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Ref. 10-1164

Dear Ms. Corwin,

The European Fund and Asset Management Association ("EFAMA"), as the representative for over 52,000 European-based funds with approximately Euro 6.8 trillion of assets under management met with your colleagues at Treasury and IRS on May 3, 2010. Our meeting was a productive interchange concerning the implementation of Chapter 4 of the Code, which was enacted as part of the Foreign Account Tax Compliance Act ("FATCA"), in relation to European investment funds.

As indicated in our meeting, EFAMA's most urgent guidance priorities are the following:

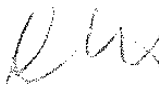
- The treatment of certain types of funds as compliant with Chapter 4, thereby exempting them from certain Chapter 4 reporting and withholding requirements;
- The adoption of simplified U.S. taxpayer identification requirements in which customarily available information is used to identify investors who are U.S. persons; and
- The treatment of intermediaries and service providers to funds in a manner that encourages rather than discourages cooperation.

At the conclusion of our May 3 meeting, EFAMA offered to provide additional information to the Treasury/IRS guidance team for FATCA. Attached is a list of the information requested and the section of this submission in which the information is provided.

We trust that this additional information will further the goal of implementing FATCA in a manner that furthers its goal of detecting U.S. tax evaders while not unnecessarily impeding the capital markets.

We welcome the opportunity to continue working with you and the team of professionals at Treasury and IRS that are dedicated to formulating effective and efficient rules well in advance of the effective date of FATCA.

Sincerely,



Peter De Prof
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TABLE OF CONTENTS

I.	List of Additional Information Provided and Location in This Submission	1
II.	Funds that are Low Risk Based on Investor Types or Status	3
III.	Deemed Compliance with Chapter 4 for Widely Held Funds and for Publicly Traded Funds	6
IV.	Procedures for Implementing Restrictions on Fund Investors	7
V.	Distributors of Interests in Funds and Compliance with Chapter 4: Complexities and Possibilities	9
VI.	Pass-thru Payments	10
VII.	Treatment of Investment Funds That Do Not Meet the Conditions For Deemed FATCA Compliance	12
VIII.	European Funds: Location and Cross-Border Reach	12
IX.	Fund Managers, Distributors and Global AML Standards	13
X.	Attachments	

I. List of Information Items Provided and Location in This Submission

Listed below are the information items either directly requested by the FATCA guidance team at Treasury/IRS in or after the May 3 meeting of the team with EFAMA leadership or requested by the IRS after the meeting. These items are provided in the current submission under the title identified under each item.

1. List of EFAMA membership
 - Provided by EFAMA Secretariat as an attachment.
2. A generic description of the low-risk fund categories, not limited to entities that would be covered by tax treaties.
 - Provided under the heading of "Funds that are Low Risk Based on Investor Types of Status."
3. An explanation of the incentives, e.g., potential for civil penalties, that exist for distributors to ensure compliance with distribution restrictions and AML/KYC requirements and a clear description of the KYC/AML rules application to UCITs and/or those in the distribution chain and a clear description of any other rules (such as MiFid) imposing due diligence requirements, ideally concluding with a standard practices summary.
 - Provided under the heading of "Fund Managers, Distributors and Global AML Standards."
4. An explanation of the treatment of the residual category of funds that are not excluded from FFI treatment or deemed compliant with Chapter 4 subject to conditions.
 - Provided under the heading of "Treatment of Investment Funds That Do Not Meet the Conditions For Deemed FATCA Compliance."
5. A description of how EFAMA proposes to deal with a link in the distribution chain that is not chapter 4 compliant. Treatment of distributors that refuse to enter into Chapter 4 agreements with the IRS.
 - Provided under the heading of "Distributors of Interests in Funds and Compliance with Chapter 4: Complexities and Possibilities."
6. Explanation of reasons why European funds will have a problem "passing on" the tax for a recalcitrant account holder.
 - Provided under the heading of "Pass-thru Payments Issue."
7. Identification of the persons in the fund distribution chain who are responsible for performing the due diligence and documentation collection for direct investors in the fund; whether the asset managers are FFIs; whether the asset manager is the same as the fund sponsor.
 - Provided under the headings of "Distributors of Interests in Funds and Compliance with Chapter 4: Complexities and Possibilities" and "Fund Managers, Distributors and Global AML Standards."
8. During the May 3 meeting, it was stated that the EFAMA group has approximately 58,000 funds. The following additional information was requested regarding funds represented by EFAMA: the approximate number of asset managers who are responsible for the EFAMA funds; a rough estimate of the number of European funds that are marketed globally; a rough estimate of the number of asset managers there are for

the global European funds. The answer should be embellished with a discussion of how our solutions are impacted or impaired by a distribution chain that extends outside the EU.

- Provided under the heading of "European Funds: Location and Cross-border Reach."
9. Whether the EU directive requires a mandatory look to an underlying owner/account holder if certain criteria/factors are present and, if so, the criteria/factors and/or a citation to the source of this information.
- Provided under the heading of "Fund Managers, Distributors and Global AML Standards."
10. Explanation of controls around UCITS sold to non-European and, in particular, off-shore investors/distributors, such as a UCITS sold by a Singapore broker-dealer to an investor.
- Provided under the heading of "Fund Managers, Distributors and Global AML Standards."
11. Support for the widely-held or publicly-traded exclusion, including rationale and criteria for treating open-ended funds as publicly-traded funds.
- Provided under the heading of "Deemed Compliance with Chapter 4 for Widely Held Funds and for Publicly traded Funds."
12. Whether EFAMA really needs an FFI carve-out for foreign-targeted funds.
- Proposal for carve-out for foreign-targeted funds withdrawn.
13. Whether EFAMA membership can support using the tax definition of a U.S. person, rather than a securities law, i.e., Reg S, definition.
- U.S. tax definition of a U.S. person can be supported by EFAMA membership going forward as described in "Transition Considerations" on p. 5.
14. Criteria for a distribution agreement that would exclude certain persons, e.g., specified U.S. persons, from investing in a fund.
- Provided under "Procedures for Implementing Restrictions on Fund Investors."

