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For the attention of:

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Comments of the European Fund and Asset Management Association
in Response to IRS Notice 2011-34

The European Fund and Asset Management Association (“EFAMA”) is pleased to submit the following comments regarding guidance to be issued by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) in respect to the implementation of the Foreign Account Tax Compliance subtitle of the Hiring Incentives to Restore Employment Act of 2010 (referred to herein as “FATCA”). Our comments are both in furtherance of our continuing dialogue with the government regarding the impact of FATCA on the European funds industry, including on fund managers and distributors, and in specific response to the request for comments in Notice 2011-34 (the “Notice”).

We commend the IRS and Treasury on their efforts in providing guidance regarding the implementation of FATCA. We are pleased the Notice is responsive to the extensive comments received by the financial industry, including EFAMA. We believe that several of the rules provided in the Notice may be effectively adapted to the funds industry.

In this comment letter, we seek to provide you with detailed information addressing the areas where we feel forthcoming guidance will benefit from additional incorporation of EFAMA's proposals in order to meet the goals of identifying U.S. investors in foreign financial institutions ("FFIs") and creating an administrable compliance system that encourages participation by FFIs. Our comments are organized into three areas: (1) comments addressing deemed compliant FFIs; (2) comments addressing withholding issues; and (3) comments addressing other issues and responses to specific requests for comments in the Notice.

EFAMA welcomes the opportunity to discuss our proposals with you and the reasons we believe our proposals should be accepted by Treasury and the IRS.

1. Deemed Compliant FFIs

The Notice provides several categories of deemed compliant FFIs, including: certain local banks; local members of participating FFI groups; and investment vehicles that, *inter alia*, permit only participating FFIs, deemed compliant FFIs, and low-risk entities described in section 1471(f) as direct account holders. The Notice also states that Treasury and the IRS are considering under what circumstances deemed compliant status should be available to (1) foreign entities, all the interests in which are regularly traded on an established securities market, and (2) funds that permit direct interest holders to include--in addition to participating FFIs, deemed compliant FFIs, and entities described in section 1471(f)--non-participating FFIs acting as distributors if certain safeguards are established to ensure that such distributors prohibit sales to specified U.S. persons. EFAMA has, in previous comment letters and discussions with IRS and Treasury officials, expressed the need for deemed compliant treatment under these circumstances.¹ In particular, we have proposed a category of deemed

¹ EFAMA draft regulations, January 31, 2011, comment letter (attached as Appendix I), sec. 1.1471-2(a)(4)(ii)(C) and (E).

compliant funds we have called “restricted funds” and have discussed the need for deemed compliant treatment for publicly traded funds, including exchange traded funds (“ETFs”) and funds with substantially similar characteristics as ETFs.

The following discussion provides additional information regarding the European funds industry and the reasons we continue to believe that the deemed compliant categories we have proposed are both appropriate and necessary.

1.1 General Concerns Underlying EFAMA’s Requests for Deemed Compliant Treatment for Certain Funds and Fund Distributors

In our prior submissions, we proposed deemed compliant treatment for funds and fund distributors that possess certain characteristics that either ensure that they do not maintain U.S. accounts (including through intermediaries) or that are a member of a class of institutions with respect to which the purposes of FATCA can be carried out without requiring a full FFI agreement. The characteristics of the funds industry are such that funds may encounter additional challenges in their FATCA compliance efforts not faced by other classes of financial institutions.

First among these characteristics is the disintermediation of the funds industry. Funds have many intermediaries, often numbering in the thousands. We expect that a significant number of these intermediaries will not enter into FFI agreements. The proportion of intermediaries that are likely to be participating FFIs may vary significantly for different countries, even within the European Union. For example, in the United Kingdom alone, there are a great number of distributors, and only a small, and decreasing, percentage of investments in funds are made by individual investors approaching the fund manager directly. A significant proportion of investment in funds is through the nominee accounts of independent financial advisers, stockbrokers, wealth managers, and execution-only brokers, including fund supermarkets. It is common for intermediaries to aggregate holdings through nominees. Intermediaries range from large institutions (which we expect likely will become participating FFIs) to stock brokers who work with only a few localized clients, have no contact with U.S. persons, and therefore are unlikely to enter into FFI agreements with U.S. tax authorities. According to one

survey, at the end of 2008, there were 12,129 advisory firms in the United Kingdom, 9,258 of which had a sales staff of only 1 to 4 employees, and only 50 of which had a sales staff exceeding 50 employees.² The sheer volume of these relationships and the reality that funds are not in a position to control whether these FFIs enter into FFI agreements lead to the conclusion that in some circumstances FATCA's purposes may best be achieved through means by which funds can exert an appropriate level of control over their distributors, such as through the funds' contractual relationships with them (as discussed below).

1.2 Restricted Funds

In our previous submissions, we have proposed that future guidance provide that if a fund permits investment only through participating FFIs, deemed compliant FFIs, non-participating FFIs that agree to prohibit U.S. investors, and, in the case of direct retail investments in the fund, the fund prohibits U.S. investors, it should be treated as a deemed compliant FFI.³ The Notice incorporates a portion of EFAMA's proposal (permitting deemed compliant treatment if all investment in the fund is made through participating FFIs or other deemed compliant FFIs), and it states that Treasury and the IRS are considering under what circumstances deemed compliant treatment may be extended to permit investment in the fund through non-participating FFI distributors, if adequate safeguards exist to ensure that such non-participating FFIs exclude specified U.S. persons, NFFEs other than excepted NFFEs, and non-participating FFIs holding for their own account. The Notice does not, however, address what procedures such a fund must undertake regarding its direct retail investors.

