[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
THE CLEARING HOUSE ASSOCIATION L.L.C.]

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Stephen E. Shay
Deputy Assistant Secretary for
International Tax Affairs
United States Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

Manal Corwin
International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

Michael Danilack
Large Business and International Division
Deputy Commissioner (International)
Internal Revenue Service
1111 Constitution Ave. NW
Washington D.C. 20224

Steven A. Musher
Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Ave. NW
Washington, D.C. 20224

CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington D.C. 20044

Re: Comments in Response to *IRS Notice 2010-60*

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

The Clearing House Association L.L.C. ("The Clearing House"), an association of major commercial banks, n1 appreciates the opportunity to submit these comments with regard to *Notice 2010-60* (the

"Notice"), which provides preliminary guidance with respect to the Foreign Account Tax Compliance Act ("FATCA") provisions of the Hiring Incentives to Restore Employment Act of 2010.

Executive Summary

The Clearing House appreciates the difficulty and complexity of the many tasks that the Treasury Department ("Treasury") and the Internal Revenue Service (the "IRS") now face, as the FATCA provisions require the interpretation of a complex statutory scheme and the implementation of a new information reporting and withholding tax regime. In addition to accomplishing the overall goals of FATCA, we understand that Treasury and the IRS will also want to ensure that the new rules are practical, logical and administratively manageable by both the IRS and the members of the financial industry who will have to apply those rules.

The Clearing House respectfully requests that its comments set forth below, as well as those expressed in its August 13, 2010 comment letter, be considered in drafting future notices, regulations, or other guidance (together, the "Guidance") implementing the provisions of FATCA. n2 These comments, like our August comments, focus primarily on the challenges facing United State financial institutions ("USFIs") under the FATCA regime. Specifically, The Clearing House:

- *proposes* that the definition of "withholdable payment" not include any payment for goods or services (other than services that give rise to interest income, such as lending);

- *strongly believes* that the"passthru payment" concept should only apply to payments (i) made by a Participating FFI described in *Section 1471(d)(5)(C)* of the Internal Revenue Code of 1986, as amended (the "Code"), (ii) with respect to an equity interest in such Participating FFI, and (iii) attributable to one or more withholdable payments received by the Participating FFI;

- *recommends* that the Guidance clarify that the term"electronicall y searchable information" be defined to reference only client static data files that are searchable by queries against the system;

- *recommends* that the definition of "financial institution" be clarified and provide for bright-line safe harbors;

- *recommends* that a USFI be entitled to rely on the self-certification of a payee (or the documentation in the USFI's files) in order to determine the payee's status as an FFI, a Participating FFI, an NFFE or

an NFFE engaged in a trade or business, provided that the USFI has no actual knowledge or reason to know the documentation is unreliable or incorrect;

- *recommends* that the IRS create an electronic system that (i) allows a payor to instantaneously verify that an FFI EIN it receives from a payee is consistent with IRS records, and (ii) notifies a payor if an FFI it queried is no longer a Participating FFI;

- *believes* that, consistent with the statute, NFFEs be required to provide withholding agents information only with respect to "substantial United States owners";

- *recommends* that the Guidance provide that an FFI described in Code *Section 1471(d)(5)(C)* be treated as "deemed compliant" and subject to the requirements applicable to an NFFE if the entity is (i) a foreign trust (regardless of the number of grantors) if all the beneficiaries are relatives of the grantors and/or charities or (ii) a foreign investment entity with less than 25 individuals as shareholders;

- *recommends* that the effective dates for reporting and withholding be clarified and provide that in no event will *reporting* commence before 1/1/2014 and in no event will *withholding* commence before 1/1/2015, with the actual dates dependent upon when the final Guidance and the final new forms are released;

- *proposes* that all FFI Agreements have an effective date that is the first day of the calendar year in which the FFI Agreement is entered into, as is the case with "qualified intermediary agreements";

- *recommends* that, in light of the complexity and breadth of the new requirements imposed on withholding agents by the FATCA rules, the IRS provide a grace period of at least one year from penalties for all FATCA errors;

- *recommends* that Form W-8BEN be replaced with two new forms, one for foreign individuals and one for foreign entities;

