

**COMMENTS**

of

**TAX EXECUTIVES INSTITUTE, INC.**

on

*Notice 2010-60*

relating to  
**The Foreign Account  
Tax Compliance Act (FATCA)**

**NOT-121556-10**

submitted to

**The Internal Revenue Service**

**October 19, 2010**

On March 18, 2010, the Hiring Incentives to Restore Employment (HIRE) Act of 2010<sup>n1</sup> was enacted. Subtitle A of Title V of the HIRE Act includes several provisions relating to foreign bank accounts, account holders, and cross border transactions, referred to as the Foreign Account Tax Compliance Act (FATCA).<sup>n2</sup>

*Section 501* of Part I of Subtitle A added Chapter 4 to the Internal Revenue Code of 1986; that Chapter, entitled *Taxes to Enforce Reporting on Certain Foreign Accounts*, sets forth four new sections to the Code:

- *Section 1471*, Withholdable payments to foreign financial institutions;
- *Section 1472*, Withholdable payments to other foreign entities;
- *Section 1473*, Definitions; and
- *Section 1474*, Special rules.

FATCA was enacted in response to the contention that U.S. persons were escaping tax on their worldwide income through the use of unreported offshore accounts and structures.<sup>n3</sup> The goal of FATCA is to require non-U.S. financial institutions to provide the Internal Revenue Service with information on U.S. persons that invest in accounts outside the United States and for non-U.S. entities to provide information about U.S. owners to the withholding agents. Chapter 4 imposes a withholding tax requirement if due diligence and reporting requirements are not met in respect of specified foreign accounts owned by certain U.S. persons or by U.S.-owned foreign entities. In effect, the withholding requirement

is the consequence of not providing information relating to U.S. holders of foreign accounts and assets. The provisions are generally effective for payments made after December 31, 2012.

In *Notice 2010-60*, the U.S. Department of the Treasury and IRS provided preliminary guidance regarding priority issues involving the implementation of the new law and requested comments on that guidance and other issues that should be given priority. TEI is pleased to respond to their request for comments.

## I. BACKGROUND

Tax Executives Institute is the preeminent association of business tax executives worldwide. Our nearly 7,000 members represent 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to developing and effectively implementing sound tax policy, to promoting the uniform and equitable enforcement of the tax laws, and to reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike. As a professional association, TEI is firmly committed to maintaining a tax system that works -- one that is administrable and with which taxpayers can comply in a cost-efficient manner.

TEI members are responsible for managing the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises. We believe that the diversity and professional training of our members enable us to bring a balanced and practical perspective to the issues raised by FATCA's implementation.

## II. DEFINITIONS AND EXCEPTIONS TO FATCA

FATCA establishes rules for payments to foreign financial institutions and other foreign entities, and imposes a 30-percent withholding tax on the gross amount of a "withholdable payment" made to a (i) "foreign financial institution" (FFI) if the institution does not meet certain requirements (*section 1471(a)*); or (ii) "non-financial foreign entity" (NFFE) if the beneficial owner of such payment is an NFFE that does not meet certain requirements (*section 1472(a)*). *Section 1471(b)* provides that an FFI must enter into an agreement (FFI agreement) with the Secretary of the Treasury and, among other items, agree to annually report extensive information about each financial account held by a U.S. person or a U.S.-owned foreign entity. The definitions of FFI and "financial institution" under *section 1471(d)* are very broad:

\* \* \*

(4) **Foreign Financial Institution.** The term "foreign financial institution" means any financial institution which is a foreign entity. . . .

(5) **Financial Institution.** Except as otherwise provided by the Secretary, the term "financial institution" means any entity that --

(A) accepts deposits in the ordinary course of a banking

or similar business;

(B) as a substantial portion of its business, holds financial assets for the accounts of others; or

(C) is engaged . . . primarily in the business of investing, reinvesting, or trading in securities . . . , partnership interests, or commodities . . . or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

These definitions may require tens of thousands of entities to enter into FFI agreements with the IRS, especially under the third prong of the definition. n5 We commend the government for recognizing in *Notice 2010-60* that certain classes of entities should be excluded from the definition of "financial institution" under FATCA to limit the burdens imposed on compliant taxpayers.

