agents. Under the Notice, the reporting for an account identified as a U.S. account by June 30, 2014 includes the 2013 year-end account balance. This appears to be the case even where the account was properly classified as a non-U.S. account in 2013 and was reclassified as a U.S. account during the first half of 2014 because, for example, the account holder moved to the U.S. Thus, in this situation, 2013 reporting would be required even though the account may have not been a U.S. account in 2013. Our recommendation above would resolve these operational issues as well.

Withholding that could have been avoided under FATCA is also likely to result from account holders being nonresponsive to documentation requests. It has been our experience that nonresponsive account holders often comply with documentation requests shortly after the withholding agent initiates withholding that would not otherwise have been required.

In each of these cases, it appears that the beneficial owners that suffer the withholding would be required to file a U.S. tax return to request a refund. We believe that this procedure will be costly and burdensome to the IRS and beneficial owners, and that there are alternatives that would ameliorate this result without compromising the integrity of the FATCA withholding regime.

Accordingly, we propose:

(1) a quarter-year schedule for depositing taxes withheld under FATCA during the initial two years after FATCA withholding becomes effective;

(2) a mechanism pursuant to which withholding agents can refund amounts withheld in error; and

(3) a provision in the regulations or FFI Agreement that permits a PFFI that suffers inadvertent withholding under FATCA to utilize a streamlined refund procedure.

First, we recommend that Treasury and the IRS adopt rules that would provide a withholding agent with the option to deposit amounts withheld under chapter 4 of the Code on a quarter-year deposit schedule during the initial two years after the FATCA withholding rules become effective. This would give the withholding agent a short grace period (of 90 days or less depending upon how close to the end of the quarter the payment is made) to secure documentation and refund amounts of excess withholding before they are deposited.

Second, for those situations in which the withholding agent is not able to secure documentation within the same quarter as the payment and, specifically for instances where it must impose FATCA withholding in years following the initial two years, we recommend that Treasury and the IRS implement a procedure whereby the withholding agent can refund amounts withheld when it subsequently obtains the requisite documentation (similar to the reimbursement and setoff procedures set forth in the regulations under Section 1461 of the Code).

Our third recommendation relates to Code Section 1474(b)(3), which provides that when a PFFI is not the beneficial owner of a payment, no refund or credit is allowed with respect to any tax properly deducted under chapter 4 unless the beneficial owner provides the Secretary with adequate information to establish whether the beneficial owner is a U.S.-owned

foreign entity, and the identity of any substantial U.S. owners of such entity. As the Notice acknowledges, there will be situations in which a withholding agent may be required to impose withholding under chapter 4 of the Code on a withholdable or passthru payment to a PFFI notwithstanding the fact that such PFFI is in good standing with the IRS. To eliminate the need for either the PFFI (when it is the beneficial owner) or its account holders to file claims for refund when this occurs, we recommend that the transition guidance provide that withholding in this circumstance is not considered "proper" for purposes of Section 1474(b) of the Code, and that regulations or the FFI Agreement contain a streamlined and efficient mechanism for the PFFI to obtain a refund of any withholding that is not properly imposed.

7. **Treasury and the IRS should confirm that the transition rules must be read in conjunction with the rules set forth previously in Notice 2010-60 and Notice 2011-34 and provide guidance with respect to reporting rules for USFIs.**

We request that Treasury and the IRS confirm its understanding that the transition rules relating to the timing of account identification, withholding, and reporting set forth in Notice 2011-53 must be read in conjunction with the rules set forth in Notice 2010-60 and Notice 2011-34. Specifically, we seek confirmation that our analysis and conclusions as to the timing of account identification, withholding, and reporting, as set forth in the series of examples below, is accurate. In addition, where the rules are unclear or nonexistent (specifically, the timing of documentation requests for new entity accounts held by USFIs and the timing of reporting requirements for USFIs), we request, as a matter of urgency, that Treasury and the IRS provide guidance as part of the transition rules.