- *recommends* that a withholding agent be permitted to collect documentation by any method, including by facsimile and by an e-mail with an attached electronic image such as a pdf, jpeg, or similar file;

- *recommends* that a Participating FFI not be able to unilaterally elect to have withholdable payments and passthru payments made to it withheld upon by its upstream withholding agent (a USFI or an FFI), and the Guidance provide that such withholding agents are not obligated to agree to this with a Participating FFI except pursuant to such terms and conditions as they mutually agree upon; and

- *believes* that, in the case of two overlapping withholding obligations, FATCA withholding should control, and duplicative reporting should be eliminated based on an expeditiously executed study of the overlap between the reporting regimes.

DETAILED DISCUSSION OF RECOMMENDATIONS

A. DEFINITIONS

1. *Definition of "withholdable payments"*

The Guidance should provide that the term "withholdable payment" does not include any payment for goods or services (other than services that give rise to interest income, such as lending), with no limitations. Thus, this rule should apply without regard to whether: (i) the payment is made as part of the ordinary course of the trade or business of the payor, (ii) the payor is a financial institution (a USFI or an FFI) or (iii) the payee otherwise has a financial account at the payor.

Code *Section 1473(1)* sets out the definition of "withholdable payment" and gives the Secretary authority to provide exclusions or otherwise clarify the definition.

The Notice contemplates providing an exemption from withholding for "arm's length payments made for goods or services" but only if certain conditions are met. n3 These conditions are (i) that the payment be made in the ordinary course of the withholding agent's trade or business, and (ii) that if the withholding agent is a USFI or an FFI, the payee does not otherwise have a "financial account" at the payor.

The Clearing House agrees that, based upon the goals of the statute, withholding should apply only to investment-type income and therefore that an exemption is appropriate for payments for goods and

services (other than services that give rise to interest income, such as lending). The Clearing House believes, however, that this rule should *not* be subject to the additional conditions set forth above. Specifically, a payment for goods or services should be a non-withholdable payment in all cases. It should not matter if the payment is made in the ordinary course of the trade or business of the payor; nor should it matter if the payor which received the goods or services is a financial institution, or if the payee who has provided the goods or services happens to also have a financial account with the payor. These additional conditions are not necessary because, so long as the payment is for goods or services (other than lending services), it will not be the type of investment income to which the statute is intended to apply.

2. *Definition of "passthru payment"*

The Guidance should provide that the only payments that will be treated as "passthru payments" are payments (i) made by a Participating FFI which is described in Code *Section 1471(d)(5)(C)*, (ii) with respect to an equity interest in that Participating FFI, and (iii) attributable to one or more withholdable payments received by that Participating FFI. The Guidance should provide a workable "tracing" regime for applying the "passthru payment" concept in this one context.

Code *Section 1471(b)(1)* requires a Participating FFI to withhold on any "passthru payment" made to certain types of persons (*i.e.*, a recalcitrant account holder, a Non-Participating FFI, or a Participating FFI that has an election to have certain payments made to it withheld on). Code *Section 1471(d)(7)* defines "passthru payment" to mean: "any withholdable payment or other payment to the extent attributable to a withholdable payment." n4 The Notice acknowledges that many commentators have expressed concern regarding how the "passthru payment" concept would be interpreted and concern regarding the difficulty Participating FFIs might have in applying the concept to payments they make to their account holders.

The Clearing House acknowledges and agrees that the "passthru payment" concept raises difficult issues for both the IRS and Participating FFIs. After considering these issues and various alternative solutions, we recommend that "passthru payments" be defined to include only dividends paid by a Participating FFI described in Code *Section 1471(d)(5)*(C) where the "financial account" is an equity interest in that Participating FFI and the Participating FFI holds U.S. securities. In that instance, it is appropriate to treat as "passthru payments" the portion of the dividends paid by the Participating FFI that are attributable to withholdable payments received by the Participating FFI on the U.S. securities it holds. The Participating FFI would have sufficient information in this instance to determine if it receives "withholdable payments" and sufficient information to apply reasonable "tracing" rules for determining when the dividends it pays to its owners are "attributable to" withholdable payments the Participating FFI received.