Under *section 1472*, NFFEs may also be subject to FATCA. Payments to an NFFE are subject to the 30-percent withholding tax if (i) the beneficial owner of such payment is such an entity or any other non-financial foreign entity; and (ii) certain requirements are not met with respect to the beneficial owner. *Section 1472(d)* defines an NFFE as "any foreign entity which is not a financial institution (as defined in *section 1471(d)(5)*)." *Section 1472(b)* provides that withholding is not required with respect to the beneficial owner of a payment if (i) the beneficial owner or the payee provides the withholding agent with either (a) a certification that the owner does not have any substantial U.S. owners, or (b) the name, address, and tax identification number (TIN) of each substantial U.S. owner of the beneficial owner; (ii) the withholding agent does not know, or have reason to know, that any information provided is incorrect; and (iii) the withholding agent reports the information to the Secretary.

*Sections 1471(f)(4)* and *1472(c)(2)* provide exceptions to the 30-percent withholding tax for any class of persons or any payments identified by the Secretary as "posing a low risk of tax evasion." The Technical Explanation of the HIRE Act, prepared by the Joint Committee on Taxation, states:

Additionally, the Secretary may provide exceptions for certain classes of institutions. Such exceptions may include entities such as certain holding companies, research and development subsidiaries, or financing subsidiaries within an affiliated group of non-financial operating companies. It is anticipated that the Secretary may prescribe special rules addressing the circumstances in which certain categories of companies, such as certain insurance companies, are financial institutions, or the circumstances in which certain contracts or policies, for example annuity contracts or cash value life insurance contracts, are financial accounts or United States accounts for these purposes. n6

TEI recommends that the Treasury Department fully exercise the authority granted to provide exceptions to FATCA's withholding rules, and thus we are pleased that the government intends to issue

guidance exempting certain classes of entities from withholding under *sections 1471* and *1472*. These entities include certain holding companies, start-up companies, non-financial entities that are liquidating or emerging from reorganization or bankruptcy, and hedging/financial centers of a non-financial group, as well as most property and casualty insurance companies or reinsurance or term-life insurance contracts. The Treasury and IRS requested comments on how these classes may be more specifically defined, what mechanisms withholding agents can use to identify such entities (including self-certification), and whether other classes of entities should be similarly excluded. n7

A. *Exception for Financing Affiliates*. Notice 2010-60 provides that a foreign entity primarily engaged in financing and hedging transactions with or for members of its expanded affiliated group (EAG) (as defined in *section 1471(e)(2)*) that are not FFIs and do not provide such services to non-affiliates "may be excluded from the definition of financial institution, provided that the expanded affiliated group is primarily engaged in a non-FI business." n8 TEI agrees that such an exclusion is appropriate.

To meet the definition of a hedging/financing center of a non-financial group, TEI recommends that the financing affiliate be primarily engaged in one or more of the following activities with or for members of its EAG, so long as the EAG is primarily engaged in a non-FI business and the financing affiliate does not provide such services to non-affiliates:

- (i) Borrowing money from, lending money to, or purchasing securities from, EAG members,
- (ii) Raising funds from related or unrelated parties and transferring funds to EAG members, or
- (iii) Providing hedging functions (including foreign exchange, raw material, and other business risks, regardless whether a hedge is designated a hedge for tax purposes), cash management activities (including long- and short-term credit or credit and collections), or other Treasury functions to EAG members. n9

We also suggest that self-certification of eligibility is appropriate either by the financing affiliate or its ultimate parent.

B. *Exception for Holding Companies*. The Notice states that the definition of "financial institution" will exclude a foreign entity the primary purpose of which is to act as a holding company for a subsidiary or group of subsidiaries that primarily engages in a trade or business other than that of a "financial institution," as defined under *section 1471(d)(5)* (an FI business). n10 TEI agrees that holding companies whose only activity is investing in companies that are not financial institutions should be exempted from FATCA.

We remain concerned, however, because the term "financial institutions" will still include any entity functioning as an investment fund, including "any investment vehicle whose purpose is to acquire or fund the start-up of companies and then hold those companies for investment purposes for a limited period of time." n11 This language will unnecessarily subject numerous foreign non-financial institution holding companies to withholding under FATCA. For example, consider a private foreign corpo-

ration owned 51 percent by a private equity investor, 45 percent by a large publicly traded corporation, and 4 percent by management; the company's sole purpose is to hold operating companies that provide insurance consulting services. While the statute could be interpreted to treat such an entity as an FFI because its sole purpose is to "acquire or fund the start-up companies for a limited time," such a result would be overkill because such an entity bears little resemblance to an FFI and, indeed, operates in a manner identical to the other holding companies to which an exemption expressly applies. We believe the exemption for holding companies should include any foreign holding company of operating companies outside the banking/financial institution field.