The restricted funds category we have proposed ensures that meaningful and effective restrictions on U.S. accounts are in place and provides a workable framework that will encourage participation in, and compliance with, the FATCA regime. As our previous submissions have stated, the advantage of the restricted funds model is that many funds already prohibit U.S. investors for securities law purposes and that many distribution agreements therefore already contain prohibitions on U.S. investors.

² Retail Distribution Review Proposals: Impact On Market Structure and Competition, June 2009 report prepared by Oxera for the Financial Services Authority, available at http://www.fsa.gov.uk/pubs/other/oxera_rdr.pdf.

³ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(a)(4)(ii)(E).

For example, a sample distribution agreement containing sales restrictions representative of those currently used by the funds industry is attached to this comment letter.⁴ While not all distribution agreements contain such terms, where they do, enforcement tools are available to the funds. The terms of the sample distribution agreement provide:

Clause (e) Distributor Persons may only offer and sell Shares to Investors who are not Prohibited Persons. The restriction in this Clause 3(e) applies to all Investors as well as to any other person or entity for whose beneficial interest the Shares may be purchased.

Clause (f) The Distributor agrees that Distributor Persons shall notify Investors purchasing Shares that: (i) documents governing the Fund prohibit ownership of Shares by Prohibited Persons and transfer of Shares to Prohibited Persons; and (ii) the Fund has a right to repurchase any Shares if such Shares are, at any time, owned by a Prohibited Person.

The agreement defines “Prohibited Person” to include a U.S. person and further provides that “[s]uch term includes any ultimate economic beneficiaries who are U.S. Persons that are subject to U.S. reporting and withholding provisions under the U.S. Tax Code.” Such sales restrictions typically are publicized by the fund through its prospectus and website disclaimers.⁵ We view these restrictions as effective in the jurisdictions where they are used. To the extent that U.S. account holders have leaked into such funds, it is primarily due to a non-U.S. investor relocating to the United States and thus becoming a U.S. resident. Under these circumstances, funds have historically either prevented the investor from making further investments (while a U.S. resident) or have subjected the investor to forced redemption. Funds and their distributors take these restrictions very seriously. No fund wants to take the risk of violating U.S. securities law (or, prospectively, U.S. tax laws, such as FATCA) and no distributor wants to take the risk of having an account holder blocked for further investment in the fund or face forced redemption, with no control over the timing of that redemption.

⁴ Attached as Appendix II to this comment letter is a sample distribution agreement with standard terms.

⁵ See, e.g., JPMorgan Investments Funds Luxembourg Prospectus - April 2010, attached to this comment letter as Appendix III.

Additional terms in the sample distribution agreement include:

- (a) A requirement that the distributor ensure that it obtains from investors any document necessary for an investment in the fund, including any identification documents;
- (b) The distributor agrees that it will redeem shares that it holds for the account of any person who the distributor learns has become a prohibited person;
- (c) The distributor agrees that it will ensure the terms of the prospectus are complied with by any investors and that it will notify the fund in writing if, at any time during the course of the agreement, any of the representations or warranties made by the distributor under the agreement become inaccurate;
- (d) Subject to applicable law limiting disclosure, if the fund is required by any relevant authority to satisfy itself or such authority as to the identity of any investor, the distributor must provide copies of all due diligence relating to such investor immediately to the fund and/or the authority.

As this example shows, funds that already prohibit U.S. investors for non-FATCA reasons have considerable contractual means to enforce applicable investment restrictions, and EFAMA believes that these restrictions and contractual means may be adapted in the FATCA context. Our restricted funds proposal also provides that, unless such distributors are local distributors, they must register with the IRS using similar procedures to deemed compliant funds and must recertify their compliance every three years.⁶

Additionally, a deemed compliant fund should not be prohibited from allowing direct retail investment in the fund, as long as the fund complies with due diligence procedures identical to the responsibilities it otherwise imposes on its distributors with respect to any direct retail investors. The practical reality for most European funds is that the bulk of investment occurs through intermediate distributors. However, many funds do permit direct retail investment and have some such investors. The laws of some countries, such as Luxembourg and the United Kingdom, provide that the fund prospectus must permit the investor to deal directly with the fund without going through an intermediary. The proportion of such direct retail investors generally is small compared to the total

⁶ EFAMA draft regulations, January 31, 2011, comment letter sec. 1.1471-2(b).

number of investment in the fund--though direct retail investment is a significant stream of business in some countries, such as the United Kingdom--and the fund should be able to identify such retail accounts. Accordingly, an “all or nothing” rule that permits a fund to be deemed compliant only if it does not permit any direct retail investment (requiring a fund that does have a small portion of direct retail investors to enter into a full FFI agreement even though the fund has the ability to ensure that such direct retail investors are not U.S. accounts) would needlessly limit the ability of European funds to qualify for deemed compliant status by virtue of excluding U.S. investors.

1.3 Publicly Traded Funds

Our previous submissions to Treasury and the IRS have expressed our view that publicly traded funds should generally be afforded deemed compliant treatment.⁷ The Notice recognizes that under section 1471, funds, all the interests in which are regularly traded on an established securities market (e.g., ETFs), maintain no U.S. accounts but could nevertheless be required to enter into FFI agreements, to withhold on passthru payments made to non-participating FFIs, and to publish a passthru payment percentage. The Notice states that Treasury and the IRS are considering under what circumstances such funds could be deemed compliant under section 1471(b)(2)(A).