For a Participating FFI described in Code *Section 1471(d)(5)(B)* where the financial account is a custodial account, the "passthru payment" tracing concept is not necessary. If the custodial account holds an asset that gives rise to a withholdable payment (*e.g.*, stock in a U.S. corporation paying U.S. source dividends), the payments to the account holder are by definition "withholdable payments" so that no "passthru payment" tracing concept is necessary. If, on the other hand, the custodial account holds an

equity interest in a foreign corporation, the payments with respect to that foreign equity interest would not be "withholdable payments" (because they would be foreign source dividends or gain from the sale of foreign equity). If the foreign entity is itself a Participating FFI described in Code *Section 1471(d)(5)(C)* (e.g., a foreign investment fund), those dividend payments made by that foreign entity, as described above, would be "passthru payments" under this proposal. If the foreign entity were a Non-Participating FFI described in Code *Section 1471(d)(5)(C)*, then its status as a Non-Participating FFI would cause the FATCA withholding regime to apply to the U.S. source withholdable payments made to it in the first instance. Therefore, it is unnecessary to require a Code *Section 1471(d)(5)(B)* custodial Participating FFI in this situation to determine if dividends paid by the foreign entity are "attributable to" withholdable payments received by that foreign entity.

Finally, if the account is an account described in Code *Section 1471(d)(2)(A)*, and the Participating FFI holds its own proprietary investments (none of which the account holder has a security interest or similar interest in), then the payment to the account holder should be foreign source interest, not "attributable to" the proprietary investments held by the Participating FFI. Applying the "passthru payment" concept with regard to a depository account is not appropriate because the account holder does not have an indirect ownership interest in the FFI's assets.

Based upon the foregoing, we strongly believe that the only type of "financial account" that should be treated in the Guidance as giving rise to a "passthru payment" is a financial account that is an equity interest in a Code *Section 1471(d)(5)(C)* Participating FFI that holds U.S. securities. If it is subsequently determined that the concept needs to be broadened to prevent a particular type of tax avoidance, expansion of the "passthru payment" concept to other types of financial accounts should be carefully evaluated at that time.

3. *Definition of "electronically searchable information"*

The phrase "electronically searchable information" should be limited to information contained in databases containing client static data files that are searchable by queries against the system. It should not include pdf files, images in image retrieval systems, e-mails, documents attached to e-mails, or documents stored on any individual user's hard drive.

The Notice includes procedures that a Participating FFI must comply with in order to identify preexisting accounts (*i.e.*, accounts opened prior to January 1, 2013) as U.S. accounts, accounts of recalcitrant account holders, or other accounts. As part of these procedures, the Participating FFI must search "the electronically searchable information maintained by the FFI and associated with the account" for indicia of U.S. status. n5

We understand that the Notice drafters intended for this phrase to mean client static data files that are searchable by queries against the system, and did not mean to include other types of electronic files that a Participating FFI might have such as pdfs or similar files, images in image retrieval systems, or e-mails. We believe that the Notice drafters correctly understood that it would be impractical and unadministrable to require entities to search all of their electronically-maintained information, such

as word processing documents, e-mails, electronic calendars or documents stored on an individual user's hard drive.

The Clearing House recommends that the Guidance clarify the above understanding.

4. *Definition of "financial institution"*

The Guidance should provide clear, easily administrable rules for determining whether an entity is a financial institution within the terms of Code *Section 1471(d)(5)(C)*. In particular, the Guidance should clarify what it means to be engaged "primarily" in investing, reinvesting and trading in securities. Further, the Guidance should assure that an entity would not inadvertently become a financial institution and that an entity would not inadvertently shift in and out of financial institution status.

Whether an entity is a financial institution or an NFFE is a seminal determination within the FATCA reporting and withholding regime. Accordingly, it is critical that there be no doubt as to a specific entity's status. In the case of the definition of a financial institution in Code Section 1471(d)(5)(C), there is a particular need for additional guidance, including guidance clarifying what it means to be engaged "primarily" in the enumerated activities. The Clearing House suggests that the Guidance provide some bright-line safe harbors for determining that an entity is not primarily engaged in such activities. The Guidance should further provide that, in those instances in which none of the safe harbors is satisfied, an alternative analysis based on facts and circumstances will apply.

