

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
ASSOCIATION FRANÇAISE DE LA GESTION FINANCIÈRE]

Paris, June 7, 2011

For the attention of:

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**Comments letter of the Association Française de la Gestion Financière (AFG) in Response to the section III paragraph C of *IRS Notice 2011-34***

Dear Madam, Dear Sirs,

We thank you for the opportunity to comment on the *section 111* paragraph C of *Notice 2011-34* dedicated to Deemed-Compliant status for certain Investment Vehicles.

The Association Française de la Gestion Financière “AFG” represents and promotes the interests of the French asset management industry, both for collective and discretionary portfolio managements. Our members include management companies which are subsidiaries of French or foreign banking, insurance or asset management groups.

As you may know, France is the number one European Centre for the financial management of funds and the second for the domiciliation of funds with:

- Over €2,650 billion under management of which

€1,450 billions are managed in the form of investment funds, the remaining €1,200 bn) being discretionary mandates,

- Over 590 asset management companies, 4 French asset management groups being in the top 20 at worldwide level,
- 11,300 funds (including 8,000 UCITS).

AFG also is an active member of the European Fund and Asset management Association (EFAMA) and has therefore participated in the production of the EFAMA papers on FATCA that were submitted to the IRS.

However, considering the legal specificities of the French asset management industry, the purpose of this letter is:

- to explain the specific practical issues which arise out of the French organisation model and to urge you to add further precision in the section III paragraph C of *Notice 2011-34* dedicated to investment Vehicles in a way to avoid misinterpretation. We understand that the BVI, the German trade association, has taken a similar step and that you rightly decided to listen to its points,
- to suggest measures in order to implement the FATCA regime to the French funds industry in the most feasible way,

#### 1. Practical issues relating to the French model

From a legal point of view, and according to the French law (French Monetary and Financial code), undertakings for collective investment are organised as follows:

- **There are two categories of funds** in France:
  - Corporate vehicles: SICAVs (“Société d’Investissement À Capital Variable”): investment companies whose shares are issued and redeemed at the request of the holders at their net asset value. There are about 700 SICAVs which manage €202 bn.
  - Contractual vehicles: FCPs (“Fonds commun de placement”):

co-ownership of financial instruments which have no legal personality and whose units are issued and redeemed at the request of the holders at their net asset value. There are about 7,150 general purpose FCPs (€1,000 bn n2).

- According to the law, the **management of funds** in France (including financial advisory, commercial activities and administrative management) **is provided by a Management Company** n3 (société de gestion) which is authorised and supervised by AMF, the French market regulator, member of International Organization of Securities Commissions (IOSCO); in particular, there is hardly any self managed SICAV in France. Concerning **distribution**, it should be noted that the French market, as other European markets, is intermediated; a significant proportion of funds are invested in through external distributors such as retail banks, independent financial advisors, wealth managers etc. **Therefore, as in Germany (whose Investment Funds Association (the BVI) directly submitted comments on Notice 2010-60), the Management Company of a French fund does not know the identity of all its share/unit holders** n4 **as the fund's register mostly comprises external distributors' names (acting on their own behalf and/or acting as nominees on behalf of others).**
- SICAVs and FCPs' assets are held by a single Custodian chosen from a list of banks drawn up by the Minister for the Economy.
- **Liability management** consists of centralising subscription/redemption orders and custodial management. It is delegated by the Management Company to a "Teneur de compte-centralisateur" -translated into English as Transfer Agent (TA) n5:
  - the TA is the intermediary responsible for centralising subscription/redemption orders. The settlement/delivery may be made directly through Euroclear France in France (the French Central Depository),
  - custodial management consists in permanently updating

the number of fund units/shares issued. The TA acts as the interface between funds and distributors, collecting and executing subscription/redemption orders and keeping positions of external distributors. It is compulsory for a Fund to have a register of share/unit-holders.

Therefore, the flows of a US source income are the following (see Chart enclosed in Appendix 1):

- The US issuer pays a dividend to the CSD that pays it back to the US Custodian, for example BoNY ( n1 n2 in the Chart)
- The US dividend is recorded in the Fund's account opened at the Custodian (safekeeper of the Fund's assets) ( n3 n4 in the Chart)
- The Fund Management Company instructs its TA to pay a coupon on behalf of the Fund ( n5 in the Chart). This coupon may or may not include the US source dividend.
- The TA credits the shareholder's account in the case the shareholder made the subscription/acquisition directly i.e. in case there is no distributor, ( n6 and n7 in the Chart)
- In case of an intermediated distributor: the TA credits the Distributor's Account Provider which in turn credits the shareholder's account. The distributor's intermediation is not mentioned in the diagram shown in appendix as it does not change the demonstration.