With respect to the documentation requests for new entity accounts, Notice 2010-60 provides that a USFI should follow the same procedures set forth for the documentation of preexisting entity accounts but use all information collected, regardless of whether the information is available in electronically searchable files. There are no stated distinctions related to timing. Thus, read literally, the request and response timelines in the procedures for accounts opened before January 1, 2013 should apply to accounts opened on or after January 1, 2013.

First, we would like confirmation that Treasury and the IRS intended to allow a USFI documenting a new entity account to follow the same timing set forth in the rules for preexisting entity accounts. Second, if such literal interpretation is not intended, we would like to reiterate the point made in The Clearing House's November 5, 2010 letter (copy attached) regarding a 90-day grace period for documenting new accounts opened by entities in the third quarter of 2014 and beyond. Specifically, because the FATCA documentation requirements are significantly more complicated, we believe that it is appropriate that USFIs (and PFFIs) be given 90 days to obtain full FATCA documentation before withholding and reporting is required.

Finally, it is important to point out that Notice 2011-53 is silent on the reporting requirements for USFIs. Since a USFI will face similar burdens with respect to system modifications and programming changes to accommodate reporting that is not currently required, we request that Treasury and the IRS follow the same reporting recommendations, outlined in Section 5 of this letter, for USFIs.

Notice 2011-53: Examples.

As mentioned above, we seek confirmation that our analysis and conclusions described below as to the timing of account identification, withholding, and reporting in the following series of examples is accurate.

Example (1).

Facts. USFI is a U.S. broker and/or custodian. ABC Banco opened an account with USFI prior to January 1, 2013, in which it holds U.S. stocks. USFI has not identified ABC Banco as a U.S. entity. USFI credits ABC Banco's account with dividends and gross proceeds in June 2013, June 2014 and June 2015.

Analysis.

2013:

Account Identification: Notice 2010-60 requires specific account identification procedures for USFIs. The effective date for these procedures is January 1, 2013. Under Step 1 of these procedures, since ABC Banco holds a preexisting account and has not been identified as a U.S. entity, it would be treated as a foreign entity. Under Step 2(a), since its name clearly indicates that it is an FFI, it would be tentatively classified as an FFI. USFI will then be required to request from ABC Banco a certification of PFFI status and an FFI-EIN. Upon receipt of the certification and FFI-EIN (subject to confirmation of the FFI-EIN with IRS), USFI would be permitted to treat ABC Banco as a PFFI. (Under Notice 2011-53, the earliest that ABC Banco could make this certification would be July 1, 2013, because that is the earliest date that any FFI agreement could become effective.) If ABC Banco does not provide a valid FFI-EIN by December 31, 2013, then USFI must again make a request of ABC Banco, this time for documentation indicating whether it is a PFFI, deemed compliant FFI, excepted entity under Code Section 1471(f), non-participating FFI, an excepted NFFE, or an NFFE. If ABC Banco is again nonresponsive by December 31, 2014, it thereafter will be classified as a nonparticipating FFI.

Despite its tentative classification as an FFI in step 2(a), if ABC Banco is nonresponsive from January 1 2013 to January 1, 2015, under Step 2(c) ABC Banco is classified as an excepted NFFE during that entire period.

Withholding: No withholding is required under chapter 4 on the dividends and gross proceeds paid to ABC Banco in June 2013.

Reporting: Notice 2010-60, Notice 2011-34 and Notice 2011-53 do not provide specific guidance on reporting by USFIs other than Section III.C.1(2)(c) of Notice 2010-60, which provides that the IRS contemplates requiring USFIs to report the identity of any entity that provides documentation indicating that it is a PFFI, but does not provide a valid FFI-EIN.

2014:

Withholding: No withholding would be required on dividends and gross proceeds paid to ABC Banco in June 2014, unless it provided documentation that it was a nonparticipating FFI before the payment in June 2014, in which case withholding would be required only on the dividend payment.

Notice 2011-53 provides that for payments made on or after January 1, 2014, withholding agents will be obligated to withhold only on U.S. source FDAP payments. However, because ABC Banco, if it is nonresponsive or provides an invalid FFI-EIN, would be classified as an excepted NFFE until December 31, 2014, no withholding would be required under the procedures of Notice 2010-60.