We continue to believe that, consistent with the spirit of the FATCA legislation in providing broad exceptions for publicly traded securities, it is appropriate to treat funds whose shares are regularly traded on an established securities market as deemed compliant. The shares of these funds have comparable characteristics to other publicly traded securities (e.g., high investor turnover makes account verification more challenging than it may be for other entities) and should therefore be treated similarly. Although it may be possible to hold interests in publicly traded funds without going through an FFI, similarly to other publicly traded securities, the vast bulk of shares of publicly traded funds are purchased through FFIs (e.g., through an investment account with a bank or brokerage firm). Requiring such funds to enter into FFI agreements would lead to duplicative reporting requirements of the sort FATCA seeks to minimize. And, importantly, the vast volume of shares and frequency of turnover of shares means that the compliance burdens for a publicly traded fund far outweigh any benefit to

⁷ EFAMA draft regulations, January 31, 2011, comment letter sec. 1.1471-2(a)(4)(ii)(C).

be achieved by requiring these funds to become participating FFIs, although we recognize that such funds should still publish a passthru percentage. In our prior submission, we provided a proposed definition of publicly traded based on the section 1296 regulations, which would effectively include funds that, while not actually traded on an exchange, have some of the same characteristics as funds whose shares are publicly traded, in the definition of publicly traded funds.⁸ We recognize that Treasury and the IRS may view this broader definition with some concern, and we accept that a narrower deemed compliant category for publicly traded funds that includes only funds whose shares are regularly traded on an established securities market may sufficiently respond to our concerns.

Section 1471(d)(2)(C) specifically provides that an interest that is regularly traded on an established securities market is not a financial account and is therefore not subject to passthru payment withholding (even if such interest is held by a U.S. person). We are concerned that the clear intent of the legislation to not impose withholding burdens on publicly traded securities would be frustrated by requiring withholding on payments made to non-participating FFIs. We recognize, however, the government's concern over the use of non-participating FFIs as blockers. A possible balance between the Congressional concern over impeding the public marketplace and placing undue burdens on issuers of publicly-traded securities on the one hand, and the concern of IRS and Treasury regarding blockers, on the other hand, is to impose passthru withholding on payments to a non-participating FFI if the non-participating FFI's investment in the fund exceeds 5 percent.

2. Withholding

In our previous comments and our interaction with representatives of Treasury and the IRS, we have emphasized the importance to EFAMA's membership of having a FATCA regime where distributions from deemed compliant funds are not subjected to passthru withholding.⁹ Our discussions with Treasury and IRS officials have demonstrated the need for us to provide more specific information regarding the reasons that such a regime is crucial for our membership. Our emphasis on reporting over withholding is based mainly on our

⁸ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(a)(4)(ii)(C)(2).

⁹ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(a)(3).

concerns for our client experience, the cost of building withholding systems, and the complexity of administering such systems.

2.1 Client Experience

Because funds, unlike banks, usually do not have direct relationships with their end investors, there is significant concern that applying withholding requirements to deemed compliant funds may impose withholding on many payments that are ultimately made to non-U.S. investors. For example, a non-U.S. person may invest in a fund through an intermediary distributor. If that distributor is a non-participating FFI (bearing in mind that, under our proposal, that non-participating FFI has committed to not sell interests in the fund to specified U.S. persons) and the fund must withhold on any payment to that non-participating FFI, the fund would be required to withhold on a payment that is beneficially owned by a non-U.S. person. In some circumstances, this may serve as an incentive for distributor FFIs to enter into FFI agreements. In theory at least, the non-U.S. person in the above example would be more likely to invest through a participating FFI, so that withholding is not imposed on that investor. However, the disintermediation of funds means that the retail investor often holds his interest in the fund through a chain of intermediaries and is unlikely to be aware of what intermediaries are in the chain. Thus, the investor may not be capable of making an informed decision to invest only through a chain of participating FFIs. If a distribution to a retail investor is thus withheld upon, it is likely easier for that investor to move his investment into non-U.S. asset based funds than to ascertain which entity in the chain is a non-participating FFI and pressure that entity to enter into an FFI agreement.

Although the fund may distribute its units through distributors, the fund's fiduciary duties remain with the end investors. To the extent that payments that are beneficially owned by non-U.S. persons are subject to withholding, the fund may be in breach of its duty to the investor. Such withholding raises additional practical concerns. First, non-U.S. persons subject to withholding are likely to move their investments into funds not investing in U.S. assets rather than assess whether any entities in a distribution chain are non-participating FFIs. Second, a non-U.S. investor who is subject to withholding is likely to presume that the fund itself is to blame (*i.e.*, because the investor may not know who else is in the distribution chain), which will likely lead to negative publicity for the fund.

Because of this, many funds likely will view withholding on fund distributions as not commercially feasible. We anticipate that a large number of funds with U.S. assets (as well as a large number of distributors of such funds) would sever any distribution relationships rather than have their distributions subject to withholding. While at the margins, such withholding may incentivize certain distributors to enter into FFI agreements, we anticipate that those FFIs that do not view U.S. persons as an important part of their client base will be more likely to sever their distribution agreements with funds holding any U.S. assets. Our funds currently have a great number of distribution relationships with distributors that may not enter FFI agreements for various reasons, including their size and sophistication, an insignificant number of U.S. persons in their client base, or the relatively small number of funds invested in U.S. assets distributed by such distributors. While funds have the ability to control their contractual relationships with their distributors, they generally do not have any practical means of forcing such distributors to enter into FFI agreements. In our restricted funds proposal, we have addressed these concerns, and the government's concerns, more directly by requiring all distributors holding accounts with the fund to commit not to hold interests in the fund on behalf of specified U.S. persons and to obtain comparable commitments from distributors down the chain.¹⁰

Moreover, it is likely that some FFIs that do plan on entering into FFI agreements may not do so in a timely fashion. For example, our members have indicated to us their concern that a large segment of the insurance industry is unlikely to be able to comply with FATCA by its effective date. A large-scale severing of distribution agreements could have a significant negative impact on the operations of the European funds industry. The result would be that assets move from U.S.-invested funds into funds not investing in the United States.

