

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED  
ON BEHALF OF THE AUSTRIAN COOPERATIVE SYSTEM]

Date 29, October 2010

To \* \* \*

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Tax

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Ref 2-827893291035401-1

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**FATCA Notice 2010-60 Comments on behalf of Austrian cooperative system**

The following comments on *Notice 2010-60* are made by us, KPMG Vienna office, on behalf of the Austrian cooperative system. They consider potential issues identified especially by cooperative banks (already participating in the QI system) as being of the most practical impact on their daily business.

Representatives of both cooperative banking systems, Raiffeisenlandesbank Niederosterreich-Wien for the Raiffeisen system, and Oesterreichische Volksbanken AG for the Volksbanken system, have thus mandated us to provide the IRS with the following comments:

*Overview on size and importance of the cooperative sector in Austria*

Cooperatives (co-ops) are an important part of Austria's business environment: in 2009, about 1600 co-ops were registered in Austria, more than 500 thereof being cooperative banks, about 400 utility cooperatives (electricity and teleheating), the rest mainly being agricultural wholesale and retailer's cooperatives.

Membership in these co-ops amounted to 1.6 million for the cooperative banks, 221,000 for the wholesale and retailer's co-ops and 171,000 for other co-ops. The turnover volume of the Austrian co-ops (excluding the cooperative banks) in 2009 was EUR 2.741 billion.

The workforce employed by Austrian co-ops comprised roughly 70,000 individuals, 45,000 thereof in the cooperative banking sector, with a total workforce in Austria of about 4 million individuals.

*Issues regarding identification of certain types of entity accounts*

Under FATCA, a participating FFI must determine for pre-existing as well as for new entity accounts whether the account holder is a U.S. account holder, participating FFI, deemed compliant FFI,

non-participating FFI, 1471(f) entity (e.g. foreign government, international organization, etc), recalcitrant account holder, excepted NFFE, or other NFFE.

Basically, if an entity account holder has not been determined as a U.S. person or as an FFI applying certain tests to the account documentation according to the proposed guidance, an FFI should search its files for evidence that the entity under scrutiny is engaged in an active trade or business (other than that of an FI). Such evidence might include evidence of employees, accounts payable or receivable, or ownership of physical assets used in a business. If such evidence exists, the account holder can be treated as an excepted NFFE, and no further documentation will be required for purposes of chapter 4.

Where there is no evidence that the entity is engaged in an active trade or business, the FFI has one year after the effective date of its FFI Agreement to request documentation establishing the entity is a participating FFI, deemed compliant FFI, non-participating FFI, 1471(f) entity, or NFFE. If no documentation is received within one year of the request, the account holder must be treated as a non-participating FFI. Where the documentation establishes the entity as an NFFE, the Notice provides that the FFI must obtain (or rely on existing) documentary evidence establishing that the NFFE is an excepted NFFE. If the NFFE is not excepted, the FFI must identify each individual or other specified U.S. person that is a direct or indirect owner of the entity and treat the account as a U.S. account.

The statute itself provides that an NFFE must certify that it does not have any substantial U.S. owners or provide the name, address, and TIN of each such owner.

The above requirements to identify account holders not only relate to accounts maintained for customers, but also to any debt or equity interest held in a financial institution. A FFI thus might be required to request proper documentary evidence or documentation from its shareholders/members.

For certain types of entity account holders, the procedures outlined above seem not to be practical, neither for the FFI nor for the entity itself. This would especially apply to account holders in the legal form of co-operatives, registered societies, savings banks and private foundations. Each of these entities will be dealt with in detail in the following:

### **1. Co-operatives**

By virtue of the GenG (Genossenschaftsgesetz ~ Law on co-operatives), co-operatives (co-ops) are legal entities with features distinct from standard corporations like private companies or stock corporations.

Co-ops share with standard corporations the requirement to be registered in the company register as a prerequisite for their creation. Unlike standard corporations, they do not have a fixed number of members and thus do not have a fixed capital. The second distinct feature of co-ops compared with corporations is that under the GenG the predominant purpose of its business has to be the advancement of the economic needs and aspirations of its members, thus co-ops can't be primarily prof-

it-oriented businesses. The liability of the co-op members may be unlimited or limited, depending on the selection made in the charter of the co-op. If not otherwise provided in the charter, the voting rights in the general assembly are not determined by a member's share in the co-ops capital (like in a corporation), but each member has one vote.