Reporting: As noted above, there is limited guidance on how and when USFI will report to the IRS.

2015:

Withholding: USFI will be obligated to withhold on dividends and gross proceeds paid to ABC Banco in 2015. Notice 2011-53 provides that for payments made on or after January 1, 2015, withholding agents will be obligated to withhold under Sections 1471 and 1472 of the Code on all withholdable payments including both U.S. source FDAP and gross proceeds. Under the procedures of Notice 2010-60, ABC Banco, if it is unresponsive or provides an invalid FFI-EIN, would be classified as a nonparticipating FFI from December 31, 2014.

Reporting: As noted above, there is limited guidance issued to date on how and when USFI will report to the IRS.

Example (2).

Facts. USFI is a U.S. broker and/or custodian. DEF opened an account with USFI prior to January 1, 2013, in which it holds U.S. stocks. USFI has not identified DEF as a U.S. entity. USFI credits DEF's account with dividends and gross proceeds in June 2013, June 2014 and June 2015.

Analysis.

2013:

Account Identification: As in example 1, DEF will be treated as a foreign entity after applying Step 1 of Notice 2010-60. However, Step 2 of these procedures would not apply since DEF's name does not indicate that it is an FFI (and it is assumed that no other readily available information in USFI's electronically searchable files clearly indicates that DEF is an FFI). Under Step 3(a), if USFI finds evidence in its account files that DEF is engaged in an active trade or business, other than a financial institution business, DEF will be classified as an excepted NFFE. If USFI has no such evidence, then it will permit DEF to provide documentation certifying its classification. USFI may rely on existing documentation for this purpose also. If DEF does not present documentation that indicates that it is an NFFE, then USFI must obtain documentation that DEF is an excepted NFFE or obtain documentation identifying DEF's direct and indirect owners so as to identify any substantial U.S. owners. USFI has until December 31, 2014, to obtain this documentation. If it has not done so by that date, it thereafter must treat DEF as a recalcitrant account holder.

Withholding: No withholding is required under chapter 4 on the dividends and gross proceeds paid to DEF in June 2013.

Reporting: As mentioned in example 1, there is limited guidance issued to date with respect to USFI's reporting obligations.

2014:

Withholding: No withholding would be required on dividends and gross proceeds paid to DEF in June 2014, unless DEF provided documentation that it was a nonparticipating FFI before the payment in June 2014 in which case withholding would be required only on the dividend payment.

Notice 2011-53 provides that for payments made on or after January 1, 2014, withholding agents will be obligated to withhold only on U.S. source FDAP payments. However, DEF, if it is nonresponsive or provides documentation of NFFE status without also providing owner documentation (or certification of no substantial U.S. owners), is not subjected to withholding until after December 31, 2014 under the procedures of Notice 2010-60.

Reporting: As mentioned in example 1, there is limited guidance issued to date with respect to a USFI's reporting obligations.

2015:

Withholding: USFI will be obligated to withhold on dividends and gross proceeds paid to DEF in 2015. Notice 2011-53 provides that for payments made on or after January 1, 2015, withholding agents will be obligated to withhold under Sections 1471 and 1472 of the Code on all withholdable payments including both U.S. source FDAP and gross proceeds. Under the procedures of Notice 2010-60, DEF, if it is nonresponsive or fails to provide documentation of NFFE status together with owner documentation (or certification of no substantial U.S. owners), would be subject to withholding under Section 1472 of the Code after December 31, 2014.

Reporting: There is limited guidance issued to date with respect to a USFI's reporting obligations.

Example (3).

Facts. USFI is a U.S. broker and/or custodian. GHI Banco and JKL each opened an account with USFI on June 1, 2013, in which they hold U.S. stocks. USFI has not identified GHI Banco or JKL as U.S. entities. USFI credits GHI Banco's account and JKL's account with dividends and gross proceeds on June 30, 2013, June 30, 2014 and June 30, 2015.