*C. Exception for Certain Retirement Plans.* Section 1471(f) authorizes the Secretary to exempt from withholding any payment to the extent that the payment's beneficial owner is part of a class of persons identified by the Secretary "as posing a low risk of tax evasion." Noting that a retirement plan may qualify as a financial institution under section 1471(d)(5), the Treasury and the IRS have announced an intent to exempt certain foreign retirement plans from withholding under section 1471(a). For this purpose, the foreign retirement plan must --

- (i) qualify as a retirement plan under the law of the country in which it is established,
- (ii) be sponsored by a foreign employer, and
- (iii) not allow U.S. participants or beneficiaries other than employees that worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued. n12

Comments were requested on this exception.

TEI recommends that the definition of a retirement or benefit plan or other deferred compensation plan in paragraph (iii) be expanded to include U.S. participants and their beneficiaries so long as the participant does not render services for the foreign employer in the United States. Frequently, employers may operate in more than one country or send their employees to work in other countries, or the employees may occasionally travel to other countries to provide services. These types of activities do not pose a high risk of U.S. tax evasion.

Moreover, TEI recommends that a retirement plan eligible for the benefits of an income tax treaty with the United States -- whereby U.S.-source interest and dividends received by the plan are not subject to U.S. tax -- should be exempt from withholding under section 1472.

In respect of certification, TEI recommends that a benefit plan certify through an expanded Form W-8BEN (*Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*) that (i) it is a benefit plan under the laws of the country in which it is established; (ii) the plan is sponsored by a non-U.S. employer; and (iii) the services provided by its employees for purposes of benefits in the plan are rendered outside the United States.

### III. WITHHOLDABLE PAYMENTS

Withholdable payments are defined by *section 1473(1)(A)* as --

(i) any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States, and

(ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.

The Technical Explanation states:

Additionally, the Secretary may identify classes of institutions that are deemed to meet the requirements of this provision *if such institutions are subject to similar due diligence and reporting requirements under other provisions in the Code.* n13

In accordance with this statement, TEI recommends the following exceptions be made.

A. *Exception for Related Party Payments.* Sections 6038 and 6038A require information reporting with respect to foreign-related parties. Under pre-FATCA law, the IRS developed specific forms to facilitate information reporting requirements for foreign subsidiaries and other foreign affiliates: Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, which must be filed for each controlled foreign corporation (CFC) of a U.S. shareholder, and Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*, which must be filed for foreign affiliates of foreign-owned U.S. corporations. These forms require, among other items, information related to the foreign entity's ownership, and a report of all transactions between the U.S. and foreign corporations in the controlled group. The information reported is the same information reported under *section 1471* because it includes amounts borrowed from such foreign corporations as well as interest paid with respect to such borrowings. There are significant penalties for failing to report these payments (\$ 10,000 for each taxable year with respect to which such failure occurs), and the statute of limitations may be suspended.

*Sections 1472(c)(1)(A)* and (B) provide exceptions for payments made to NFFEs that are publicly held corporations and their affiliates. n14 *Sections 1473(3)(A)* and (B) provide an exception for payments made to FFIs with respect to publicly held account holders. To provide relief for those companies that are not publicly traded, TEI recommends that an exception from *sections 1471* and *1472* be added for payments made to related entities that are reported on Forms 5471 and 5472.

B. *Exception for Payments Made in the Ordinary Course of Business.* The Technical Explanation states:

It is anticipated that the Secretary may exclude certain payments made for goods, services, or the use of property if the payment is made pursuant to an arm's length transaction in the ordinary course of the payor's trade or business. n15

In today's global economy, U.S. businesses make numerous payments to unrelated foreign companies of amounts described in *section 1473(1)(A)*. For example, a technology company may license know-how from an unrelated foreign licensor to use in the technology company's trade or business. Furthermore, almost all withholdable payments subject to *sections 1471* and *1472* must already be reported under *section 1441*. The only items not covered by *section 1441* are original issue discount and any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States. TEI recommends that exceptions from *section 1472* be provided for payments of rents, salaries, wages, premiums, annuities, compensation, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payments are from sources within the United States and are made in the ordinary course of the payor's trade or business. Because such payments are already reported under *section 1441* and pose a low risk of tax evasion, they should be excluded from reporting under *section 1472*.

The Notice states that the IRS may exempt certain classes of payments made by U.S. financial institutions (USFIs) to NFFEs. n16 TEI supports this exemption and recommends that it also include payments made by all U.S. payors (and not just USFIs) for withholdable payments made to NFFEs in the ordinary course of business.