II. Funds That are Low Risk Based on Investor Types or Status

EFAMA proposes to exclude from the reporting and withholding obligations under Chapter 4 any fund that limits investment to any combination of the low risk investor types under the definition below. EFAMA proposes specifically that funds with a low-risk investor base be deemed compliant with the requirements imposed under Chapter 4 of the Code on a foreign financial institution ("FFI"). A fund established prior to January 1, 2013 would be permitted to determine its compliance with the prohibition against investment by specified United States persons based on the SEC definition of a United States person. Reasonable transition rules would apply to funds established before January 1, 2013.

Description of a fund with a low-risk investor base:

A fund should be deemed to comply with the requirements imposed under Chapter 4 of the Code on a FFI if the fund does not allow investment by specified United States persons or if investment in the fund is limited to low risk investors described below. Such restrictions are required to be enforced by the fund under written procedures. See "Application of Restrictions Investors in a Fund. " A non-exhaustive list of examples of funds that comply with this restriction is provided in paragraph (3) below.

- (1) The fund meets the condition of prohibiting investment by specified U.S. persons if the fund prohibits investment by a U.S. person, other than either a person described under Internal Revenue Code section 1473(3)(A) through (J) or any other US person that is excluded from this definition under a different provision of the Code or under any form of tax guidance.

Note: The US persons described in subsections (A) through (J) of IRC section 1473(3) and therefore not required to be reported are the following:

- Any corporation the stock of which is regularly traded on an established securities market,
- Any corporation which is a member of the same affiliated group (as defined in IRC section 1471(e)(2) without regard to the last sentence thereof) as a corporation the stock of which is regularly traded on an established securities market.
- Any organization exempt from taxation under IRC section 501(a) or an individual retirement plan.
- The United States or any wholly owned agency or instrumentality thereof.
- Any State, the District of Columbia, any possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing.
- Any bank (as defined in IRC section 581).
- Any real estate investment trust (as defined in IRC section 856).
- Any regulated investment company (as defined in IRC section 851).
- Any common trust fund (as defined in IRC section 584(a)).
- Any trust which is either exempt from tax under IRC section 664(c) or is described in IRC section 4947(a)(1).

(2) A foreign person is a low risk investor described in this paragraph if it is within in any of the following categories:

- a) A pension or employee benefits plan or arrangement that is generally exempt from income taxation in the foreign country in which it is established.
- b) A foreign government, any political subdivision of a foreign government or any wholly owned agency or instrumentality thereof.
- c) A wholly owned and controlled entity of a foreign government.
- d) A foreign central bank of issue.
- e) Any international organization or any wholly owned agency or instrumentality thereof.
- f) An investment entity wholly owned and controlled by a foreign government.
- g) An entity established in a foreign jurisdiction for a public purpose, e.g., religious, scientific, literary, educational or charitable purpose, operated exclusively for that purpose and generally exempt from income taxation in the jurisdiction in which it is established, or
- h) A non financial foreign entity ("NFFE") to which the reporting requirements under section 1472(a) do not apply.

- Note: Under section 1472(c)(1) and (2), the reporting requirements under section 1472(a) do not apply to the following categories of foreign entities:

Section 1472(c)(1):

- A. Any corporation the stock of which is regularly traded on an established securities market;
- B. Any corporation which is a member of the same expanded affiliated group (as defined in section 1471(e)(2) without regard to the last sentence thereof) as a corporation; described in subparagraph (A) above;
- C. Any entity which is organized under the laws of a possession of the United States and which is wholly owned by one or more bona fide residents (as defined in section 937(a)) of such possession;
- D. Any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing;
- E. Any international organization or any wholly owned agency or instrumentality thereof,
- F. Any foreign central bank of issue; or

Section 1472(c)(2): Any other class of persons identified by the Secretary for purposes of this subsection as posing a low risk of tax evasion.

- i) An NFFE that complies with the requirements under Chapter 4 of the Code.
- j) A pooled fund whose investors, directly and indirectly, are limited to persons in any combination of the above categories or whose investors are other pooled funds whose investors, directly and indirectly, are limited to persons in any combination of the above-described categories.

(3) Examples of low-risk funds under the criteria above include the following:

- a) Example (1). Facts. A fund is prohibited from accepting investment from any specified U.S. person and this limitation, which is specified in fund documentation, is required to be enforced by the fund in accordance with written procedures. Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.
- b) Example (2). Facts. A fund is prohibited from accepting investment from any U.S. person and this limitation is required to be enforced by the fund in accordance with written procedures. Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.
- c) Example (3). Facts. The only investors permitted in the fund are foreign pension funds or employee benefits plans, pooling vehicles whose investors consist of pension funds, employee benefits plans or other pools whose investors are pension funds or employee benefits plans. Each such plan or pool is generally tax exempt in the country in which it was established. Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.
- d) Example (4). Facts. The only investors permitted in the fund are non-U.S. pension funds or arrangements that are generally exempt from income taxation in the country in which they are established and U.S. pension funds that are exempt from tax under section 501(a), as well as pools whose investors consist of either investor type.. Therefore, all U.S. persons permitted to invest are persons that are excluded from the definition of a "specified United States person under Section 1473(3)(C). Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.
- e) Example (5). Facts. The only investors permitted in the fund are investment entities that are wholly owned and controlled by a foreign government. Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.
- f) Example (6). Facts. The only investors permitted to invest in the fund are the following: a corporation the stock of which is regularly traded on an established securities market, corporations that are members of the same expanded affiliated group as the publicly traded corporation, pension funds established by any member or members of the expanded affiliated group of the publicly traded corporation and pension fund pooling vehicles. Conclusion. The fund is deemed to comply with the obligations imposed on an FFI under Chapter 4 and therefore is not subject to obligations of reporting or withholding under Chapter 4.