Analysis.

2013-2015:

Account identification: As mentioned above, Notice 2010-60 provides that for accounts opened on or after January 1, 2013, USFIs will identify accounts by following procedures similar to the procedures for accounts opened before January 1, 2013. The principal difference specified in Notice 2010-60 is the requirement for a USFI to use all information collected regardless whether the information is available in electronically searchable files. There are no stated distinctions related to timing. Thus, read literally, the request and response timelines in the

procedures for accounts opened before January 1, 2013 should apply to accounts opened on or after January 1, 2013. Consequently, the analysis for payments to ABC Banco and DEF in examples (1) and (2), above, should be the same for 2013 through 2015.

Withholding: USFI would not be required to withhold on the payments to GHI Banco and JKL in 2013 or 2014 under Notice 2011-53. It would, however, be required to impose withholding on both the dividend and gross proceeds paid in 2015 if required FATCA documentation allowing exemption from withholding is not provided prior to payment.

Reporting: As stated in examples 1 and 2, above, there is limited guidance issued to date as to how and when USFI would report to the IRS.

Example (4).

Facts. PFFI is a foreign bank, whose FFI agreement became effective on July 1, 2013. Individual M opened a private banking account with PFFI on June 1, 2013, in which she holds U.S. and non-U.S. stocks. The balance of M's account on July 1, 2013 is over $500,000. At account opening, Individual M presented a foreign passport showing a place of birth in the U.S., which PFFI copied and placed in Individual M's account file. PFFI has not documented Individual M as a U.S. person (i.e., it does not have a Form W-9 on file). Further, the relationship manager does not have actual knowledge that M is a U.S. person. PFFI credits M's account with dividends and gross proceeds on July 1, 2013, July 1, 2014, and July 1, 2015.

Analysis.

2013:

Account Identification: The reference point for PFFI's account identification procedures is the effective date of its FFI agreement, July 1, 2013. Since Individual M opened her account before the effective date of PFFI's FFI agreement, it is subject to the procedures for preexisting accounts. The identification procedures for preexisting individual accounts in Notice 2010-60 were superseded by the procedures in Notice 2011-34, as modified by Notice 2011-53.

Step (1) of these procedures does not apply to Individual M because she was not already documented as a U.S. person and her account is not a depository account. Step (2) of these procedures should not apply to M's account because the account did not exist at the end of the calendar year preceding the effective date of PFFI's FFI agreement. If Step (1) did apply to Individual M, PFFI would classify her as a U.S. person already identified as such or as a foreign person based on those tests, which do not specify a completion date.

The facts indicate that Individuals M's account is a private banking account the value of which exceeds $500,000 on the effective date of PFFI's agreement and the relationship manager has no actual knowledge that Individual M is a U.S. person. Consequently, PFFI is required under Step (3) of these procedures to review all paper and electronic files for Individual M. Since these files contain a copy of Individual M's foreign passport showing a place of birth in the U.S. (U.S. indicia), PFFI will be required to request that Individual M provide a Form W-9 and waiver of applicable reporting restrictions, or a Form W-8, government-issued documentary evidence establishing non-US citizenship, and a written explanation regarding renunciation of U.S. citizenship or the reason why U.S. citizenship was not acquired at birth. PFFI must complete this step within one year of the effective date of its agreement, i.e., before July 1, 2014. If Individual M does not establish non-U.S. status during that time period, PFFI must then treat her as recalcitrant.

Withholding: Under Notice 2011-53, PFFI has no withholding obligation for payments made in 2013.

Reporting: Notice 2011-53 would require reporting for Individual M if she had provided a Form W-9 to PFFI before June 30, 2014. Alternatively, inclusion in the aggregate reporting for recalcitrants would be required if Individual M, who is an account holder with U.S. indicia, were determined to be recalcitrant by June 30, 2014. Filing would be required by September 30, 2014 in that case. The same would be the case if PFFI elected Form 1099 reporting under Section 1471(c)(2) of the Code.