In the following, the distinctive features of co-ops are described in more detail together with an overview on the size and importance of the cooperative sector in Austria

### 1.1. Voluntary and open membership ~ variable capital

Unlike the standard corporations under Austrian law, i.e. the Gesellschaft mit beschränkter Haftung (GmbH) ~ private limited company and the Aktiengesellschaft (AG) ~ stock corporation, co-ops are not required by law to have a fixed capital which would be reflected in a fixed number of members.

Upon joining the co-op, each new member has to assume ownership of at least one share in the co-op. Members can join the co-op, if they are admitted to it. Members can retire from the co-op not only by selling their share, but also by cancelling their membership and having their share in the co-op paid out and, if the charter provides for such measure which is regularly the case, if they are expelled based on material grounds.

Only the face amount paid-in on the share in the co-op is reimbursed upon the retirement by a member; the member does not get his/her share in the other equity (retained earnings etc) attributable to the period of his/her membership. The face amount of such a share usually is EUR 7 to EUR 10.

In a standard situation, each co-op member holds only one share in the co-op. Interests in a co-op of at least 10% (threshold for substantial U.S. ownership) isn't observed in practice.

Although the changes in the membership in the co-op as described above can't be ruled out in the charter, membership can be limited to people with certain characteristics, e.g. to the farmers of a specific village, to winegrowers or to public servants.

Co-ops are required to maintain a membership register at their seat which shall show the first and last name and profession for each member, the day of admittance to and the day of retirement from the co-op, as well as the number of membership interests held by each member.

### 1.2. Advancement of the economic needs and aspirations

The predominant purpose of a co-op's business has to be the advancement of the economic needs and aspirations of its members. This may be achieved by either saving them expenses through the provision of e.g. cheaper housing (housing co-ops), cheaper consumer goods (consumer co-op) or cheap credit (credit/banking co-op). The advancement may also be the support of the business activities of the co-ops members, like a winegrower's co-op for winegrowers or a dairy co-op for dairy farmers.

Co-ops are thus not predominantly profit oriented. Any earnings would primarily be reimbursed to the members (retailer's co-ops) or distributed to the members, the distribution typically being limited with 6% of the membership share. Since a share in the co-op usually amounts to a maximum of EUR 10, the distributions to the members can't be seen as substantial.

### 1.3. Issues in connection with identification of cooperative account holders

If the current proposed regulations will enter into force unchanged, Austrian co-ops would face significant issues in connection with the requirement to identify account holders, which are described in more detail in the following:

#### 1.3.1. Non-banking cooperatives

For many of the non-banking co-ops as account holders, their upstream participating FFI will, after having determined that the co-op is not a U.S. person or an FFI, be able to get hold of evidence that the co-op is engaged in an active trade or business (other than that of an FI). If such evidence exists or can be provided, the co-op account holder can be treated as an excepted NFFE.

If it can not be established though that the co-op is engaged in an active trade or business, a participating FFI has to request documentation establishing that the co-op is a participating FFI, deemed compliant FFI, non-participating FFI, 1471(f) entity, or NFFE.

For NFFEs, the participating FFI must obtain documentary evidence establishing that the NFFE is an excepted NFFE. If it can not be established that the NFFE is excepted, the participating FFI has to establish each individual or other specified U.S. owner that is a direct or indirect owner of the entity. In this process, the participating FFI may rely on the documentation received from the entity account holder. If a specified U.S. owner is identified, the FFI must treat the account as a U.S. account and obtain documentation for such persons as if they were new account holders.

The requirements just outlined would pose severe problems for any co-op that can't establish that it is engaged in an active trade or business, since it would be required to investigate the U.S. tax status of each of its members; only then would it be able to certify to its FFI that there are no direct or indirect U.S. owners.

Although the co-op has to keep a register of its members, such register only shows the first and last name and profession for each member, the day of admittance to and the day of retirement from the co-op, as well as the number of shares held by each member.

The register does not contain any KYC documentation for the members like copies of identification and contains no information on the tax residence or other relevant tax characteristics of the members.