The Guidance also should minimize the likelihood that an entity will inadvertently become a financial institution and that an entity could change status year-to-year. For example, an extraordinary transaction (such as a sale of an operating business in exchange for cash that is temporarily invested, or a capital raise or capital infusion that brings in a large amount of cash that is invested pending being deployed in the business) should not temporarily shift an entity that is otherwise not a financial institution into financial institution status. Similarly, investments of cash held by a corporation in the process of winding down its business should not shift that corporation into financial institution status.

B. DETERMINING THE STATUS OF PAYEES

1. *Establishing the status of a payee as an FFI, a Participating FFI, an NFFE or an NFFE that is engaged in a trade or business*

A USFI should be entitled to rely on a self-certification from a payee that it is an FFI, a Participating FFI, an NFFE or an NFFE engaged in a trade or business, provided that the USFI has no actual knowledge or reason to know the documentation is incorrect. A USFI also should be entitled to rely on the customer documentation in its files if it chooses to do so.

A USFI's FATCA responsibilities differ depending upon whether the foreign payee is a Participating FFI, a Non-Participating FFI, a deemed-compliant FFI, an exempt FFI, an NFFE not engaged in a

trade or business, or an NFFE engaged in a trade or business or other excepted NFFE. Therefore, each of the above determinations is a pivotal FATCA determination. USFIs need to be able to make these determinations in a way that is certain and administrable. We propose that the Guidance provide that a USFI should determine whether or not its foreign entity payees are FFIs, Participating FFIs, NFFEs, exempt or deemed-compliant FFIs, or excepted NFFEs by means of a self-certification from the payee. The USFI should be able to rely on this certification unless it knows or has reason to know that the certification is unreliable or incorrect. Alternatively, at the option of the USFI, it should be able to rely on the documentation in its customers' files or other available sources to make this determination.

Self-certification is an established method of determining a payee's status for U.S. tax reporting and withholding purposes which is used consistently throughout the withholding and information reporting rules. It is an effective way to identify the tax status of customers and the most likely to assure that foreign entity customers are properly classified, U.S. accounts are identified and that the IRS obtains the information it seeks.

The Guidance also should make clear that a payor may always choose to withhold if it is not satisfied with the certification or other documentation provided by the FFI or NFFE.

2. *Verifying the "participating" status of a payee that claims to be a "Participating FFI" through an IRS system similar to the TIN Matching program*

In order to facilitate the determination as to whether an FFI account holder is a Participating FFI, the IRS should create an electronic system that (i) allows a payor to instantaneously verify that an FFI EIN it receives from a payee is consistent with IRS records, and (ii) notifies a payor if an FFI it queried is no longer a Participating FFI. Once this system is in place, if a withholding agent elects to verify its records with the IRS system, the withholding agent should treat a payee as a Participating FFI if (a) the IRS system reports that the name and FFI EIN of the Participating FFI are consistent with IRS records, and (b) the withholding agent has not been notified by the IRS system that the FFI should *not* be treated as a Participating FFI.

The IRS should implement an electronic program similar to the current TIN Matching program to facilitate the determination by USFIs (and FFIs) as to whether an FFI account holder is a Participating FFI. Under the TIN Matching program, a payor can verify with the IRS that the name and TIN of its payee match IRS records. Adapting this for verifying Participating FFIs, the withholding agents would be able to verify the name, FFI EIN, and the good standing status of the Participating FFI. Ideally, this would be similar to the TIN Matching program and the verification could be done electronically in minutes.

In addition, this program should send an alert to withholding agents if a Participating FFI loses its "participating" status. This notification process could be handled in a manner which is similar to the IRS's "B-Notices" and "C-Notices", in which the IRS notifies payors of the requirement to commence backup withholding due to an incorrect payee TIN or due to payee underreporting, respectively.

Once this system is in place, if a withholding agent elects to verify its records with the IRS system, n6 the withholding agent should treat a payee as a Participating FFI if (a) the IRS system reports that the name and FFI EIN of the Participating FFI are consistent with IRS records, and (b) the withholding agent has not been notified by the IRS system that the FFI should *not* be treated as a Participating FFI.