The Notice also sets forth an exemption "with respect to certain classes of payments, such as arm's-length payments made for goods or services in the ordinary course of the withholding agent's trade or business." n17 A payment made for *goods* to an NFFE, however, does not fit within the definition of a withholdable payment under *section 1473(1)(A)*. TEI recommends that the word "goods" be stricken from Section G of the Notice.

According to the Notice, the IRS is considering an exception to *section 1472* for payments made by withholding agents (other than financial institutions) to NFFEs that are engaged in an active trade or business. n18 TEI agrees that such an exception is appropriate because there is a low risk of tax evasion associated with such payments. Requiring NFFEs to send certifications to all their customers, however, is impractical. For example, an NFFE engaged in the development and licensing of software may have thousands of customers in the United States. Rather than an NFFE's communicating its withholding status to all its U.S. customers, TEI recommends that the determination whether an NFFE is engaged in an active trade or business be based on a certification that the NFFE would provide to the IRS, which could publish a list of companies that have so certified.

1. *Exclusion of Non-Financial Foreign Corporations from Withholding Agent Definition.* *Section 1473(4)* defines withholding agent as all persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment. The definition is expansive and could be interpreted as including foreign persons, including NFFEs. Under *sections 1471* and *1472*, any U.S.-source payments made to FFIs and NFFEs would require an analysis to determine whether the recipient is an FFI or an NFFE. In the case of an FFI, the payor must determine whether the FFI has signed an agreement with the IRS. In the case of payments to NFFEs, the payor must determine whether there are substantial

U.S. owners or whether the payee meets the exceptions provided in *section 1472(c)(1)*. Although few U.S.-source payments would likely be made by a non-financial foreign corporation to an FFI or NFFE, the foreign corporation would have to implement controls to ensure that it could identify such payments and report them as required. In addition, payments made between foreign corporations and U.S. shareholders and their affiliates are required to be reported to the IRS under *sections 6038* and *6038A*. Therefore, any potential routing of U.S.-source payments to be received ultimately by a U.S. person through related foreign corporations is already required to be reported. U.S.-source payments made by foreign corporations to FFIs or NFFEs present a low risk of tax evasion because of the low number of such payments and the presence of an extant reporting mechanism. TEI therefore recommends that the definition of withholding agent for purposes of *sections 1471* and *1472* exclude non-financial foreign corporations.

2. *Payments Made By U.S. Payors.* Under current rules, foreign vendors that do not sell or provide goods or services in the United States are not subject to U.S. information reporting or withholding requirements, but often must provide detailed information to U.S. payors before receiving payment to document to the payor that the vendor is a foreign person and that the payment either is not U.S. source or is subject to a treaty. This may take the form of the payee completing a Form W-8 BEN (required if treaty-based withholding relief is requested) or supplying other documentation showing that the payee is a foreign person. The FATCA guidance should clarify that no additional reporting or withholding is required in these circumstances. For example, a U.S. payor paying for hotel stays in a foreign jurisdiction should not be subject to the FATCA reporting requirements in respect of the hotel.

3. *Credit Card Payments.* To avoid duplicative reporting, TEI recommends that the withholding agent for payments made via credit card should be the credit card company. This is consistent with reporting under *section 6041* because the regulations under *section 6050W* provide that payments made with credit cards are exempt from reporting under *section 6041*. Furthermore, an exclusion from the reporting rules for finance charges imposed on credit cards should be adopted because these payments pose a low risk of tax evasion.

C. *Public Companies.* Except as otherwise provided by the Secretary, *section 1472(c)(1)(A)* exempts public companies from the FATCA reporting requirements. It is unclear, however, how the exemption applies when the status of a company changes, for example, from public to private. The Notice does not address this issue.

To implement the reporting and withholding rules of *section 1472*, accounts payable departments will need to be notified. Just as in the case of information reporting under *section 6041*, an employee processing the payments must rely on information as of a given point in time. The guidance should address how the reporting requirements will apply when the public status of a company changes. TEI recommends permitting a payor to rely on a foreign payee's publicly held status at the beginning of a calendar year to determine whether reporting and withholding under *section 1472* applies.

D. *De Minimis Payments.* FATCA contains no exception for *de minimis* payments. TEI recommends that an exception be provided that mirrors the limitation set forth in *section 6041 of the Code*, which currently is \$ 600 in a calendar year. n19

E. *Clarification of Sourcing Rules.* *Section 1473(1)(A)* defines "withholdable payment" as "any payment . . . if such payment is *from sources within the United States*," and "any gross proceeds from the sale . . . of any

property . . . which can produce interest or dividends *from sources within the United States.*" *Section 1473(1)(B)* sets forth an exception to the definition of a withholdable payment for income connected with a U.S. business, providing that "[s]uch term shall not include any item of income which is taken into account under *section 871(b)(1)* or *882(a)(1)* for the taxable year." *Section 1473(1)(C)* sets forth a special rule for sourcing interest paid by foreign branches of domestic financial institutions, providing that "[s]ubparagraph (B) of *section 861(a)(1)* shall not apply."