Since the co-op has to rely on the cooperating of its member to keep the membership data up-to-date (i.e. the members are obliged to report to the co-op any change in their status), it might be that a minor or even a significant portion of the membership data is not up-to-date any more, meaning that many members contained in the membership register could not be contacted since their membership data are outdated.

For many smaller co-ops, the membership register is not kept in electronic form. This makes searching the register for potential U.S. persons even more cumbersome.

In any case, co-ops would be required to approach all of their members to request sufficient documentation establishing the non-U.S. status of their members, even if the co-op would not be invested in any U.S. securities and the members most surely do not have any U.S. connection at all (typically being members of a specific local community or a specific profession). The necessity of the whole procedure could not be explained to the members of the co-op to their satisfaction.

The practical benefit also would be at least doubtful, since a co-op would not be a type of entity suited for evading U.S. tax.

### 1.3.2. Banking cooperatives

Co-ops running a banking business will qualify as FFIs and need to be treated as either a participating or non-participating FFI by their upstream FFIs.

Under the current proposed regulations, even small co-op banks could probably not qualify as deemed compliant FFIs, although certainly complying with FATCA as a FFI will be very cost prohibitive for such entities.

Since U.S. accounts also include equity interests in foreign entities held by a specified U.S. person, a co-op bank would not only be required to request proper documentation from its customers, but also from its members.

For the reasons described for non-banking co-ops, the documentation requirement with respect to its members may be burdensome or even impossible for a banking co-op to meet:

The membership register does not contain any KYC documentation for the members like copies of identification and contains no information on the tax residence or other relevant tax characteristics of the members.

Since the co-op has to rely on the cooperating of its member to keep the membership data up-to-date (i.e. the members are obliged to report to the co-op any change in their status), it might be that a minor or even a significant portion of the membership data is not up-to-date any more, meaning that many members contained in the membership register could not be contacted since their membership data are outdated.

Every customer of banking co-ops who has applied for a loan has also applied for membership in the co-op and such membership has been granted upon the granting of the loan. This currently amounts to a total membership count for all banking co-ops of 1.6 million.

Having those 1.6 million members documented for U.S. tax purposes although they don't have any connection with the U.S. at all certainly can't be seen as adequate. It is unlikely that any of those members is holding a minimum 10% interest in any of these co-ops.

#### 1.4. Suggested relief with respect to Austrian co-ops

Based on the structure of Austrian co-ops as provided by Austrian law, it can be stated that co-ops pose a low risk of tax evasion.

To mitigate the burden laid upon them by the customer identification requirements of FATCA, we suggest that they are

- a) Added to the list of persons posing a low risk of tax evasion, or
- b) Allowed to be treated as an excepted NFFE, regardless of whether an FFI can get hold of evidence that the co-op is engaged in an active business.

For banking cooperatives some practical threshold should be introduced, below which the banking co-op would be considered being a deemed compliant FFI to alleviate the administrative burden for such co-ops.

Regarding the documentation requirement for the co-ops members, due to the low risk of tax evasion a co-op poses and the practical obstacles, such requirement should be abandoned for banking co-ops with a broad membership base which can't be documented using reasonable resources.

## 2. Registered Societies/Associations

The Austrian VerG (Vereinsgesetz ~ law concerning registered societies/associations) provides that two or more individuals may, based on formal by-laws, form a legal entity called a Verein in order to pursue or accomplish a common, non-material goal. A Verein must not be profit-oriented and has to use its assets only for the pursuit of the goals as put-down in the by-laws.

The formation of an association has to be announced to the local public authorities. The authorities may prohibit the formation if the goals to be pursued by the association, the organization or the name of the association are against the law; otherwise the association is to be included in the local register of associations at the local public authority. The Ministry of the Interior keeps a central register of all associations registered.

The purpose of an association is the pursuit of its non-material goal without profit-orientation. Consequently, an association will mainly be financed by membership fees, donations and subsidies/grants. If such financing does not suffice, an association may run a business as well for generating cash, but not profit. Since the assets of an association may only be used for the pursuit of the association's purpose, no profit distributions to its members are possible; members of an association may not be reimbursed for their membership fees at all upon their retirement from the association; only if an association is dissolved, members may be reimbursed from the liquidation proceeds up to their original contributions, any surplus is to be used for the furtherance of the association's stated purpose or for similar purposes or, if the former is not possible anymore, for welfare purposes.