This would significantly limit the IRS's ability to obtain information on U.S. accounts. A U.S. investor's ability to hold an account with a non-participating FFI would not be affected as long as that U.S. person is willing to invest only in funds not invested in U.S. assets. The non-participating FFI would not be able to do business with a participating FFI insofar as such business involves the distribution of funds invested in U.S. assets. Thus, the IRS would forgo the ability to obtain information regarding potential U.S. persons and could not be assured that U.S. persons are not using such non-participating FFIs to conceal assets from the IRS.

¹⁰ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(a)(4)(ii)(E)(3)(b).

By contrast, our proposal to mandate reporting and to exclude from passthru withholding distributions on fund shares to any FFI if appropriate restrictions exist (e.g., where the fund and distributors meet the requirements of our proposed restricted funds category, including verification and enforcement provisions)¹¹ enables funds to continue operating without significant disruption to their business model or divestment from U.S. assets. Under our proposal, a non-participating FFI would only be exempt from passthru withholding with respect to distributions from such funds where these contractual restrictions are in force. Likewise, even where a distribution is made through a chain including both participating FFIs and non-participating FFIs, that fund distribution should not be subject to withholding affecting the ultimate beneficial owner if the restrictions on U.S. investors are in place all the way down the distribution chain, including by the participating FFI. Our proposal gives the IRS greater assurances that FFIs that choose not to enter into FFI agreements will exclude U.S. investors. Because most funds that restrict investment already do so for securities law purposes, as a practical matter, restrictions on U.S. investors will exist in all distribution agreements, including those with participating FFIs (and including restrictions on further downline distributors), and the same incentives for distributors to abide by their contractual obligations and for funds to enforce those restrictions that exist today will apply under our proposal, reinforced by the verification and enforcement provisions we have recommended. As stated, funds already enforce similar restrictions (and will continue to do so) through their distribution agreements for securities law reasons. Thus, we expect that requiring withholding by participating FFIs in the distribution chain will not be necessary.

2.2 Cost and Complexity of Building Withholding Systems

A further cause for concern for our membership is the cost of building withholding systems and the complexity of applying passthru withholding. Building withholding systems will include both the fixed costs of an industrial build (i.e., setting up the withholding system) and costs on a per fund basis. The costs of building withholding systems will be relatively higher for smaller entities, again making such entities less likely to enter into FFI agreements if withholding systems are required.

¹¹ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(a)(3) and (4)(ii)(E).

These costs are exacerbated for the funds industry in Europe where no existing systems can be adapted for FATCA purposes. For example, although the EU Savings Directive (“EUSD”) requires withholding in some circumstances, the only EU countries that have EUSD withholding tax are Luxembourg and Austria. In addition, as withholding under the EUSD applies only to the last entity in the distribution chain that makes a payment to the retail investor, this is rarely the fund itself.

In addition, quarterly provision of FATCA passthru payment percentage figures is too expensive to implement-- particularly as many non-U.S. funds will only have U.S. assets as a result of the passthru payment percentage applicable to a participating FFI interest held by the fund. It should be sufficient to supply figures once annually.

Finally, if an FFI has an extremely low passthru payment percentage and withholding would therefore be only on small amounts, the passthru payment mechanism is likely to be a less effective tool to encourage compliance with FATCA. At the same time, the burden imposed on an FFI to calculate the passthru payment percentage would remain unchanged. We accordingly support a rule that an FFI that has a passthru payment percentage below a certain threshold (*e.g.*, 5 or 10 percent) may treat its passthru payment percentage as zero.

2.3 Favoring Reporting Over Withholding For Deemed Compliant Funds

As discussed, requiring funds in all cases to withhold on passthru payments may lead to significant negative impacts on the European funds industry, including large-scale severing of relationships between funds and distributors and consequently a decrease in investment in funds that hold U.S. assets. We anticipate that a large number of FFIs acting as distributors may be reluctant to enter into FFI agreements. Such reluctance will generally be greatest for smaller or more localized FFIs. If future guidance requires withholding on payments to non-participating FFIs in all cases and relationships between funds and distributors are severed, the IRS’s ability to gather information about potential U.S. accounts will be compromised. Our proposal for restricted funds, where FFIs contractually commit to exclude U.S. accounts (which, as discussed above, many already do for securities law reasons) and appropriate controls exist to ensure that such restrictions are enforced by any distributor FFIs, ensures that the risk of U.S. persons investing through such distributor FFIs is vastly smaller. In the case that such an FFI determines that a U.S. person has somehow managed to maintain an account with

such an FFI, we believe the goals of FATCA are served more appropriately by the redemption and/or reporting of that account than by imposing withholding on payments from the fund to the non-participating FFI. As discussed above, we believe that our restricted fund proposal provides appropriate safeguards to ensure that restrictions on U.S. investors will be enforced through a fund's distribution chain. The withholding alternative, on the other hand, would be severely disruptive to the industry with little or no benefit to the IRS.

Section 1471(b)(2) gives Treasury and the IRS the authority to treat an FFI as having met the requirements of section 1471(b)(1)--which may include treating the FFI as having met the passthru withholding requirement of section 1471(b)(1)(D)--if (i) such institution complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain U.S. accounts, or (ii) if such institution is a member of a class of institutions with respect to which application of section 1471 is not necessary to carry out the purposes of section 1471. We ask that Treasury and the IRS exercise their authority under section 1471(b)(2) to provide specifically that FFIs that meet the requirements of EFAMA's proposed restricted fund model and funds that are publicly traded are not subject to passthru withholding.