Application of Restrictions on Investors in a Fund

Fund documentation and distribution agreements can be used to limit fund subscriptions to investors permitted under applicable laws and regulations. Also, local law can limit fund subscriptions to certain categories of investors. Investor restrictions in either fund documentation and distribution agreements or local laws should be sufficient for purposes of establishing that a restriction exists. We are glad to provide examples. Investment restrictions are further discussed under the heading of "Procedures for Implementing Restrictions on Fund Investors."

Transition Considerations

Currently fund documentation provisions that limit the extent of investment by U.S. persons generally apply the definition of a U.S. person under U.S. securities law. The securities law definition differs from the tax law definition because it does not consider U.S. citizens to be U.S. persons if they reside outside the United States. Funds established before the effective date of Chapter 4 should be permitted to apply the U.S. securities law definition. Persons becoming Investors in a fund established before the effective date of Chapter 4 and after a date that is two years after the issuance of final regulations will be subject to the U.S. tax law definition of a U.S. person.

III. Deemed Compliance with Chapter 4 for Widely Held Funds and for Publicly Traded Funds

EFAMA proposes that collective investment funds that are publicly traded or otherwise widely held be deemed compliant with the rules governing foreign financial institutions ("FFIs") under Chapter 4 of the Code. For purposes of this proposal, a fund is defined as a vehicle, regardless of form, established and maintained for the purpose of pooled investment and regulated as such in the country in which it is established and maintained.

Widely Held Funds

A threshold issue in terms of implementing the FATCA provisions is the proper scope of an exception from the reporting and withholding requirements under Chapter 4 of the Code for widely held collective investment vehicles ("funds").

The Technical Explanation of the FATCA provisions prepared by the Staff of the Joint Committee on Taxation (JCX-4-10, February 23, 2010) anticipates that the Secretary may provide rules that would permit certain classes of widely held collective investment vehicles to be deemed to meet the requirements of Chapter 4. The Technical Explanation also anticipates that the entities providing administration, distribution and payment services on behalf of these vehicles may be deemed to meet the requirements of Chapter 4 to the limited extent necessary to implement these rules.

The inclusion of such regulatory authority in the legislative history is reasonable given the necessity of allowing funds to operate cross border and the administrative difficulty of reporting and withholding on large funds, which typically have a high volume of investor turnover. Practical administrative concerns include the prospect that even reasonably accurate withholding on pass-thru payments through a chain of distributors is not feasible. Interests in these funds typically are sold through a distribution chain whereby the fund and its manager typically do not have knowledge of the beneficial owner of the investment. Rather, the knowledge of beneficial ownership rests with financial intermediaries in the chain of distribution that are foreign financial institutions subject to Chapter 4 and are expected to either agree to the Chapter 4 due diligence procedures or suffer the consequences of not agreeing to do so. Treating widely held funds as deemed compliant also is consistent with the policy underlying Section 1471(d)(1)(c)(i) of avoiding duplicative reporting requirements where a financial account is held by another financial institution.

Therefore, the adoption of regulatory rules that deem widely held funds as defined below to be compliant with the FFI provisions under chapter 4 is the logical course of action from the perspective of fostering cross-border investment and minimizing disruption to capital markets. This policy concern is reflected in Section 1471(d)(2)(c) which excludes equity interests that are publicly traded from the definition of a financial account.

In addition, we believe that such treatment would not compromise the achievement of the policy goals of FATCA because such funds present a very limited risk of abuse by U.S. persons for tax evasion purposes given the absence of the ability of an investor to effectively control the assets held by the fund and the fact that investments in widely held fund are predominately made through intermediaries most of which would likely be Chapter 4 compliant. Nevertheless, we appreciate that it may be appropriate to require such funds to report the identities of direct U.S. interest holders under a procedure that would be reasonable in terms of burdens versus benefits. We will be glad to work with you to develop such a procedure. Also, it is contemplated that it may be appropriate in certain circumstances that a widely held fund will have restrictions in place through its chain of distributors as detailed in "Procedures for Implementing Restrictions on Fund Investors."

We also appreciate that it may be appropriate to condition the deemed compliance of the fund on the inclusion of provisions in the fund's distribution agreement adequate to assure compliance with the restrictions. This is further discussed under the heading of "Procedures for Implementing Restrictions on Fund Investors." EFAMA proposes that a fund meet the definition of "widely held" if it meets all three of the following conditions: (i) is owned by more than 100 investors provided that none of its direct investors is a specified U.S. person that owns interests in the fund that exceed 10% of the value of all the interests in the fund; (ii) regulated by the financial services regulator in its country of establishment and (iii) having a diversified investment portfolio. For this

purpose, the definition of the term "diversified" should be similar to the definition under rules applicable to U.S. regulated investment companies ("RICs") or an EU Member State Undertaking in Collective Investment in Securities ("UCITS") or to the diversification criterion for a similar fund type established in another jurisdiction. EFAMA's proposed definition of a widely held fund is consistent with the definition of the term "collective investment vehicle" ("CIV") as described in paragraph I.4. of the OECD report entitled The Granting of Treaty Benefits With Respect To the Income of Collective Investment Vehicles (adopted by the OECD Committee on Fiscal Affairs on April 23, 2010). In order to take into account start up funds that initially might fail the 100 investor minimum during the start-up period, the widely held requirement will be deemed to be met in the first year of the fund's operations if the fund is marketed and made available to a wide group of investors.

