

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
STATE STREET BANK AND TRUST COMPANY]

October 28, 2010

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

RE: State Street Comments on *IRS Notice 2010-60*

Ladies and Gentlemen:

State Street Bank and Trust Company (State Street) welcomes the opportunity to submit comments pursuant to *IRS Notice 2010-60*, regarding the Foreign Account Tax Compliance Act (FATCA) chapter 4 tax processing provisions of the Hiring Incentives to Restore Employment Act of 2010. Headquartered in Boston, Massachusetts, State Street specializes in providing institutional investors with investment servicing, investment management and investment research and trading. With \$20.23 trillion in assets under custody and administration and \$1.90 trillion in assets under management at September 30, 2010, State Street operates in 25 countries and more than 100 geographic markets worldwide. FATCA will affect many areas of State Street as well as many of our customers around the world.

Although State Street supports the tax compliance objectives of FATCA's chapter 4 text, we wish to note several issues the Treasury and IRS should consider as the regulatory process moves forward. The following list is not exhaustive, but represents the issues of greatest concern to State Street from its perspective as a provider of financial services to institutional investors:

The need for prompt guidance

1. Treasury and IRS deserve credit for issuing *Notice 2010-60* (the Notice) relatively quickly after enactment of the HIRE Act, and for meeting with industry groups to develop a base of knowledge about FATCA's possible effects on financial institutions and transactions. FATCA will call for extensive changes in operations among payors and investors worldwide, and planning for most of those changes cannot begin in earnest without detailed guidance. For example, if Treasury and IRS take until late spring 2011 to issue detailed proposed guidance, time would be very short for all the tasks necessary to meet the statutory January 1, 2013 start date. We ask that you consider releasing portions of guidance, forms and draft agreements as you develop them.

Subjects for United States Financial Institutions and Participating Foreign Financial Institutions

2. The Notice distinguishes new accounts from existing accounts. At least among institutional investors, it is quite common for an existing client to maintain multiple accounts at a custodian to address separate investment strategies, while the client maintains other accounts at the custodian's securities lending area and capital markets area. An additional account for that investor is associated with the existing tax documentation and account profile (including know your customer data), and nothing would be added by a new start-to-finish review of the investor's documentation. We ask that that the definition of existing account include additional accounts for an existing client.

3. The Notice provides transition rules for existing accounts at a US financial institution (USFI) and participating foreign financial institution (pFFI). As to the review of non-electronic data, we ask for clarity on the period of time that must be considered. For example, must archived materials be reviewed, and for what past periods? Perhaps the period would be related to the frequency of review for changed client information addressed in #5 below. In any event, the withholding agents will need a statute of repose.

4. USFIs and other withholding agents (such as pFFIs) will need administrative guidance on the standards to review a client's self-certification of FFI status. In the event the IRS expects a withholding agent to validate the FFI claim, we ask that the IRS consider an online (searchable) document similar to the existing TIN Matching system available from the IRS e-services system, or Publication 78.

5. The Notice calls on a USFI to use all information collected by it to validate documentation provided by a non-US investor. Please consider whether the USFI must review changes in its information over time, and what frequency of review would be needed. A USFI will need time to review changes in information and feed that information into its tax system, query the client, and possibly make other changes to tax processing.

6. The likely overhaul of the current Form W-8 series is an opportunity to eliminate gaps and uncertainties. As just a single example, the financial services industry has asked for several years for guidance on the "capacity" portion of the Form W-8BEN. A new Form W-8BEN and instructions are an opportunity to address the need for stated capacity and, if needed, the acceptable capacities at non-US entities. Treasury and IRS can eliminate this issue and many other lingering chapter 3 documentation uncertainties while preparing for chapter 4.

7. We suggest that Treasury and IRS import as much of the current chapter 3 regime as possible into the new chapter 4 regime. Withholding agents and their advisors have a decade of experience under the chapter 3 requirements, and starting from scratch is warranted only if specifically needed. The existing settled processes range from procedural matters (such as the ability to relate back a Form W-8 to document an account, and the ability of a withholding agent to rely on a client's documentation and representations until informed otherwise or until it has actual contrary knowledge) to the tax deposit and information reporting mechanisms.

8. The Notice at page 18 states that controlled foreign corporations (CFCs) are not deemed compliant under chapter 4. The Notice also notes that CFCs already are subject to Form 1099 reporting requirements. We ask that Treasury and IRS rationalize the rules so CFCs will follow FATCA, and not chapters 3 and 61. This will provide clarity, and will tend to minimize the current anti-competitive effect of CFC tax processing obligations compared with the absence of similar obligations at their non-CFC competitors.