3. Responses to Specific Requests for Comments in Notice 2011-34 and Other Issues

3.1 Preexisting Accounts

We believe that the procedures outlined in Part I of the Notice for identifying preexisting individual accounts can also be effectively applied to funds and that these procedures may be effectively applied to the identification of entity accounts.

Part I of the Notice provides procedures that participating FFIs must follow for the identification of pre-existing individual accounts. The Notice generally provides that participating FFIs must determine whether electronically searchable information maintained by the FFI and associated with an account or account holder includes U.S. indicia. Participating FFIs must perform a diligent review of their records associated with an account or account holder that is a private banking client or with an account that exceeds \$500,000 in value.

The Notice recognizes that the procedures for identifying preexisting individual accounts are most relevant to those FFIs that engage in banking, brokerage, and similar businesses, and Treasury and the IRS have requested comments concerning whether other FFIs should perform similar procedures.

The rules crafted in the Notice present a balanced approach by Treasury and the IRS. They provide significant relief to FFIs while requiring a higher diligence burden in those targeted situations of most concern. We believe that this approach may also be used by funds to identify their preexisting accounts,. We further believe that the de minimis and high net worth thresholds of \$50,000 and \$500,000 should be applied to funds. For example, in the United Kingdom, we estimate that there are approximately 6.6 million accounts under \$50,000 invested into funds, approximately 1.1 million accounts between \$50,000 and \$500,000, and approximately 40,000 accounts over \$500,000.¹² Thus, using these thresholds will significantly reduce the account identification burden on funds.

Private Banking

However, we believe that the “private banking department” definition in the Notice is over-inclusive, and that future guidance should limit the circumstances under which a private banking relationship is deemed to exist. An FFI’s label on a department as, e.g., a “private banking department” or “wealth management department” alone is not necessarily indicative of the type or depth of relationship with which Treasury and the IRS are concerned .

Entity Accounts

We further believe that certain aspects of these new procedures for identifying preexisting individual accounts may be advantageously added to existing procedures described in Section II.B(3)(a) of Notice 2010-60 for handling preexisting entity accounts. In particular, it would be worth extending to entities the principle that, in the

¹² One of the U.K.’s major fund administrators has provided us with data that covers approximately 40 percent (measured by AUMs) of the collective investment vehicles in the U.K. According to this source, the total number of investors in those vehicles less than 30,000 GBP is approximately 2,600,000, the total number between 30,000 GBP and 300,000 GBP is approximately 435,000, and the total number over 300,000 GBP is approximately 16,000. Our estimate above assumes that the data is a representative sample of the U.K. funds industry as a whole. We have thus multiplied these numbers by 2.5 to arrive at our results. Because the data was provided in pounds, we have used a 0.6:1 GBP/USD exchange rate as a reasonably close approximation to the \$50,000/\$500,000 thresholds.

absence of U.S. indicia or a private banking relationship, an account of less than \$500,000 requires no further action by the FFI beyond triennial review.

Anti-money laundering (“AML”) rules enacted by European Union countries generally require financial institutions to identify any ultimate beneficial owners of an entity account that control at least 25 percent of an entity--unless that entity is listed on a recognized stock exchange--and require the financial institution to obtain certain documentation (generally, a copy of the individual’s passport) from any such beneficial owners that control at least 25 percent of the entity.¹³ If the entity holds the account through an intermediary financial institution that is subject to equivalent AML laws, the diligence requirements are generally placed on that intermediary. Thus, in many cases, financial institutions are already required to identify the ultimate beneficial owners of their entity accounts.

We understand that one of the concerns of Treasury’s and IRS is the potential ability of U.S. persons to conceal their identity by holding an account through an entity that acts as a blocker. We believe that the existence of this volume of AML data should give Treasury and the IRS comfort that, in relation to the over 25 percent U.S.-held entities that represent the greatest risk of being blocker entities fronting for U.S. tax evaders, a “U.S. indicia” test would be effective in identifying risk accounts. Thus we do not see the need for the monetary thresholds to be set lower for entities than for individuals.

The ability of any U.S. persons to engage in such planning since the publication of the Notice is significantly compromised because the Notice specifically requires participating FFIs to certify that their management personnel did not engage (in the period between the publication of the Notice and the effective date of any FFI’s FFI agreement) in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts. Thus, the Notice itself goes a considerable distance toward alleviating Treasury’s and the IRS’s concerns in this area, especially when considered in light of the AML requirements described above.

¹³ EFAMA’s July 7, 2010, comment letter addresses this issue in greater detail.

We accordingly believe that providing for similar procedures for the identification of entity accounts as are currently provided for individual accounts in part I of the Notice is appropriate and that the de minimis and high net worth thresholds of \$50,000 and \$500,000, as well as the private banking rule, contained in the Notice can also be applied to entity accounts, and that an FFI should be able to rely on electronically searchable information maintained by the FFI and associated with the accounts or account holders of entities that do not exceed \$500,000 in value or constitute a private banking relationship..

The requirements to identify an NFFE's substantial U.S. owners may be substantially streamlined if future guidance provides a procedure whereby an NFFE may disclose its substantial U.S. owners (or lack thereof) directly to the IRS, rather than to the withholding agent. We suggest that the IRS maintain a database where NFFEs can register as being in compliance with the ownership rules or as being operating companies. FFIs then may rely on this registration with respect to NFFE accounts. Such a procedure would greatly reduce compliance burdens.