As noted In EFAMA's initial position paper provided to the Treasury Department and the Internal Revenue Service prior to EFAMA's May 3 meeting with the FATCA guidance team, there is precedent for considering an investor base to be diversified at 100 investors. Under the criteria established in Treas. Reg. §1.7704-1(h) (relating to publicly-traded partnerships), a partnership may be publicly-traded (because it will not qualify for the private placement safe harbor) if the interests in the entity are held, directly or indirectly, by more than 100 investors, (with a look-through rule for certain types of investors). The 100 investor cut-off is also consistent with other U.S. tax law standards, such as the definition of marketable stock as defined in Treas. Reg. §1.1296-2(d)(1) (for purposes of a mark to market election for PFIC stock), the definition of a small business corporation (Section 1361(b)(1)(A)) and the definition of a Real Estate Investment Trust (Section 856(a)(5)).

Publicly Traded Funds

EFAMA proposes that publicly traded collective investment vehicles ("funds") be deemed to be compliant with the requirements imposed on FFIs under Chapter 4 of the Code. EFAMA proposes to treat all publicly traded funds, both closed-end and open-ended, similarly. EFAMA proposes open-ended funds (funds the interests in which are issued and redeemed by the fund) be treated as publicly traded provided that the interests are regularly issued and redeemed. There is precedent for treating an open-ended fund the interests in which are regularly issued and redeemed the same as a fund traded on an exchange. For example, Treas. Reg. §1.1296-2(d)(1) provides the conditions under which stock in an open-ended passive foreign investment company ("PFIC") is considered marketable stock for purposes of a mark-to-market election applicable to PFICs.

Many publicly traded funds are already effectively exempt from FATCA reporting rules under IRC section 1471(d)(2), which, as noted above, excludes from the definition of a financial account equity in an FFI that is regularly traded on an established securities market, such as an ETF. Further, the legislative history grants the Secretary authority to expand that exclusion. While such publicly traded funds are within the definition of a foreign financial institution, they are not required to apply the reporting rules of Chapter 4 in order to escape U.S. withholding tax under Chapter 4. There is no practical or policy reason for creating a market bias in favor of funds whose interests are traded on an exchange over funds whose interests are traded to the general public either through an interdealer quotation system or through the process of regular issuance and redemption by the fund.

IV. Procedures for Implementing Restrictions on Fund Investors

EFAMA proposes that funds restricted to low-risk investors be deemed compliant with the FFI provisions under Chapter 4 of the Code. The scope of EFAMA's proposal is detailed in the discussion entitled "Funds That Are Low Risk Based on Investor Types or Status." As discussed in the EFAMA proposal, consistent with the statute, references below to U.S. persons, and "prohibited U.S. persons," is intended to mean "specified U.S. persons" as described in the statute and implementing guidance. The purpose of this discussion is to describe how EFAMA proposes that restrictions as to persons permitted to invest in a fund be implemented.

General Description of the proposed procedures

EFAMA proposes that FATCA guidance provide a general rule that a fund must put in place adequate safeguards to ensure the implementation of applicable investor restrictions. FATCA guidance should also provide examples of such adequate safeguards, but the examples provided in guidance should not be exhaustive. If a fund uses procedures that are not described in the examples, an expedited procedure for IRS clearance should be made available.

Ensuring compliance with investor restrictions does not compel the development of a single one-size-fits-all set of fund documents. Specific provisions in fund documents may depend on the regulatory context within the country in which the fund is established. For example, a specific type of investment vehicle in a country may be limited as to its investor categories, e.g., pension funds. For such an investment vehicle, the exclusion of specified U.S. persons could be achieved by including in the documentation, e.g., the trust agreement, deed of constitution, articles of incorporation or partnership agreement, etc., provisions that limit investors to those authorized by the law or regulation under which the vehicle is established and to implement investor subscription procedures requiring investors to certify that they fall within the category of persons permitted to invest in the fund. Investor restrictions apply to investment in some funds currently; there are examples in fund prospectuses, examples of which are included in this submission as attachments.

Methods of implementing investor restrictions

EFAMA proposes the following:

1. The fund documents and agreements that provide the rights and obligations of the investors in the fund as well as of the fund distributors and administrators and the offering documents ("fund documents") must describe the applicable investor restrictions. Under these restrictions the fund and each of its distributors must agree to offer to sell and sell fund interests only to persons authorized to invest in the fund.
2. Under the investor subscription procedure, the fund and each distributor must obtain investor certification, as follows:
 - a. The investor is a person that is within the category of persons permitted by the fund to invest and is not within a category of persons prohibited by the fund from investing, or
 - b. The investor is a financial institution acting as a distributor.
3. Each distributor must agree to obtain the certification above from each incoming investor and to reject an investor subscription if the distributor has actual knowledge that the certification is false at the time of the subscription.
4. Each distributor must agree to redeem interests that it holds for the account of any person who the distributor learns is not a person permitted to invest in the fund under the fund's investor restrictions.
5. Each distributor must agree to notify investors purchasing interests in the fund of any investor restrictions and that the fund has a right to repurchase any interests if the interests are, at any time, owned by a person that does not meet the investor restrictions.
6. Each distributor must agree to provide to the fund, on request, a summary description of procedures that are presently applied to give assurance that the distribution restrictions in the fund prospectus and/or in the distribution agreement are enforced effectively.
7. Each distributor must agree to inform the fund as to the identity of any person who the distributor learns is not a person permitted to invest in the fund under the fund's investor restrictions promptly on the distributor learning of such circumstance or to request the fund to redeem the interests in the fund held by that investor.
8. The fund documents must provide for meaningful consequences for a distributor's failure to obtain the certification above from an investor. Therefore, for example, the indemnity and liability provisions between each distributor and the fund will permit the fund to discontinue its relationship with a distributor

that does not comply with its obligations with respect to implementing investor restrictions and will permit the fund to redeem all interests in the fund held through that noncompliant distributor.

V. Distributors of Interests in Funds and Compliance with Chapter 4: Complexities and Possibilities

EFAMA proposes that collective investment funds ("funds") that meet certain criteria be deemed compliant with Chapter 4 of the Code. For purposes of this discussion, a fund is defined as a vehicle, regardless of form, established and maintained for the purpose of investment and regulated as such in the country or countries in which it is established and maintained. As discussed in relation to widely held funds, the Technical Explanation of the FATCA provisions prepared by the Staff of the Joint Committee on Taxation (JCX-4-10, February 23, 2010) anticipates that the Secretary may provide rules that would permit certain classes of widely held collective investment vehicles to be deemed to meet the requirements of Chapter 4. The Technical Explanation also anticipates that the entities providing administration, distribution and payment services on behalf of these vehicles may be deemed to be deemed to meet the requirements of Chapter 4 to the limited extent necessary to implement these rules.

In relation to entities providing administration and payment services for funds, the Chapter 4 provisions applicable to the fund should govern the actions of a fund administrator or paying agent of the fund. However, determining the proper application of Chapter 4 to a fund distributor is more complex because distributors do not act in the name of the fund. In the European fund distribution model, generally, investors in European funds do not purchase or hold interests in funds directly, but rather they acquire them through a chain of distributors and hold them in an account with the selling distributor. Generally, the fund itself does not know the identities of its investors at the end of the distribution chain.

An issue of importance to the non-U.S. fund industry is the extent to which fund distributors should be required to enter into an agreement with the IRS and to comply with reporting requirements under Chapter 4 of the Code. The IRS is likely to receive information that is relevant for U.S. tax purposes if the distributor that has the account relationship with the investor has the responsibility for reporting the identity of the investor who is a specified United States person to the IRS and if that distributor does so. In such cases, the policy objective of Chapter 4, which is to increase disclosure to the IRS of specified U.S. persons, will be advanced.

Many distributors are large financial institutions with substantial U.S. assets. Therefore, many distributors will have agreements with the IRS under which they will comply with the information reporting requirements under Chapter 4. However, there is general recognition that some distributors will have no interest in entering into agreements with the IRS. Some distributors may have no incentive to do so because they are local or regional in scope and have minimal investments that produce U.S. source income or gross proceeds on U.S. assets and their account holders will not suffer the economic cost of refusing to permit their identifying information and account specifics to be released to the IRS. Also, many may question whether the courts in their country of residence would uphold the imposition of a 30% withholding tax on a pass-thru payment made by them if, under local law, the payment were sourced in their residence country. (Aside from the source question, as explained in our discussion of pass-thru payments, the mechanics of imposing a 30% withholding tax on a pass-thru payment are impractical and, if feasible at all, will result in the effective imposition of the tax on all fund interest holders, including non-U.S. investors and compliant U.S. investors.)

It is also appreciated in the industry that the punitive imposition of a withholding tax on the wrong people will not encourage the central objective of Chapter 4 -- to increase reporting on specified U.S. persons. So the question is how the rules can be crafted in a manner that will foster, rather than inhibit, reporting on specified U.S. persons.

Given these considerations, we suggest it would be of benefit to both the IRS and to the industry for distributors to be able to obtain a unique registration number that could be accepted by a third party as sufficient evidence that the distributor is compliant, and in particular can be paid gross within the FATCA scheme. Registration numbers would be issued both to firms in full Chapter 4 compliance and (with an identifiably different format) to those qualifying for a light procedure. The registration procedure could be completed online and would be

available in a form that is short and standard, rather than requiring an individualized agreement. These identification numbers would make it easier for the IRS to track the investment activities of firms availing themselves of the light procedure, and withdrawal of the registration number would be an administratively easy and effective way of communicating the withdrawal of gross recipient status from firms who were found to have failed to comply to other market participants.

Also, there are a variety of possibilities that would increase the likelihood that distributors will cooperate in the implementation of Chapter 4. Here are just a few of them:

- Provide for a simplified registration for a fund distributor below a certain size, e.g., in terms of assets, that agrees to provide identifying information as to any specified U.S. persons that hold an account with that distributor at the end of the year in which the account is acquired. Such simplified registration would be appropriate, whether or not the fund is widely held.
- Provide for a simplified compliance procedure applicable to distributors that agree to comply with investment restrictions imposed by funds to ensure that only low-risk investors are permitted to invest. A distributor that contractually commits to abide by any restrictions on investors in the fund will be deemed compliant with Chapter 4 with respect to any investments in the fund made through that distributor.
- Require no reporting or withholding with respect to an account of a distributor that is a resident of a jurisdiction that has an income tax treaty or tax information exchange agreement ("TIEA") with the United States under which automatic exchange of information is not prohibited, provided that the entity is required to report all income paid to its account holders (resident and non-resident) to its residence country tax authority. If appropriate, the IRS could consider including a condition that the IRS can, by advance notice, exclude jurisdictions that have not demonstrated adequate cooperation in the exchange of information.