Finally, the Notice states that a withholding agent can tentatively treat an FFI as a Participating FFI without having received the FFI's FFI EIN. We believe that the Guidance should make it clear that a Participating FFI's EIN will be provided by the IRS simultaneously with the execution of the Participating FFI Agreements (making it impossible for a Participating FFI to not have an FFI EIN).

3. *Gathering from NFFEs and reporting to the IRS information only about an NFFE's "substantial United States owners"*

In accordance with the statute, the Guidance should require NFFEs to provide to withholding agents information only with respect to "substantial United States owners" (i.e., those owning greater than a 10% interest, except in the case of an FFI described in Code *Section 1471(d)(5)(C)* or a grantor trust).

Code *Sections 1472(b)(1)(A)* and (B) provide that an NFFE meets the requirements to avoid withholding if it provides the payor with either (A) a certification that the NFFE "does not have any substantial United States owners", or (B) the name, address and TIN "of each substantial United States owner". "Substantial United States owner" is defined in Code *Section 1473(2)(A)* as essentially a greater than 10% (by vote or value) shareholder, greater than 10% (profits or capital) partner or greater than 10% beneficial interests owner in a non-grantor trust. n7

The Notice's discussion and guidance on this point is unclear. It could be read to suggest that the NFFE must provide the payor with information as to *all of* the NFFE's U.S. owners, no matter how small their interests; and it could also be read to suggest that the payor must then report all of that U.S. owner information to the IRS. n8

We believe the Guidance should clarify that the withholding agent needs to obtain from the NFFE a certification only as to whether it has any "substantial United States owners", and if it does, the name, address and TIN of those substantial United States owners. The Guidance should also clarify that the withholding agent is required to provide to the IRS only the information received about the "substantial United States owners".

4. *FFIs that should be "deemed compliant"*

The Guidance should provide that an FFI that is described in Code *Section 1471(d)(5)(C)* should be treated as "deemed-compliant" and subject to the rules applicable to NFFEs if the entity is: (i) a foreign trust (regardless of the number of grantors) if all the beneficiaries are relatives of the grantors and/or charities and (ii) a foreign investment entity with less than 25 individuals as shareholders.

The Notice explains that:

> Pursuant to *section 1471(b)(2)*, the Secretary may treat an FFI as meeting the requirements of section 1471(b) (a deemed-compliant FFI) if the FFI . . . is a member of a class of institutions with respect to which the Secretary determines that application of *section 1471* is not necessary to carry out the purposes of *section 1471*. . . . n9
>
> The definition of FFI under *section 1471(d)(5)(C)* includes investment funds and other entities that may have only a small number of direct or indirect account holders, all of whom are individuals or NFFEs that will not be subject to withholding or reporting under *sections 1471* or 1472 or future regulations thereunder (excepted NFFEs). An example of such an entity may be a small family trust settled and funded by a single person for the sole benefit of his or her children. For such entities, the administrative burden of entering into an FFI Agreement and complying with the reporting requirements thereunder may be disproportionate to the amount of U.S. investments giving rise to withholdable payments or passthru payments beneficially owned by such entity. n10

We support the IRS's focus on these types of entities, but we believe it is important that the types of entities covered by this exemption not be limited to the facts of the example given in the Notice. Thus, we recommend that the proposed deemed-compliant rule apply to (i) any foreign trust (regardless of the number of grantors) if all the beneficiaries are relatives of the grantors and/or charities and (ii) any foreign investment entity with less than 25 individuals as shareholders.

We also believe that as suggested by the Notice, these entities should be subject to the procedures applicable to NFFEs, rather than an apparently very similar procedure referenced in the Notice. n11 The NFFE ownership information procedures would (as is the case with respect to NFFEs) provide the IRS with sufficient U.S. ownership information to determine whether these FFI entities are being used for tax evasion. Therefore, we suggest that the existing NFFE regime be applied to these FFI entities.

C. EFFECTIVE DATES

1. *Effective dates for reporting and withholding by USFIs*

The effective dates for reporting and withholding by USFIs should be clarified and should provide that (regardless of whether an account is opened before or after 1/1/2013) in no event will *reporting* commence before 1/1/2014 and in no event will *withholding* commence before 1/1/2015, with the actual dates dependent upon when final Guidance and final new forms are released.