In 2010, more than 110,000 associations were counted in Austria.

Associations are separate legal entities and as such, they might open accounts with Austrian banks.

### 2.1. Issues in connection with identification of account holders in the form of associations

Since associations are not allowed to pursue material goals and may not be profit-oriented, they do not fulfil the criteria for a FFI, since they (1) do not accept deposits in the ordinary course of a banking business, (2) are not engaged in the business of holding financial assets for the account of others, or (3) are not primarily engaged in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.

Associations currently will not fall under the definition of an exempt entity as provided by the draft Notice.

For some of the associations as account holders, their upstream participating FFI will be able to get hold of evidence that the association is engaged in an active trade or business (other than that of an FI). This may be the case for certain associations in the sporting sector (e.g. running a football team as a business). If such evidence exists or can be provided, the association as account holder can be treated as an excepted NFFE.

If it can not be established though that the association is engaged in an active trade or business, which will be true probably for the overwhelming majority of Austrian associations, a participating FFI has to request documentation establishing that the association is a participating FFI, deemed compliant FFI, non-participating FFI, 1471(f) entity, or NFFE.

For NFFEs, the participating FFI must obtain documentary evidence establishing that the NFFE is an excepted NFFE. If it can not be established that the NFFE is excepted, the participating FFI has to establish each individual or other specified U.S. owner that is a direct or indirect owner of the entity. In this process, the participating FFI may rely on the documentation received from the entity account holder.

Austrian associations will not have the requisite information regarding their members to be able to certify to their participating FFI the tax status of its members. Since the members of an associations are not registered with the authorities, but only the association's organs (president of the association etc), a participating FFI will not be able to get hold of such information by itself.

Like co-ops, Austrian associations would be required to approach all of their members to request sufficient documentation establishing the non-U.S. status of their members, although the association must not be profit-oriented, and even in situation where the association would not be invested in any U.S. securities and the members most surely do not have any U.S. connection at all. The necessity of the whole procedure could not be explained to the members of the association to their satisfaction.

## 2.2. Suggested relief with respect to Austrian associations

Based on the legal framework of Austrian law governing associations, one can conclude that Austrian associations pose a low risk of tax evasion.

To mitigate the burden laid upon them by the customer identification requirements of FATCA, we suggest that they are

- c) Added to the list of persons posing a low risk of tax evasion, or
- d) Allowed to be treated as an excepted NFFE, regardless of whether an FFI can get hold of evidence that an association is engaged in an active business.

## 3. Private foundations

Pursuant to the PSG (Privatstiftungsgesetz ~ Law concerning private foundations), a private foundation in Austria is formed by a letter of donation from one or more founder(s) donating funds or assets to be administered for a specific purpose. It is not necessary that a foundation serves a purpose of general interest, thus a private foundation may have diverse purposes, including but not limited to collective, familiar or self-serving.

The foundation is a separate legal entity without owners or members, acting through its organs, as provided by law and the letter of donation; its charitable or self-serving purpose must be stated in its letter of donation, and the private foundation must have capital dedicated to the pursuit of the stated purposes. A foundation may not directly be engaged in running a business, though, but may invest its funds in shares in corporate entities. The founding documents, i.e. the letter of donation and a possible supplement to the letter of donation, have to identify the beneficiaries of the private foundation, or identify who has been authorized by the founders to nominate beneficiaries.

Many Austrian private foundations have received cash donations and are investing the funds received to pursue the purpose set forth by the founder(s) with the investment income earned. Other private

foundations may have received real estate or stake(s) in one or more enterprises instead of cash, but will also pursue the purposes set out by the founders with the income generated by the assets donated.

### 3.1. Issues in connection with identification of account holders of private foundations

Since Austrian private foundations are not allowed to run a business, but rather are limited to passively investing the assets donated by the founders, they typically will qualify as FFIs in the form of a foreign entity that is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such assets.

As such, they might qualify as deemed compliant FFIs, if they meet the requirements of the Notice for entities with certain identified owners. Guidance is needed in this context, how the IRS defines “small”, e.g. with regard to the number of account holders or the assets held by the private foundation.