VI. Pass-thru Payments

We do not believe that application of the pass-thru payments procedures to the European funds industry is practical; nor is it consistent with the goals of Chapter 4 when applied to funds. There are three main reasons for this:

1. Overwhelming administrative complexity: Even assuming some relaxations in the forthcoming regulations, the difficulties that arise through the application of such a regime to funds with constantly varying US asset percentages and constantly changing investor percentages makes it unworkable, as further explained below.
2. The difficulty in ensuring that the economic burden of a recalcitrant investor is born by that investor: It will not be practical for fund managers to ensure the innocent do not get hurt. This is a threefold problem i) it blunts the behavioral stimulus that Chapter 4 withholding is supposed to provide ; ii) it lays the fund manager open to financial compensation claims and also reputational damage; and iii) it discourages investment in US assets.
3. Legal aspects: We have a concern that European national courts may rule that it is not lawful, under the constitution or local law of that country, to deduct a sum in respect of the taxation of another country, most probably as a justification for giving redress to 'innocent' investors who have lost money due to non-compliance by others. If this happened, it would leave the fund manager very exposed to investor compensation claims. We would clarify, though, that we have not at this point identified specific instances where a deduction from a pass-thru payment would be a clear and specific breach. Therefore, the concern relates to case law that may evolve from 2013 onwards.

Discussion

The purpose of imposing a 30% withholding tax on pass-thru payments is to influence behavior -- to encourage foreign financial institutions ("FFI's") to report U.S. accounts as required under Chapter 4. Assuming that the fund and its distributors are compliant, the likelihood that the imposition of a 30% withholding tax will influence behavior depends on the prospect that a specific account holder would suffer the effect of the withholding. An account holder that anticipates the imposition of a 30% withholding tax as the cost of noncompliance might well either dispose of the interest or agree to the reporting of that interest. In contrast to European funds, interests in U.S. retail funds normally are purchased directly from the fund or through a broker. This direct distribution model enhances the likelihood that compliance by the fund would increase compliance by an account holder because the fund would be able to immediately identify the noncompliant account holder and impose the precise cost of noncompliance on that account holder assuming that fund rules permit such an assignment. However, where interests are acquired through a chain of intermediaries, as is the norm with European funds, the ability of the fund to identify the ultimate beneficial owner is compromised.

A delay of even a day could lead to the exit from the fund of the noncompliant, i.e., recalcitrant, account holder and the imposition of the effect of the withholding on all others (even if fully compliant) on a pro rata basis within a share class. Therefore, between day one and day two, a distortion of the effect of withholding would result, even if the mix of U.S. and non-U.S. assets in the share class were to remain the same from day one to day two and this distortion is increased for every day of delay.

Also, if the mix of U.S. and other assets alone were to change from day one to day two because of acquisitions in a share class with no recalcitrant investors, the percentage of total U.S. assets held by the noncompliant investors would increase or decrease. Therefore, the amount of withholding would change for reasons unrelated to the actions of recalcitrant investors.

These potential distortions are easily envisioned through the attached example entitled "FATCA Pass Through Payments Problems for Funds -- Simple example of complexity." See the percentage change in recalcitrant investors in share class C between day 2 and day 3. In that case, the share value of the stock of the class does not change. See the percentage change (increase) in the value of share class B between day 3 and day 4. Although the value of U.S. assets does not change, the total value of all assets changes, which reduces the effect of withholding on class B, even if the percentage of recalcitrant investors does not change. These are distortions caused by time delay in the simplest case.

The typical retail distribution model in Europe is more complex because it is likely that a chain of several distributors lies between the ultimate account holder and the fund, with the fund not knowing the identities of most of its ultimate account holders. Where those distributors are not Chapter 4 registrants, the fund manager will have had to establish they are not 'US Accounts' i.e., have zero US ownership at set up. There will be an extended and potentially unreliable process of identifying where this status has changed, and in reality the delay in the fund manager finding out could run to months. Where distributors are Chapter 4 compliant, and themselves have recalcitrant holder problems, they are likely to exercise the election to be withheld against proportionately. For a large fund company with say 900 such distributors, that potential means they have 900 different withholding tax rates to operate. In principle, the recalcitrant holder percentage for each such distributor would change daily; it is clearly impractical for the distributors to modify their election and the fund manager to update their system so frequently. Even with administrative relaxation, such as allowing for averaging over a quarter, the cost of building systems would be disproportionate to any possible benefit.

The difficulty in tracking particular income streams to payments to specific investors was explained in paragraphs 18-22, under section 2.2 of the OECD document, The Granting of Treaty Benefits With Respect to the Income of Collective Investment Vehicles (adopted by the OECD Committee on Fiscal Affairs on April 23, 2010). As described in that document, highly intermediated investment structures present a practical obstacle to determining the eligibility of income of collective investment vehicles ("CIVs") for treaty benefits when payments pass through layers of intermediaries. Likewise such structures make the likely effect of a withholding tax on a pass-thru payment so unpredictable as to be an ineffective deterrent to an investor deciding whether to waive a secrecy right to which the investor may be entitled under the laws of the country in which a distributor is established.