Notice 2011-53 is not clear as to the reporting period. It appears that the reporting period would include the period from July 1, 2013 (the earliest date that an FFI agreement can be effective) through June 30, 2014. Notices 2010-60 and 2011-34 refer to annual reporting, but do not specify a calendar year reporting period. (The private banking procedures described in Notice 2011-34 provide that an FFI's due date for reporting U.S. accounts and information regarding recalcitrant account holders will be the "designated reporting dates (to be prescribed) following the close of the first full year covered by the FFI's FFI agreement").

2014:

Withholding: Because Individual M had a private banking account, PFFI would have determined her classification as U.S., foreign or recalcitrant account holder by July 1, 2014. If she were classified as a recalcitrant account holder, her July 1, 2014 U.S. dividends would be subject to withholding under Notice 2011-53.

Reporting: There is no guidance concerning how and when PFFI would report for the second half of 2014. Notice 2011-53 states that reporting for 2014 and subsequent years will be required as contemplated in Notices 2010-60 and 2011-34, neither of which address how and when reporting will be required.

2015:

Withholding: Individual M, if still uncooperative, will be subject to withholding on her July 1, 2015 U.S. dividends and gross proceeds and non-U.S. dividends to the extent of the relevant issuer passthru payment percentage.

Reporting: There is no guidance at this time regarding how and when PFFI will be required to report.

Example (4-A).

Facts. The facts are the same as in Example 4, except that M's account balance on July 1, 2013 is less than $500,000.

Analysis 2013-2015:

Individual M's account is a private banking account the value of which is less than $500,000 on the effective date of PFFI's FFI agreement, and the relationship manager has no actual knowledge that Individual M is a U.S. person. As a result, PFFI would have to perform the same identification procedures described above, but would have until December 31, 2014 to complete them. In this case, if Individual M withheld her Form W-9 until that date (or was nonresponsive to the documentation requests up to that date), she should not be classified as a U.S. person or as a recalcitrant account holder until that date.

Example (4-B).

Facts. The facts are the same as in Example 4, except that M's account is not a private banking account.

Analysis 2013-2015:

Individual M's account is not a private banking account, however, the balance threshold exceeds the "high scrutiny" designation. Under Notice 2011-53, PFFI would have two years

from the effective date of its FFI Agreement to complete the identification procedures in Step (4) and (5), i.e., until July 1, 2015. Because M's account balance exceeds $500,000, Step (5) requires both a paper and electronic search for U.S. indicia.[8]. As a result, PFFI would discover the U.S. birthplace on M's passport and would be required to follow-up with the additional documentation request.

As mentioned above, because M's account is not a private banking account, PFFI has two years to obtain this documentation before it must classify M as a recalcitrant account holder.

Example (4-C).

Facts. The facts are the same as in Example 4, except that M's account is not a private banking account and the balance on July 1, 2013 is less than $500,000.

Analysis 2013-2015:

As in example 4-B, Individual M's account is not a private banking account. Therefore, under Notice 2011-53 PFFI has two years from the effective date of its FFI agreement to complete the identification procedures in Steps (4) and (5), i.e., until July 1, 2015. Step (4) requires an electronic search for U.S. indicia followed by the same documentation rules as above when U.S. indicia are discovered. Unless PFFI recorded Individual M's place of birth in its electronically searchable records, Individual M would be classified as a foreign person in Step (4).

* * * * *

As indicated at the onset of this final section, we seek confirmation that its understanding of the application of the rules as described in the examples set forth above is correct, accurate, and complete. Further, as made clear in these examples, USFIs have limited guidance with respect to their reporting obligations (i.e., how and when reporting will be required) at this time. We would like to reiterate the need for immediate guidance on this point.

We thank you for considering our views. We would be happy to discuss our suggestions further at your convenience. If you have any questions or need further information, please do not hesitate to contact David Wagner, for The Clearing House, at 212.613.9883 (email:

[8] The Clearing House notes that this example is included solely for purposes of illustrating how the transition period works. This example should not be construed as its support of the requirement to manually review all documentation.

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