We understand the Notice as providing and suggest that the Guidance confirm that:

- for preexisting accounts (*i.e.*, accounts opened before 1/1/2013), the account holder has until 1/1/2015 to provide the appropriate documentation to the USFI before any withholding commences;

- for accounts opened 1/1/2013 or later, while the procedures that the parties must apply are slightly different, the same time frames apply, meaning that withholding will not commence prior to 1/1/2015; and

- the effective date for *reporting* under FATCA will be earlier than the effective date for *withholding*.

We recommend that Guidance also should provide that:

- the effective date for *reporting* should be no earlier than twelve months after the release of both the final regulations and the final new reporting forms (and in no event before 1/1/2014);

- the effective date for *withholding* (even with respect to accounts opened after 1/1/2013) should be at least 24 months from the date the final regulations and forms are released (and in no event before 1/1/2015). Since USFIs need sufficient time to implement and test procedures and systems, it is especially important that withholding on new accounts not commence any earlier than this date. Commencement of withholding any earlier than 2015 could result in erroneous deductions from payments to account holders; and

- once the above periods after the issuance of final regulations have passed and the FATCA rules thus are fully effective, a USFI (or FFI) should be given a 90-day period after a customer opens a new account before it must completely document the account, report

> or withhold for FATCA purposes. Under existing U.S. tax withholding and reporting regimes, a withholding agent is often given (depending on the situation) an additional 30, 60 or 90 days from the date an account is opened to obtain a Form W-8 or W-9 from the account holder. Since the FATCA documentation requirements are significantly more complicated, it is appropriate that USFIs (and FFIs) be given 90 days to obtain full FATCA documentation before reporting and withholding is required.

With respect to preexisting accounts in particular, we recommend that the Guidance clarify that if the account holder provides, prior to 1/1/2015, documentation establishing that it is a Non-Participating FFI, the USFI would not need to commence reporting prior to twelve months after the release of both the final regulations and the final new reporting forms (and in no event before 1/1/2014) and would not need to commence withholding prior to 24 months after the release of both the final regulations and the final new reporting forms (and in no event before 1/1/2015). Any other result would essentially punish FFIs which provided their documentation before 1/1/2015.

2. *Effective dates of FFI Agreements*

All FFI Agreements should have an effective date that is the first day of a calendar year, as is the case with "qualified intermediary agreements".

Several parts of the Notice, dealing with FFI transition rules, specify required actions which are defined by reference to "the effective date of FFI's FFI Agreement" (e.g., Notice Section III.B.2.a, item 5). We believe it would simplify the application of these rules if all FFI Agreements are effective as of the beginning of the calendar year in which the FFI Agreement is entered into. If a refund from the IRS is available because a withholding agent withheld on payments to an FFI after that January 1 effective date of its FFI Agreement, the responsibility to claim the refund should lie solely with the FFI.

3. *Penalties*

In light of the complexity and breadth of the new requirements imposed on withholding agents by the FATCA rules, it would be consistent with good tax administration to administratively provide a grace period of at least one year from penalties for all FATCA errors.

The Notice does not address penalties. We suggest that for any errors made within the first twelve months of the effective date of the applicable rule, penalties not be asserted if the U.S. payor, FFI or NFFE can demonstrate that it made reasonable efforts to comply with the applicable rule.

D. FORM OF DOCUMENTATION

1. *New Forms W-8BEN*

Form W-8BEN should be replaced with two new forms, one for foreign individuals and one for foreign entities. The form for foreign entities would include a section covering FATCA-related matters, including a place where a payee could certify whether it is a Participating FFI.