VII. Treatment of Investment Funds That Do Not Meet the Conditions For Deemed FATCA Compliance

EFAMA has been asked to explain the appropriate treatment of funds that are not deemed compliant with Chapter 4 of the Code, because they do not meet the conditions for such treatment. Our view expressed below on the proper treatment of such funds assumes that widely held funds, publicly traded funds and funds that are low risk based on their low risk investor base are deemed compliant with FATCA under reasonable conditions.

Assuming that a greater proportion of investment in funds with fewer than 100 end investors would be made directly, as opposed through distributors, it is likely that information on the end investors would be available to the fund. Also, if an investor were to refuse to allow the investor's identity and assets to be revealed, such a fund would likely be able to identify the person to which withholding on a pass-thru payment should be imposed.

Nevertheless, we propose that compliance obligations be crafted with a view to fostering the purpose of FATCA -- to increase reporting by non-U.S. entities on the income and assets of specified U.S. persons, rather than to impose a punitive withholding tax on entities that may not be able to fully comply with an onerous regime. We propose that guidance impose fewer obligations on funds located in jurisdictions that cooperate in exchanging tax information with the United States under income tax treaties and tax information exchange agreements.

Funds not deemed compliant and located in non-cooperating jurisdictions

Many funds that are likely to fall within this category would be funds subject to a low level of regulation. Such funds historically have been located in low-tax jurisdictions that do not require reporting of financial transactions and do not permit the provision of tax information to the tax authorities of the countries in which the investors are resident. Also, in general, these jurisdictions engage only in very limited exchange of information, if any, with the United States. Therefore, such funds may operate under conditions that maximize the opportunity of individuals who reside elsewhere to hide their identities and assets in low-tax jurisdictions from their home country tax authorities.

Funds not deemed compliant and located in cooperating jurisdictions

Funds that are not deemed compliant but that are located in countries with active exchange of information programs with the United States where bank secrecy rules in the other country do not block the provision of financial information to the United States should be permitted to provide more limited information than funds in non-information-sharing jurisdictions. For funds located in cooperating jurisdictions, investor identifying information only, rather than the full report of transfers into the account, withdrawals and highest balance, should be all that is required. In this manner, funds located in cooperative jurisdictions would not be required to provide information that could be exchanged between the country of investor residence and the country of fund domicile. This reduced burden will encourage compliance; and any further information on an identified U.S. investor would be available to the United State under the exchange of information provisions of income tax treaties and tax information exchange agreements. The guidance could allow the government to exclude jurisdictions where experience demonstrates inadequate cooperation on the exchange of taxpayer information.

VIII. European Funds: Location and Cross-Border Reach

As described by EFAMA representatives in the EFAMA meeting of May 3, 2010 with members of the Treasury/IRS FATCA guidance team, the group consisting of EFAMA members (list of current membership attached) has approximately 58,000 funds. We understand that the FATCA guidance team would appreciate receiving information on both of the following aspects of European fund operation:

- the approximate number of asset managers who are responsible for EFAMA funds, a rough estimate of the number of European funds that operate globally and the number of assets managers that operate European funds globally; and

- whether/how the solutions proposed by EFAMA are impacted by a distribution chain that extends outside Europe

Sources of Information on European asset management companies and funds

There are various sources of information about the European fund industry. The EFAMA website is a good source of information, including *The Third Annual Review of Asset Management in Europe: Facts and Figures*, published on April 29, 2010. EFAMA's review (copy attached) provides a snapshot of the industry, looking at its overall size, general structure, asset allocation and client base. See the EFAMA website at the following address: http://www.efama.org/index.php?option=com_docman&task=cat_view&gid=89&Itemid=-99

Asset managers with European funds - number and locations

Based on information collected by EFAMA, more than 2500 asset management companies operate within Europe, taking into account the European Union ("EU"), Norway and Switzerland. Asset management companies tend to be concentrated, but not exclusively, within three EU member states: France (590); Luxembourg (360) and Ireland (252).

European Fund locations

Based on information collected by EFAMA, the number of funds is greatest in Luxembourg (9017 UCITS and 3215 non-UCITS) and Ireland (2721 UCITS and 1906 non-UCITS).

Based on information collected by EFAMA, the U.K., France and Germany account for the greatest amount of assets under management (approximately 66%), with the U.K. having the largest portion of discretionary mandate and France having the largest portion of total assets under management.

Trends in the European Investment Fund Industry in the Fourth Quarter of 2009, published by EFAMA, provides the most recent EFAMA data on the size of the European fund industry in terms of assets under management and the distribution of these assets across Europe.

Cross-border operations of European funds including distribution outside Europe

Funds that operate cross-border, either within Europe or from Europe to other areas, principally Asia and Latin America, tend to be established to a greater extent in Ireland or Luxembourg, although funds established elsewhere in Europe are also distributed outside Europe. European funds that qualify under the UCITS directive are especially appealing outside Europe. Attached is a publication of Euroclear, *Focus FundSettle: Supporting Asia's funds markets*, Issue n° 15, June 2010, describes opportunities for Asian funds in Europe and the increasing opportunity for cross border distribution of UK funds and lists the twenty (in terms of assets) fund management companies in Europe.