9. The Notice at page 60 asks for comments on arm's-length payments by US withholding agents other than USFIs. Further guidance should exempt typical accounts payable payments from the definition of "withholdable payments" and chapter 4 processing. Providers of goods and services, and landlords providing real estate, are almost always in active businesses and present a low hazard of US tax avoidance. We suggest that this exemption should be equally available to all withholding agents, including USFIs and pFFIs, as the low risks to the fisc are equal across all withholding agents.

10. Further guidance should exempt payments to related parties from the definition of "withholdable payments" and chapter 4 processing. These payments are already subject to information reporting on Forms 5471 and 5472.

11. The Notice at page 15 notes that Code *section 1471* processing will not apply to certain retirement plans, but the Notice goes on to narrowly define those plans. We request that the Treasury and IRS expand the scope of exempted retirement plans to include:

- multi-employer plans,
- multi-market plans,
- pooled accounts and other pooling vehicles in support of retirement plans,
- plans that allow US participants employed outside the US, and
- plans that allow US persons as secondary participants.

As in the US, multi-employer plans are common. Some large businesses sponsor plans that cover employees in more than a single jurisdiction. As to US persons, expatriate US employees are common, locally resident US persons are common, and US spouses and other US persons inheriting plan accounts occur with regularity. In all of these instances, the expanded definition of exempted retirement plan would not increase the hazards of tax avoidance.

The Treasury and IRS should consider adopting the pension plan definition from the 2006 US Model Tax Convention on Income and its accompanying Technical Explanation for use in defining "retirement plans" under chapter 4.

Subjects for Participating Foreign Financial Institutions

12. The Notice at page 57 clarifies that guidance will not exempt collective investment vehicles (CIVs) from chapter 4 processing due to their status as CIVs ~ as UCITs funds for example. Consistent with the *Notice at page 58*, we request the Treasury and IRS thoughtfully consider broad exemption for CIVs by behavior ~ preventing US unitholders, reviewing transfer agent data to find and redeem any US unitholders, etc. Thousands of CIVs pose a very low risk of facilitating US tax avoidance, and withholding agents and CIVs have a great interest in administrable solutions to chapter 4's application to CIVs.

13. Code *section 1471(c)(1)* provides for a newly-created reporting regime for US accounts at pFFIs, and the *Notice at page 49* asks for comments on how to implement the reporting regime. The reporting system will be time-consuming and expensive to create and review within pFFIs, and we request the Treasury and IRS consider practical reporting in lieu of optimal reporting. For example, if the goal is to identify US persons with pFFI accounts and report some information about those accounts, the pFFIs should have some flexibility in choosing currency conversion conventions, as conversion methodologies would not often change the usefulness of the data. Further, the account values should be taken "as is" without the need to adjust for original issue discount or other amounts that may not be shown on the customers' account statements.

14. PFFIs may have recalcitrant account holders due to minor operational errors, client conversions, and business acquisitions. The Notice at page 56 notes that Treasury and IRS are considering terminating FFI agreements if a persistent number of recalcitrant account holders exist. We request that further guidance introduce a facts and circumstances test, and avoid a bright line test, for this issue. An analogous issue exists with B Notice processing under chapter 61, where some payors have a chronic number of B Notices due to business complexities and in spite of good procedures and diligence in eliminating name/TIN mismatches. Similar business complexities arise at Qualified Intermediaries (QIs). It is not possible to provide a numerical cap or presumed errors, other than at an ineffectively high level.

15. We request that further guidance confirm that pFFIs and other withholding agents under chapter 4 can engage vendors such as administrators, custodians and professional firms to undertake the US tax processing work for the withholding agents. Outsourcing should lead to efficiencies and would not create any hazards to the fisc.

16. Passthru payments defined by Code *section 1471(d)(7)* are dauntingly complex to address through tiers of intermediaries. The OECD Collective Investment Vehicles project (with 2009 Reports available at [http://www.oecd.org/document/12/0.3343.en_2649_33747_39251660_1_1_1_1.00.html](http://www.oecd.org/document/12/0,3343,en_2649_33747_39251660_1_1_1_1.00.html)) highlighted many of the challenges in addressing tax matters flowing through CIVs. Although the *Notice at page 54* asks for comments on how a pFFI could apply chapter 4 to passthru payments, the subject needs much more of an interactive discussion. We request the Treasury and IRS begin that discussion with an initial description of their thoughts on how passthru payments could be taxed under chapter 4 in the CIV context.

I would be happy to discuss these issues with you in more detail. Please feel free to contact me.

Best regards,

Robert J. Foley
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