## 2. AFG proposal on how FATCA should be implemented in relation to French funds

According to *Notice 2011-34*, the conditions for an Investment Vehicle to be Deemed-Compliant are the following:

*“( . . ) Under this guidance, a fund will be deemed-compliant if it meets the following three requirements:*

*(1) all holders of record of direct interests in the fund (e.g., the holders of its units or global certificates) are participating FFIs or deemed-compliant FFIs holding*

*on behalf of other investors, or entities described in section 1471(f);*

*(2) the fund prohibits the subscription for or acquisition of any interests in the fund by any person that is not a participating FFI, a deemed-compliant FFI, or an entity described in section 1471(f); and*

*(3) the fund certifies that any passthru payment percentages that it calculates and publishes will be done in accordance with Section II of this Notice. (. . .)”*

According to the French legal organisation described above, the “holder of record of direct interests in the fund” is the “Teneur de compte-centralisateur” described on page 3 which keeps a record of the positions of all the direct investors (be it nominees acting on behalf of others investors or final investors investing directly) in the fund. This register is very similar to the “global certificate” that was described to you by the German investment Funds Association (BVI) on November, 12, 2010.

Therefore, provided that the “Teneur de compte-centralisateur” of the fund is a PFFI, a DCFFI or an exempted FFI, the fund should be considered as “deemed compliant FFI” provided that it meets the third requirement set forth in section III paragraph C of *Notice 2011-34*,

In order to reach the US objectives, our interpretation, inspired from Section IV paragraph E “Elimination of Duplicative Reporting” of *Notice 2010-60* and from the drafting of Section III, paragraph C of *Notice 2011-34*, will then be that:

- if the payment made by the “Teneur de compte ~ centralisateur” benefits a Participating FFI (which is generally the case), this PFFI will at its own level:
  - Determine which holders are US accounts
  - Comply with verification and due diligence procedures on such account
  - Report information regarding US accounts to the IRS or close the account
  - Deduct and withhold the tax on any withholdable and/or passthru payments made to recalcitrant account holders and/or non participating FFIs according to PPP that will be computed and published by the Deemed-Compliant fund.

- If the payment made by the “Teneur de compte ~ centralisateur” benefits:
  - a non PFFI: the “Teneur de compte ~ centralisateur” will at its own level deduct and withhold the tax on any withholdable and/or passthru payments made to the non participating FFIs according to PPP that will be computed and published by the Deemed-Compliant fund.
  - in the case of the “Teneur de compte ~ centralisateur” is also the Account provider of the Clients : the “Teneur de compte ~ centralisateur” will at its own level report information on US accounts to the (RS or close the accounts in the case of recalcitrant direct investor.

As it is the case in the notice 2011-34 in which it is written under brackets that holders of records or global certificates are considered holder of records of direct interests in the fund, would it be possible to add that a “Teneur de compte ~ centralisateur ~ transfer agent” which holds the register of shares/units is also a holder of record?

Should you need any further explanations concerning the French organization or on our proposal, please do not hesitate to contact Mrs. Delphine Charles-Peronne, our tax Director, or Mr Philippe Sebagh, Chair of AFG’s FATCA working group:

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Mrs Charles-Peronne and Mr Sebagh would make themselves available in case you would need to meet them in Washington.

Yours sincerely,

Pierre Bollon  
 Delege General

Delphine Charles-Peronne  
 Directeur des Affaires Fiscales  
 Association Francaise del la  
 gestion financiere

Paris, FR

End: Appendix 1

\* \* \* \* \*

**Appendix 1 : The account of the share/unit holder is in France  
(simplified example) Link-to-image-2011155631**

Detail of the flows:

1 & 2: The US issuer pays a dividend to the CSD that pays it back to the US depository (for example BoNY)

3 & 4: The US dividend is recorded in the Fund's account (opened at the Custodian ~ Fund's assets).

5: The Funds Management Company instructs the TA to pay a coupon (the US source dividend may or may not be part of the coupon)

6: The Funds TA pays the coupon to the Account provider of each client (net of WHT if paid to a non PFFI).

7 & 9: The Account provider credits the account of the share/unit-holder and deals with FATCA obligations;

8: If needed, the Management Company provides the Client account provider and the TA with the necessary information (passthru payment)

10: The TA pays the withholding tax to the IRS

**FOOTNOTES:**

n1

This summary describes the most common organisation. However, other organisations may exist.

n2

€1,350 bn if we include FCPE (Employee saving funds) and FCPR (Venture capital funds)

n3

A Management Company must be approved by the “Autorite des Marches Financiers” (French equivalent of the US SEC),

n4

Please note that there are no bearer shares or units.

N5

In most cases, the duties of the Custodian and the Transfer Agent are carried out by the same financial institution.