Depending on the facts of the matter, a private foundation might qualify as an exempt entity in the form of a holding company for non-financial activities; if a foundation is only invested in real estate, it might be considered running a rental business for purposes of FATCA.

For a private foundation to qualify as a deemed compliant FFI, its withholding agent has to specifically identify each individual, specified U.S. person, or excepted NFFE that has an interest in the foundation, either directly or through ownership in one or more other entities, and has to obtain from each such person the documentation that would be required if such person would be a new account holder or direct payee of the withholding agent.

Private foundations do not have any owners or members who are holding shares in the capital of the foundation. Determining the percentage of interest of a specific individual in a private foundation is thus not a straight-forward issue.

Austrian banks are required to determine and document, in an anti-money laundering (AML) context, any individual that is at least 25% beneficiary of a private foundation.

To qualify as a beneficiary for AML purposes, it is sufficient that the respective individual might be entitled to benefits of the foundation only in the future or only if certain future conditions are met. Thus, the interests in a private foundation, if summed up, can be more than 100% (if, e.g. 7 persons are current or potential future at least 25% beneficiaries of the foundation).

Further guidance is needed on how to determine beneficiaries, i.e. interest holders, in an Austrian private foundation ~ will only individuals currently entitled to benefits be comprised or are potential future beneficiaries also to be considered interest holders.

It is also not currently clear and further guidance is needed regarding how to calculate the percentage of the interest, a beneficiary of a private foundation is holding: is this calculated as a percent-

tage of the net assets of the foundation or need expected future earnings also be taken into account (like for Austrian AML purposes)?

If the standards of the current Austrian AML rules for determining the beneficiaries of a foundation also should apply for FATCA purposes, the 10% threshold for U.S. owned foreign entities would be especially burdensome because all 25% plus beneficiaries of a private foundation already have been identified and documented, and the whole procedure would need to be repealed applying a 10% threshold this time.

### 3.2. Suggested relief with respect to Austrian private foundations

The criteria to qualify as a deemed-compliant FFI need to be described in more detail so that Austrian private foundations can easily determine if they can qualify as such. The criterion what constitutes a “small” number of direct and indirect account holders should be set out to be practical, i.e. to not exclude too many private foundations from application. Since a participating FFI would be required to identify all individual, specified U.S. person, or excepted NFFE that has an interest in the foundation, the threshold for what be considered “small” can be handled in a generous way in our opinion.

Further guidance is needed, especially for Austrian private foundations, how the term “interest” is to be construed with respect to the beneficiaries of a private foundation and how the percentage of interest in such an entity is calculated. As described above, one could constrain oneself only to the current beneficiaries of a private foundation as potential interest holders, or one could consider potential future beneficiaries also.

Austrian banks maintaining accounts for private foundations are required to identify all 25% plus interest holders according to the current Austrian AML rules, so it would be welcomed if the requirements under FATCA would be the same as under Austrian AML rules.

If a 25% interest threshold for U.S. controlled foreign entity will not be introduced, the 10% interest threshold should only be applicable to newly established accounts of private foundations, grandfathering all existing accounts where all beneficiaries with a minimum 25% interest have been documented.

## 4. Savings banks

Savings banks are non-profit-oriented banks, regulated in the Sparkassengesetz (Law concerning savings banks). The law provides that the founders of a savings bank (for which only municipalities and registered associations are eligible) are excluded from participation in the assets and profit of the bank. Any profit of a savings bank may only be used for charitable, beneficent or parochial purposes. In practice, the statutes usually provide for a furtherance of the economical, social and cultural development of the community in which the savings bank is domiciled, as well as for the assumption of social, charitable and cultural responsibilities.

The banking business may itself be run in the legal form of a savings bank, or the banking business may be run in the legal form of a stock corporation, the sole owner of which would then be either a savings bank holding or a savings bank private foundation. For both, the savings bank holding and the savings bank private foundation, the above mentioned restrictions regarding non-profit-orientation and purpose of the entity being the furtherance of social, charitable and cultural will apply.

#### 4.1. Issues in connection with identification of savings bank account holders

Most likely all Austrian savings banks currently are already Qualified Intermediaries and as such would be required to become participating FFIs. Any remaining savings banks would be non-participating FFIs due to the banking business they run.