IX. Fund Managers, Distributors and Global AML Standards

The Internal Revenue Service has requested that EFAMA provide information on the following points:

- The incentives, e.g., potential for civil penalties, that exist for distributors to ensure compliance with distribution restrictions, and know-your-customer and anti-money-laundering ("AML/KYC") requirements;
- KYC/AML application to UCITS and/or those in the distribution chain, including identification of persons in the fund distribution chain who are responsible for performing the due diligence and documentation collection for direct investors in the fund;
- Any other rules, such as MiFID, imposing due diligence requirements;

- Whether the EU anti-money-laundering directive requires a mandatory look to an underlying owner/account holder if certain criteria/factors are present and, if so, the criteria/factors and/or a citation to the source of this information.
- Controls around UCITS sold to non-European and, in particular, off-shore investors/distributors, such as a UCITS sold by a Singapore broker-dealer to an investor.
- Standard KYC/AML practices summary.

Information provided by EFAMA on these points is as follows:

- Incentives for compliance.
 - The European Union's (EU) Anti-Money Laundering (AML) Directives are unique. There are no other mandatory, detailed trans-national AML regimes that articulate specific customer due diligence requirements and identification of ultimate beneficial owners.
 - The EU Directives are enforced against countries through the European Court of Justice and against individual private firms by the financial services agencies of individual EU member states.
 - Like US supervisors, EU country supervisors enforce EU AML rules against regulated entities, including fund managers and third party distributors, by a variety of administrative, civil and criminal actions.
- KYC/AML responsible parties in the fund/distributor chain. When UCITS are distributed by third parties ("distributors"), the primary regulatory responsibility for customer due diligence is that of the third party distributor, rather than the fund manager. The fund will hold documentation only for directly registered accounts. Any sales restrictions imposed by the fund apply wherever the fund is distributed, regardless of the size of the distributor or the country in which the distributors operate.

Other rules imposing due diligence requirements. Other EU regulatory requirements, such as the investment suitability requirement of the Markets in the EU Financial Instruments Directive ("MiFID"), support the mandatory customer due diligence ("CDD") documentation requirements by mandating that those who distribute funds have clear KYC procedures to categorize clients and assess their suitability for each type of investment product.

- EU KYC/AML requirements to know the underlying owner/account holder.
 - The Third Money Laundering Directive (the "Third Directive"), approved by the European Parliament in May 2005, requires institutions to verify the identity of 25% or greater beneficial owners and take reasonable steps to understand the ownership and control structure of the customer.
 - The Third Directive applies not only to EFAMA's members in the European collective investment and asset management industries, but also to the custodians, fund administrators and distributors who serve the European fund industry.
 - Mandatory CDD documentation requirements are applicable to all actors in the chain of distribution. Such documentation will be retained by the respective entities. As noted above, the fund will hold documentation only for directly registered accounts.
- Controls around UCITS sold to non-European and, in particular, off-shore investors/distributors. When UCITS are distributed outside the EU through third party distributors, local customer due diligence standards are applied by the distributors, who are subject to local regulation and local government supervision. See FATF-related section below for a discussion of non-EU global standards.
- Summary of Standard KYC/AML practices outside the EU.

- Outside the EU, national AML laws and standards vary, based largely on individual country norms, often guided by the "Recommendations" of the Financial Action Taskforce ("FATF"), an intergovernmental organization.
- The FATF standards, discussed below, recommend customer due diligence, identification of beneficial ownership and comprehensive enforcement of AML laws and regulations.
- Governmental compliance with FATF standards are encouraged through publicized "Mutual Evaluations," conducted either by FATF or other organizations discussed below, but such organizations lack enforcement capability. Background in relation to FATF is provided below.

Background on FATF: High-Level Description

- FATF mission. FATF is an inter-governmental body whose purpose is to establish international standards and promote national and international policies to combat money laundering ("ML") and terrorist financing ("TF").
- FATF's role is to do the following:
 - Articulate 40+9 Recommendations (the FATF standards), which are international standards to combat money laundering and terrorist financing.
 - The FATF 40 Recommendations on ML
 - Legal systems: criminalization of money laundering; provisions for international cooperation.
 - Comprehensive set of preventative measures: to be taken by financial institutions and non-financial businesses and professions, as to customer due diligence, identification of beneficial owners, and record keeping.
 - Institutional framework and other measures: Include reporting of suspicious transactions, compliance, regulation and supervision, and sanctions.
 - International cooperation: mutual legal assistance, extradition, and information sharing.
 - The 9 Special Recommendations on TF
 - Ratify United Nations instruments.
 - Criminalize terrorist financing.
 - Freeze and confiscate assets.
 - Report suspicious transactions.
 - International cooperation.
 - Protect against abuse of alternative remittance systems and abuse of non-profit organizations.
 - Ensure originator information on wire transfers.
 - Detect cash couriers.
 - Maintain the Mutual Evaluation System, which assesses national compliance with the FATF standards.

- FATF organization. FATF was established by the G-7 Summit held in Paris in July 1989 to examine measures to combat money laundering. FATF originally comprised the G-7 member states, the European Commission and eight other countries. Currently FATF has 33 members. In addition, there are FATF-style regional bodies (FSRBs).
 - The Gulf Cooperation Council is a member of the FATF.
 - The European Commission is a member of the FATF.
 - Together the 9 FSRBs comprise more than 150 jurisdictions.
 - The Middle Eastern and North African FATF (MENAFATF) is a FSRB comprising the following countries: Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates and Yemen.
 - Traditionally the FSRBs have been Observers in FATF. Now they may gain associate membership. Three FSRBs are already Associate Members of the FATF.
- Both FATF and the members of the FSRBs have all directly committed to implement the FATF standards. Implementation takes the following forms:
 - Mutual Evaluations conducted by FATF, World Bank, IMF and FSRB using FATF procedures.
 - Studies of methods and techniques of ML and TF and publication of reports on these subjects.