3.2 Local Distributors

In our submission of January 31, 2011, we recommended that a fund be allowed to distribute its units through certain non-participating FFI distributors that did not maintain operations outside their countries of organization if those distributors, through their distribution agreements with the funds, agreed to take certain measures to exclude U.S. investors.¹⁴ Such a rule is vital to the structure of the funds industry in Europe. As we have discussed in Section 1.1 of this letter, the proportion of fund distributors that are likely to be participating FFIs may vary significantly for different countries. In the United Kingdom, for example, at the end of 2008, of 12,129 advisory firms, 9,258 (approximately 76 percent) had a sales staff of 4 or fewer employees, and only 50 firms had a sales staff exceeding 50 employees. Expecting such small advisory firms to enter into FFI agreements with the IRS is unrealistic.

We note with approval section III.A of the Notice, which permits certain local banks to be treated as deemed compliant FFIs, and we believe similar rules for distributors that operate only locally are vital. However, as we

¹⁴ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(b)(2).

proposed in our January 31, 2011, submission, such local distributors should not be required to enter into agreements with the IRS that require them to demonstrate to the IRS how they meet applicable restrictions. Rather, we believe that for local distributors, such restrictions can be sufficiently enforced through contractual distribution agreements with the funds. Because the rationale for granting a local distributor rule is that such distributors can not reasonably be expected to interact with the IRS to the extent FATCA otherwise requires, it is crucial that the local distributors exception not place excessive burdens on such distributors. Accordingly, where the Notice requires the local bank to demonstrate to the IRS how it meets certain restrictions, the local distributors rule should permit the local distributor to instead meet these requirements through the fund (*i.e.*, the fund is required to be aware of how the local distributor meets its restrictions in order to certify its own deemed compliant status).

We have specifically proposed that a distributor that (i) has no branches outside of the country in which it is organized, (ii) is not a member of an affiliated group of companies that includes FFIs operating outside of the country in which it is organized, (iii) operates solely in the country in which it is organized, (iv) does not market its services outside of the country in which it is organized, and (v) certifies that it meets these criteria to the fund with which it has a distribution agreement should be considered deemed compliant without being required to register for deemed compliant status with the IRS.¹⁵

While the need for a local distributor category is even more compelling than the need for a local bank category, local distributors possess some of the same characteristics as local banks that cause them to present a low risk of use for tax evasion.

The Notice requires a bank seeking to qualify for the “local banks” category to be licensed and regulated as a bank or similar organization authorized to accept deposits under the laws of its country of organization. Such a regulatory requirement, if appropriately circumscribed, may also be applied in the local distributor context, if Treasury and the IRS feel the need to include it. For example, Treasury and the IRS may consider requiring that an FFI seeking to qualify for the local distributor exception be regulated as a securities broker/dealer or as a financial planner/adviser under the laws of its country of organization.

¹⁵ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-2(b)(2).

The Notice also requires that a local bank maintain no operations outside its country of organization, solicit no customers outside its country of organization, and implement procedures to ensure that it does not maintain accounts for non-residents, non-participating FFIs, or NFFEs (other than excepted NFFEs). The first two of these three restrictions may also be effectively applied to local distributors. However, European Union law may not permit a local distributor to exclude other EU residents. It is common practice for EU residents to live and work in different countries. For example, an individual may live in the Netherlands but work in a city in Belgium close to the Dutch border. Such an individual may well deal with a local distributor in Belgium, rather than in the Netherlands. A prohibition on clientele that are not residents of the distributor's country of organization may render the local distributor category of limited use to distributors located in the European Union. Accordingly, such a prohibition should not apply to local distributors.

Because such FFIs only operate in a local market, they are less likely to see the need for entering into FFI agreements. Since such FFIs are also more likely to be small institutions, they likely face proportionately higher costs than larger FFIs on a per-customer basis if they were to enter into a full FFI agreement, and because they operate and market only within the local market, the risk of their being a vehicle for U.S. tax evaders is substantially diminished. Thus, permitting such distributors to become deemed compliant rather than requiring them to become participating FFIs encourages participation in FATCA by such distributors and makes the entire FATCA framework more effective by maximizing participation by FFIs. Permitting the local distributor to meet the requirements through its contractual obligations with the fund and to certify to the fund that it meets the local distributor category is also appropriate because our proposal permits the fund itself to be deemed compliant even where it does business through a local distributor. This is preferable to requiring the local distributor to demonstrate directly to the IRS how it meets the requirements of the category because it recognizes the reasons behind the local distributor category--namely, that some entities are localized enough that it is not realistic to expect them to deal directly with the IRS.

We believe that the deemed compliant treatment extended to certain local banks should therefore be extended to local distributors of funds. We are confident that reasonable limitations on local distributors such as those we

have proposed are adaptable to the fund distribution context and may be enforced through contractual agreements between the funds and their distributors.

3.3 Fund Structures

We suggest that future guidance under FATCA clarify that where an umbrella/sub-fund structure exists, FATCA will be applied at the sub-fund level, rather than at the umbrella level.

An umbrella/sub-fund structure is a common fund structure under which several sub-funds, which may not be separate legal entities, are organized under one umbrella fund. Although such sub-funds may not be separate legal entities or separate units, the operational reality of the funds industry is that funds are almost always marketed, distributed, and sold at the sub-fund level. In Luxembourg, for example, as of March 2011, out of 3,724 total funds, 2,351 are umbrella funds, which have 11,684 sub-funds, while 1,373 funds do not employ an umbrella/sub-fund structure.¹⁶ In addition, it is common in European tax regimes to regard the sub-fund (and not the umbrella) as an entity for tax purposes (e.g., for U.K. corporate/income taxation of the fund, German tax reporting, and the application of the EU Savings Directive), and investor taxation will typically follow the principle that each investment in different sub-funds within an umbrella is a separate holding for investor tax purposes. As such, European service providers are geared to address taxation issues by reference to sub-funds and not umbrellas. It is therefore appropriate to apply FATCA at the sub-fund level.