For FATCA-purposes, U.S. accounts also include equity interests in foreign entities held by a specified U.S. person. Thus, each savings bank would be required to have its interest holders documented, which is not possible due to the lack of owner/interest holders. Beneficiaries would be, as described above, charitable and/or social causes relating to the community in which the savings bank is embedded; such causes are not able to provide the savings bank with proper KYC documentation. As a consequence, an ownership interest of at least 10% of US persons is not possible with respect to an Austrian savings bank.

As savings banks don't have any interest holders, an upstream FFI of a savings bank also can't be required to identify such persons, regardless of the qualification of the savings bank as a participating or non-participating FFI. Since US ownership is not possible,

#### 4.2. Suggested relief with respect to Austrian savings banks

Austrian savings bank are non-profit-oriented entities without owners; since qualified US interests in savings bank are not possible and these entities, being without an option to distribute monies to anybody except for charitable or social purposes, pose a low risk of tax evasion, a carve-out from application of the FATCA requirements for such entities should be implemented. Such carve-out would of course not affect the saving bank's responsibilities in their capacity as Qualified Intermediaries.

For upstream FFIs for savings banks, it should be made clear that they aren't required to identify the owners of the savings bank to determine if there is a qualified US interest in the bank.

### 5. Holding companies

The Notice provides for an exclusion from the definition of financial institution for foreign entities the primary purpose of which is to act as a holding company for a subsidiary or group of subsidiaries that primarily engage in a trade or business other than that of a "financial institution" (an FI business).

According to the notice such holding companies would include e.g. a traditional holding company of a group of operating subsidiaries engaged primarily in a non-FI business. Entities functioning as an investment fund, private equity fund, venture capital fund, leveraged buyout fund or as an investment vehicle to acquire or fund start-up companies with the intent to hold those companies for investment purposes, will not qualify for the exclusion.

#### 5.1. Issues in connection with the treatment of holding companies under FATCA

In the co-operative banking business in Austria, it is observed that small first-tier coop banks are holding their interest in a second-tier coop bank (which usually provides banking services to all the first-tier coop banks) using another co-op interposed as a holding company. Besides the first-tier coop banks, minor interest in the interposed holding company may be held by non-financial coops and in rare cases some individuals (which for certain no US persons and hold interests of less than 10% for sure). In addition to the interest in the second-tier coop bank, the holding company is also holding participations in several subsidiaries engaged in non-financial trades and businesses (industrial participations).

It is clear that in such a structure, the first-tier and the second-tier coop banks will qualify as FFIs and need to be treated as such. Requiring that the interposed holding company be treated as a FFI, i.e. forcing such holding to enter into an FFI Agreement with the IRS to become a participating FFI seems overly burdensome, in the light of the fact that all shareholders in the interposed holding company are either QIs/FFIs, non-financial coops or non-US individuals.

The treatment of a mixed holding company, i.e. a company holding interests in subsidiaries that are engaged in an active trade or business other than that of a financial institution together with interest in banking subsidiaries, is not clear under the Notice. For such holdings, it needs to be determined how the term “primarily” with respect to the engagement in an active trade or business other than that of a financial institution is to be construed. It has not been explained what indicators are to be used for such determination - One may use the turnover generated by the subs, the profit earned by the subs, the total assets or some other financial indicator. It has also not been explained whether one should use the numbers for just the previous year or some average of the e.g. previous 5 years for making the determination. Further guidance is also required with respect to the percentage of non-financial institution business to total business that would still be considered primarily?

#### 5.2. Suggested relief with respect to holding companies

For intermediate holdings interposed between (cooperative) banks, where all interest holders in the holding qualify as QIs/FFIs, are non-financial coops or non-US individuals holding a minority interest, it is suggested that such entities are given some relief, either by considering them as deemed-compliant FFIs or by providing a carve-out from the requirements of FATCA. At least some threshold should be introduced up to which an interest of individuals or non-FFIs in the holding company would still not require the company to become a participating FFI.

For mixed holdings, more detailed guidance is requested how to determine whether a holding is “primarily” engaged in a trade or business other than that of a “financial institution” by providing specific thresholds like e.g. the ratio of book value of FFI participations to book value of non-FFI participations being lower than 1.

Guidance is also requested for what period of time such a determination, if once made, shall remain valid.