The new FATCA regime will require U.S. withholding agents to classify foreign entity payees in a manner that has not been previously required. For example, they will need to first determine whether a foreign entity is an FFI or an NFFE and if an entity is an FFI, whether it is a Participating FFI or otherwise exempt from withholding under the FATCA rules, or if an entity is an NFFE, whether it complies with its disclosure requirements for substantial U.S. owners or is an excepted NFFE. We believe that USFIs will need a reliable, straightforward method to properly characterize and document these payees and suggest that the current IRS Forms W-8 be replaced (or modified) for this purpose. Suggested changes to the Form W-8 include:

Separate Forms W-8BEN for Individuals and Entities

We believe it makes sense to use separate forms for documenting the tax status of individuals. The individual form would be simpler and more straightforward than the new form for entities (which, as described below, would have a section that covers the FATCA rules). A separate form would be easier for individuals to complete and, in turn, makes it more likely that USFIs will receive properly completed forms. To ease the transition to new forms, any existing tax documentation that has been collected could be relied upon until it expires under the existing rules. n12 As discussed previously, however, no reporting or withholding should be required until after new forms have been issued and there is an opportunity to solicit such new forms from customers.

Forms for Entities

We suggest that a new Form W-8BEN be designed to be used solely by non-U.S. entities. This new form could be based on existing Forms W-8 but could include a new FATCA-related section in which a payee would, for example, identify itself as either an FFI or an NFFE. An FFI would also need to certify its status as a Participating FFI and provide its FFI EIN or certify its status as an entity otherwise exempt from the rules under Treasury regulations. An NFFE would need to certify whether it has substantial U.S. owners within the meaning of the FATCA rules and attach (or otherwise provide) a list of such owners and other required information. As with the current rules for Forms W-8, a U.S. withholding agent would have no obligation to independently verify the information on the Form absent actual knowledge or a reason to know that the information or statements made are incorrect or unreliable. To ensure that the information on the forms remains up-to-date, the regulations could retain the current rules that generally require Form W-8BEN to be renewed. A payee should be required to notify the withholding agent and update the form if within 30 days (as currently required) there are any changes in circumstance or tax status (for example, if an NFFE has a change in ownership that causes it to have substantial U.S. owners).

The redesign and use of new Forms W-8 will require adequate time to implement. The new forms will have to be incorporated into new account opening procedures and customer communications and

will require applicable changes to systems so that they capture and apply, for reporting and withholding purposes, the information required on the revised forms. Therefore, as previously discussed, the revised forms should be available at least 12 months prior to the date they will be needed for *reporting* with respect to new accounts and 24 months prior to the date that *withholding* with respect to new accounts takes effect. We also recommend that the revised forms be issued in draft form first and be subject to a comment period.

2. *Format in which certifications and documents are collected*

A withholding agent should be permitted to collect documentation by any method, including by facsimile or by an e-mail with an attached electronic image such as a pdf, jpeg, or similar file.

Limiting documentation collection to hard copies will create time delays and add unnecessary burdens. Accordingly, withholding agents should be permitted to collect certifications and documents by other methods, including by facsimile and by an e-mail with an attached electronic image such as a pdf, jpeg, or similar file.

E. CODE SECTION 1471(b)(3) ELECTION

1. *The Code Section 1471(b)(3) election available to a Participating FFI*

The Guidance should provide that a Participating FFI's election to have withholdable and passthru payments made to it withheld upon by its upstream withholding agent (a USFI or an FFI) should not be effective unless agreed to by the withholding agent and memorialized in an agreement providing the terms and conditions under which the Participating FFI's withholding burden has been shifted to the withholding agent.

Complying with the FATCA withholding requirements (including determining whether a payment is a withholdable or pass thru payment and the amount subject to withholding) is a substantial burden. Therefore, the shifting of that burden should only occur if the upstream withholding agent agrees to accept this responsibility and then only on the terms that the parties mutually agree. In particular, these terms should include, as a condition to the withholding agent's undertaking the FFI's withholding responsibility, that the FFI must provide the necessary customer and payment information to the withholding agent.

Section 3.05(C) of the qualified intermediary ("QI") agreement fully supports this position. There, a QI is not relieved of its primary backup withholding and Form 1099 reporting responsibilities on payments of designated broker proceeds unless "the other payor agrees to do the reporting and backup withholding and the QI provides all the information necessary for the other payor to properly [report and backup withhold]." Likewise, a Participating FFI should not be able to unilaterally shift its FATCA withholding responsibilities to its upstream withholding agent without that withholding agent's acquiescence and without the participating FFI providing all the requisite information to that withholding agent so that it can adequately carry out that responsibility.

