

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
HUNTON & WILLIAMS LLP]

June 7, 2011

Internal Revenue Service
CC:PA:LPD:PR (NOT-121556-10)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: *Notice 2011-34* ~ Supplemental Notice to *Notice 2010-60* Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of the Code

Dear Ladies and Gentlemen:

Pursuant to *Notice 2011-34*, *2011-19 I.R.B. 1* (the "Notice"), the undersigned hereby provides comments on the appropriate treatment under Chapter 4 of Subtitle A ("Chapter 4") of the Internal Revenue Code of 1986 (the "Code") of non-profit international organizations whose members are exclusively sovereign nations and whose operations are solely for non-profit purposes. n1 This letter supports the positions expressed by the New York State Bar Association, in its submitted comments on *Notice 2010-60*, dated November 16, 2010, that international non-profit organizations should be wholly exempt from any U.S. withholding tax exposure and from full compliance with information reporting requirements (other than documentation requirements set forth below) under Chapter 4 of the Code.

The undersigned represents a large multilateral development fund (the "Development Organization") that was established by an agreement amongst its members, each of which is a sovereign nation. The exclusive objective of the Development Organization, based upon its establishing agreement and other organizational documents, is to "reinforce financial cooperation" between its member nations, on one hand, and "developing countries," on the other hand. That cooperation is encouraged through financial support from the Development Organization to such developing countries.

The Development Organization has international legal personality endowed by its member sovereign nations by agreement among them that requires the Development Organization to operate solely for its purpose described above. The government of each member sovereign nation appoints a director to the board that manages and controls the Development Organization, and, in accordance with its organizational documents, the Development Organization acts on behalf of all of its member sovereign nations; consequently, the Development Organization functions as an agency, or instrumentality, of the governments of its member sovereign nations. The Development Organization believes that its operating purpose meets the requirements for a tax-exempt social welfare organization set forth within *section 501(c) of the Code*. Furthermore, the Development Organization has no owners or investors; its only members are sovereign nations. The Development Organization's sole sources of funding for pursuit of its express purpose set forth above are member contributions and any profits earned from its invest-

ments or other financial activities in pursuit of its purpose. The Development Organization does not accept deposits of any kind and does not maintain any financial assets for the account of any other persons. Thus, the Development Organization makes no passthru payments, or payments that could be construed as passthru payments, as such term is defined in *section 1471(d)(7)*.

We support the New York State Bar Association comments that foreign charitable organizations and foreign non-profit, governmental or quasi-governmental organizations should be exempt from the withholding rules of *sections 1471 and 1472*. We urge that the documentation requirements that you promulgate for an exemption from *sections 1471 and 1472* include, but not be limited to, the current documentation requirements promulgated for international tax-exempt organizations in *Treasury Regulation section 1.1441-9(b)* (simple requirement that the organization be described in *section 501(c)*).

The basis for such exemption should, in the first instance, be that organizations such as the Development Organization are exempt as agencies or instrumentalities of the governments of their member nations. ⁿ² *Sections 1471(f)(1) and 3472(c)(1)(D) of the Code* both exempt from their application a foreign government and a “wholly owned agency or instrumentality” of a foreign government. Multilateral organizations such as the Development Organization, which are exclusively managed and controlled by foreign governments and act on their behalf, should qualify for these exemptions as agencies or instrumentalities of more than one foreign government.

Alternatively, organizations described in *section 501(c) of the Code*, such as the Development Organization, should be exempt from *sections 1471 and 1472*. That exemption is consistent with the fact that such organizations currently are exempt under *section 1441*.

Finally, whether or not the agency or instrumentality test is met or the non-profit test of *section 501(c)* is met, an international organization should be treated as a “deemed complaint FFI” as long as it establishes to the satisfaction of the IRS that it (a) takes no deposits, (b) maintains no financial assets for the account of any third party, (c) is required by its charter documents to operate in accordance with its stated non-profit objective and (d) its sole members are sovereign nations, each of whom are excepted NFFE’s under *section 1472(c)*. Even though the financial activity of the organization might cause it be treated as an FFI, the fact that its sole members are sovereign nations and the fact that it must act only in accordance with its organizing objective should mean that it can and will be treated as a deemed complaint FFI as long as it documents its organizational structure and operating objectives to the satisfaction of the IRS. As the New York State Bar Association comments suggest, that documentation can be achieved by either (1) submitting the organizational documents of the organization to the IRS or (2) securing a letter, from an appropriate governmental agency of the country where the organization operates, affirming the existence and operational attributes of the organization.

In the case of the Development Organization, deemed complaint FFI status can be established by either of the foregoing methods. The purpose of Chapter 4 of the Code is to disclose to the US government potential taxable income of US taxpayers. It is clear that the purpose of Chapter 4 of the Code is fully served by treating the Development Organization as a deemed compliant FFI because of the following facts: (a) the Development Organization takes no deposits from anyone, (b) the Development Organization maintains no financial assets for others, (c) under its charter, the Development Organization

must operate in accordance with its governmental objective set forth above and (d) the Development Organization has only sovereign governments as its members.

In summary, we endorse the position expressed by the New York State Bar Association comments regarding foreign charitable or non-profit organizations. But we encourage Treasury and the IRS to be express in adopting a position that the eligibility of a foreign entity to meet the deemed compliant FFI test set forth in those comments, and described above, should not be exclusively dependent upon an organization's being described within one of the categories set forth in *section 501(c) of the Code*, Rather, that test should also permit an organization to be wholly-exempt under *sections 1471(f)(1) and 1472(c)(1)(D)* or achieve deemed compliant status, in either case, by meeting those factors listed here: (a) absence of any deposits to the organization from third parties, (b) absence of any financial assets maintained by the organization for the account of any other person, (c) organizational documents requiring organization operations in accordance with a legitimate, multi-lateral shared objective of its members and (d) sole and exclusive members who are sovereign nations which are excepted NFFE's described in *section 1472(c)*.

We would be pleased to have further discussions regarding this comment letter with appropriate personnel if that would be helpful.

Sincerely yours,

B. Cary Tolley, III
Hunton & Williams LLP
Miami, FL

cc:
Thomas A. Rice

FOOTNOTES:

n1

Except as otherwise noted, all section references in this letter are to Code *sections 1471-1474* which comprise Chapter 4 of Subtitle A, of the Code.

n2

Chapter 4 also exempts from its rules "international organizations." Such an organization is defined in *section 7701(a)(18)* and only includes an organization specifically defined as an international organization under the International Organizations Immunities Act (*22 U.S.C. 288-288f*); many international organizations will not meet that narrow definition.