If Treasury and the IRS instead decide to apply FATCA at the umbrella fund level, the risk of withholding being suffered by investors who are investing in funds that contain no U.S. assets would be increased. In practice, a decision to apply FATCA at the umbrella level may lead funds employing an umbrella/sub-fund structures to “split the umbrellas;” that is, to organize its sub-funds that are not invested in U.S. assets under a separate legal entity. The availability of this method to protect those investors investing in funds that do not hold U.S. assets from potential FATCA withholding underscores the difficulties that Treasury and the IRS may face in attempting to apply FATCA at the umbrella level. Achieving the most effective regulatory framework for both the government and the public is therefore best achieved by applying FATCA obligations at the sub-fund level. We

¹⁶ See, ALFI, monthly data regarding Luxembourg UCIs, March 2011, attached as Appendix IV.

believe that any concern that applying FATCA at the sub-fund level will lead to a greater number of FFI agreements that the IRS must monitor is addressed by the centralized compliance option for funds that Treasury and the IRS are considering (see Notice part VI.D) and which we endorse.¹⁷

3.4 Treatment of Contractual Funds, Trusts and Other Non-corporate Funds

We request that future guidance clarify that a fund which is organized in non-corporate form would be treated in the same way as a fund organized in corporate form. In Europe, contractual funds and other funds without legal personality are commonplace while in the Republic of Ireland and the United Kingdom funds are frequently organised as unit trusts. In the case of a unit trust, it (or more accurately its trustee) is treated for most domestic law purposes as if it were a distinct entity with a separate legal personality. In the absence of a clarification in future guidance, some ambiguity may exist that any reporting obligation in respect of the fund would fall on the trust management company or fund management company and/or the group within which the trust management company or management company is controlled, rather than on the fund itself.

3.5 Derivatives

Section II.A.3 of the Notice provides that, for purposes of calculating an FFI's passthru payment percentage, an asset includes (i) any asset includible on the FFI's balance sheet under its method of accounting, and (ii) off-balance sheet transactions or positions to the extent provided in future guidance. Through our discussions with Treasury and IRS officials, we understand that Treasury and the IRS are considering how future guidance should address the inclusion of derivative financial instruments in the passthru payment percentage. An existing fund must follow the investment strategy and guidelines set forth in the fund prospectus, which may restrict its ability to move from holding actual assets to derivatives. However, if FATCA creates a strong incentive to move into derivatives, new funds may be structured so as to benefit from this incentive.

¹⁷ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-1(e).

We believe that, to the extent possible, FATCA should not influence, in either direction, an FFI's decision to engage in transactions or take positions in derivative financial instruments. In our view, this may best be achieved by requiring derivatives to be valued, for purposes of applying the passthru payment percentage calculation, in the same way that they are required to be valued for securities law purposes in the FFI's country of organization. Such a rule would minimize creating artificial incentives for FFIs to move their economic exposure either into or out of derivatives.

We recognize that such a rule may have limitations where an FFI holds disproportionately large positions in derivatives. For example, a fund may have economic exposure to the U.S. market under a swap or other derivative. It is possible that, valuing the swap in the same way as for securities law purposes, its value would be zero. Nevertheless, there may be a return based on U.S. assets. It may therefore be appropriate to provide that where an FFI's economic exposure via derivatives exceeds a certain percentage (for example, 20 percent) of its asset value, the notional value of its derivative assets should be used for purposes of calculating the passthru payment percentages, rather than the value required for securities law purposes.

It is also important that future guidance clarify in which situations derivatives will be treated as U.S. assets. Section II.B.4 of the Notice provides that generally a U.S. asset includes any asset to the extent that it could give rise to a withholdable payment. Thus, under the Notice, an asset is generally a U.S. asset to the extent that income from the asset is characterized as U.S. source income. In most circumstances, a similar approach is appropriate to determine whether derivatives are U.S. assets. However, such an approach may present problems with respect to derivatives that could give rise to U.S. or foreign source income depending on who makes or receives the payments. For example, if an interest rate swap is entered into between a U.S. counterparty and a European counterparty, generally a periodic payment made under that swap would be foreign source if the payment is made to the European counterparty and would be U.S. source if made to the U.S. counterparty. If the rule in the Notice that an asset is a U.S. asset includes any asset to the extent that it *could* give rise to a U.S. payment were applied literally, this could lead to a rule that treats all swaps with U.S. counterparties as U.S. assets (which would encourage FFIs to engage in swaps only with foreign counterparties instead of U.S. counterparties). Rather, it seems more appropriate to determine whether a derivative that could give rise to either U.S. or foreign source payments is a U.S. asset with reference to the referenced asset. Thus,

a derivative on U.S. equity or debt would be a U.S. asset. Conversely, a derivative that does not reference U.S. equity or debt would not be a U.S. asset for purposes of determining the passthru payment percentage. Such a rule would be least likely to create distortive incentives to move either from actual assets to derivatives (or vice versa) or to reduce derivatives transactions with U.S. counterparties.