F. OVERLAP OF FATCA AND OTHER RULES

1. *Overlap of other preexisting reporting and withholding rules with FATCA's rules*

If there are two overlapping withholding obligations, FATCA rules should control, as provided for in the legislation.

We believe that Guidance should clarify the order in which a U.S. payor should apply the FATCA regime and the Code *Sections 1441*/1442 withholding regime. While we believe that most practitioners have assumed that a USFI should apply the FATCA rules before applying the rules for *Sections 1441*/1442 withholding, we think the Guidance should make this explicit and should include illustrative examples.

With respect to the possible overlap of FATCA reporting and other reporting rules, we agree with the suggestions that have been made by others that overlapping reporting should be eliminated. We believe that a study should be made of the existing reporting rules with a goal of rationalizing them and eliminating those that are duplicative.

Thank you for considering and giving us the opportunity to share our views. We would be happy to discuss our suggestions further at your convenience. If you have any questions or need further information, please contact me at 212.613.9883 (email: david.wagner@theclearinghouse.org).

Sincerely,

David Wagner
Senior Vice President,
Financial and Tax Affairs
The Clearing House Association,
L.L.C.
New York, NY

cc:
The Honorable Michael Mundaca
Assistant Secretary (Tax Policy)
Department of the Treasury

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service

The Honorable William Wilkins
Chief Counsel
Internal Revenue Service

Heather Maloy
Commissioner, Large and Mid-Sized Business
Internal Revenue Service

Michael Plowgian
Attorney Advisor, Office of the International Tax Counsel
Department of the Treasury

Jesse Eggert
Attorney Advisor, Office of the International Tax Counsel
Department of the Treasury

Carl Cooper
Senior Counsel, Office of the Associate Chief Counsel
(International)
Internal Revenue Service

John Sweeney
Attorney, Office of the Associate Chief Counsel (International)
Internal Revenue Service

FOOTNOTES:

n1

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n2

Defined terms not otherwise defined herein shall have the meanings ascribed to them in the Notice.

n3

Notice Section V.G. (p. 60).

n4

Code *Section 1471(d)(7)*.

n5

See Notice Section III.B.2.a.3 ("if the electronically searchable information maintained by the FFI and associated with the account (*e.g.*, customer information kept for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements)") and Sections III.B.3.a.2 and 3.

n6

The decision whether to rely on the payee's self-certification or, alternatively, to pursue verification of a payee's status with the IRS, should be within the discretion of the withholding agent.

n7

The 10% threshold is lowered to 0% for FFIs that are described in Code *Section 1471(d)(5)(C)* or that are grantor trusts.

n8

See Notice Sections III.B.3 (p. 39) and III.C.1 (p. 45).

n9

Notice Section II (p. 4).

n10

Notice Section II.B.3 (p. 12).

n11

Notice Section II.B.3 (p. 12-13).

n12

We suggest that this new Form W-8BEN for individuals be revised to address an issue that presents difficulties for qualified intermediaries and USFIs (in particular certain foreign branches and subsidiaries of U.S. financial institutions) under the current Code *Sections 1441*/1442 withholding regime and will present difficulties for withholding agents (USFIs and FFIs) under FATCA. The issue arises with respect to individual customers (particularly elderly individuals) whose "know your customer" documentation indicates that they were born in the U.S. but who claim not to be U.S. citizens or residents, either because they have formally renounced their U.S. citizenship (but do not have documentation to support this either because it was not required at the time of their renunciation or because it was lost) or because they do not consider themselves U.S. citizens (or treat themselves as having renounced their U.S. citizenship) because they have had no contact with the U.S. since birth. We respectfully request that both under FATCA and the existing rules for Code *Sections 1441*/1442 withholding, the IRS and Treasury create workable presumptions which would initially classify such persons as nonresident aliens. Specifically, the form could allow such individuals to identify themselves as having been born in the U.S. but claiming not to be U.S. citizens or residents. Pursuant to the presumption rule, the withholding agent would be permitted to treat the payee as a nonresident alien, provided that the withholding agent provides this information to the IRS for verification and a final determination. In addition, a Form W-8BEN revised as described above should relieve an FFI of the need to obtain additional documentary evidence when electronic searchable files reveal U.S. indicia in the form of a U.S. place of birth.