3.6 Sanctions

The Notice addresses what procedures a participating FFI must undertake to identify preexisting individual accounts. Section I.C of the Notice provides that Treasury and the IRS are considering under what circumstances measures should be taken to address long-term recalcitrant accounts, including whether and under what circumstances, FFI agreements should be terminated due to the number of recalcitrant account holders remaining after a reasonable period of time.

Section 1471(b)(1)(D) refers to passthru payments that are made to a recalcitrant account holders *or* a non-participating FFI. The regulations should make clear that a non-participating FFI is not a recalcitrant account, so that a participating FFI is not in danger of having its FFI agreement terminated due to long-term relationships with non-participating FFIs. Moreover, funds that are participating FFIs may have significant long-term recalcitrant accounts, despite their best efforts to obtain information with respect to those accounts. We request that future guidance provide rules that are sensitive to this reality and that Treasury and the IRS reserve the power to terminate an FFI agreement due to a high number of long-term recalcitrant accounts only for those egregious cases that clearly demonstrate an FFI's unwillingness to obtain information regarding such accounts.

Section II.B.5 of the Notice provides that a participating or deemed-compliant FFI must certify to the IRS every three years that the passthru payment percentages it publishes are accurate. We request that future guidance clarify under what circumstances a published passthru payment percentage will be considered as inaccurate. Due to the potential complexities of calculating passthru payment percentages, it is likely that some passthru payments percentages that are published by FFIs will, despite the reasonable efforts of the FFI, be imprecise. We suggest that future guidance clarify that a "reasonable efforts" rule will apply for purposes of certifying the

accuracy of passthru payments percentages and that an FFI may rely on publicly available information to calculate its passthru payment percentage.

3.7 Retirement Plans and Other Benefits Plans

Part III.D of the Notice reiterates Treasury's and the IRS's intention to issue guidance providing that certain foreign retirement plans pose a low risk of tax evasion under section 1471(f) and solicits comments regarding foreign retirement plans, retirement accounts, and other categories of entities that should be treated as deemed compliant FFIs because they present a low risk of tax evasion.

Our January 31, 2011, submission recommended that Treasury and the IRS issue guidance that provides that certain foreign pension funds and employee benefits plans pose a low risk of tax evasion under section 1471(f), and that funds that are legally restricted to investment only by such entities be exempted from entering into an FFI agreement.¹⁸ We believe that the parameters that we have recommended for such plans are an appropriate expansion of the narrow definition of retirement plans initially provided in Notice 2010-60. Our proposed definition permits multi-jurisdiction and multi-employer plans, as well as plans established pursuant to an organized labor agreement or arrangement, all of which are prevalent in Europe. We continue to believe that such plans do not present a significant risk of tax evasion where they qualify as a retirement plan or employee benefit plan under the tax laws of the countries in which they are established and they do not allow participants other than employees of a type the plan is intended to benefit (e.g., in the case of an employer-sponsored plan, employees who worked for the employer) or their beneficiaries.

Tax-advantaged employee benefits plans and retirement savings plans serve important public policy functions both in the U.S. and abroad. Where a foreign government has made a legitimate decision that it is in the public interest to encourage saving for certain purposes (e.g., retirement, health care, education) and to do so in a tax-advantaged way, such determination should be respected as long as appropriate safeguards exist to prevent use of such savings vehicles by persons other than those the savings vehicle was designed to benefit. We believe that our proposals in our January 31, 2011, submission provide such adequate safeguards.

¹⁸ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-3(a) and (b)(4), sec. 1.1471-4(b).

Moreover, it is appropriate to extend similar treatment to individual retirement plans or accounts in certain circumstances. We recognize that in theory individual retirement plans present a greater risk of use for tax evasion because an investor may exercise greater control over investments in such a plan or be able to invest in such a plan regardless of employment in a certain country. In practice, however, individual retirement plan regimes often have significant restrictions that make them an unattractive option for U.S. persons seeking to avoid U.S. income tax. Such restrictions may include relatively low contribution limits, early withdrawal penalties, and limitations on rollover contributions (e.g., limitations that permit rollover contributions only from other retirement plans). If an individual retirement plan regime possesses such characteristics, we believe that it presents a low risk of U.S. tax evasion.

We further renew our proposal that funds restricted to low-risk investors should be exempt from FATCA, rather than deemed compliant.¹⁹ Imposing on such funds the same burdens that apply to deemed compliant FFIs is neither necessary nor appropriate and would impose significant costs on these low-risk funds that are disproportionate to any perceived benefit for the government. For example, funds that are restricted to low-risk investors will not, as a definitional matter, have recalcitrant account holders or any non-participating FFIs in their ownership or distribution chains and requiring such funds to determine and publish a passthru payment percentage would be superfluous.

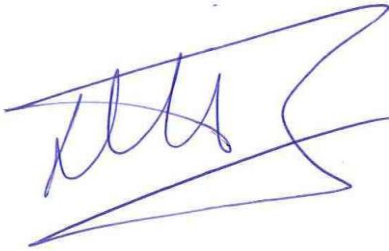
4. Continuing the Dialogue

EFAMA appreciates the continuing efforts of Treasury and the IRS to publish meaningful and timely FATCA guidance and to be responsive to industry comments and concerns. The Notice, which addresses several of the concerns EFAMA raised in its ongoing dialogue with Treasury and the IRS, is reflective of these efforts. We remain committed to working with you to this end and are available for another meeting between your FATCA guidance team and representatives of EFAMA to address in detail any remaining concerns you may have regarding our proposals.

¹⁹ EFAMA draft regulations, January 31, 2011, comment letter, sec. 1.1471-4(b).

We look forward to meeting with your team and to making further progress on these key issues.

Sincerely,



Peter De Proft
Director General

Enc.

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