Under *sections 861* and *862*, the source of interest income is generally determined by the residence of the debtor: Interest paid by residents of the United States constitutes U.S.-source income, while interest paid by foreign residents is foreign-source income. *Section 861(a)(1)(B)* treats interest on deposits with foreign branches of U.S. banks as foreign-source income. *Section 1473(1)(C)* therefore re-sources the interest on deposits with foreign branches of domestic banking institutions as U.S.-source income.

TEI suggests that the government clarify that the re-sourcing rule in *section 1473(1)(C)* is not intended to change the source rules to bring purely foreign-to-foreign payments under the definition of "withholdable payment." To illustrate this point, the following example should be added to the guidance:

Company A is a U.S. corporation involved in the manufacture of widgets. Company F is a CFC of Company A incorporated in France and is involved in the manufacture and sale of widgets in France. Bank B is a financial institution engaged in the banking business in France. Bank B makes a loan to Company F. The payment of interest on the loan by Company F to Bank B is not considered to be "*from sources within the United States*" under *section 1473* and is therefore not a "withholdable payment." Company F is therefore not required to perform any FATCA due diligence with respect to Bank B.

#### IV. REPORTING ISSUES

A. *Information Reporting for U.S. Branches.* *Section 1471(c)(2)* permits an FFI to elect to be subject to the same reporting as a USFI:

In the case of a foreign financial institution which elects the application of this paragraph --

(A) subparagraphs (C) and (D) of paragraph (1) shall not apply, and

(B) the agreement described in subsection (b) shall require such foreign financial institution to report such information with respect to each United States account maintained by such institution as such institution would be required to report under *sections 6041*, *6042*, *6045*, and *6049* if --

- (i) such institution were a United States person, and
- (ii) each holder of such account which is a specified United States person or United States owned foreign entity were a natural person and citizen of the United States.

Thus, an FFI making this election must still report the name, address, and TIN of each account holder that is a specified U.S. person, and, in the case of any account holder that is a U.S.-owned foreign entity, the name, address, and TIN of each substantial U.S. owner of the entity, as well as the relevant account numbers. An electing FFI will not, however, have to report the account balance, value, or gross receipts and gross withdrawals of payments.

In *Notice 2010-60*, Treasury and the IRS state their intent not to exempt an FFI from the requirement to enter into an FFI Agreement, even if the FFI receives withholdable payments solely through its U.S. branch:

Thus, where a U.S. branch of an FFI receives withholdable payments that are not eligible for the ECI exclusion, the FFI generally will be required to execute an FFI Agreement to avoid being subjected to withholding under *section 1471(a)*.

When a U.S. branch of an FFI receives a withholdable payment as an intermediary, however, Treasury and the IRS are considering permitting the U.S. branch to document its account holders for chapter 4 withholding purposes under the requirements to be imposed on USFIs. . . . *Treasury and the IRS anticipate that regulations will include rules coordinating the reporting required of FFIs with U.S. branches under chapter 4 with other U.S. tax reporting obligations, so as to avoid duplicative reporting with respect to accounts maintained by the U.S. branch of the FFI.* n20

U.S. branches of FFIs are U.S. withholding and reporting agents and subject to the requirements of Code sections 1441 (*Withholding tax on non-resident aliens*), 6041 (*Information at source*), 6042 (*Returns regarding payments of dividends and corporate earnings and profits*), 6045 (*Returns of brokers*), and 6049 (*Returns regarding payments of interest*). They are also subject to the audit process and penalty provisions. In other words, U.S. branches are treated identically to USFIs. But, even if the FFI were required to enter into an FFI agreement, its U.S. branches would also be required to report account balances, deposits, and withdrawals -- requirements not imposed on USFIs.

Requiring U.S. branches to enter into an FFI agreement would create a severe disadvantage for such branches vis-a-vis USFIs. U.S. branches would be required to create new systems to capture, track, and report the additional information, increasing both the costs and difficulties of doing business in the

United States. While electing to be treated as a U.S. payor under *sections 6041, 6042, 6045, and 6049* avoids the balance reporting, the scope of the reporting required is expanded far beyond that required by USFIs. Under current law, U.S. withholding agents are not required to report interest, dividends, or broker proceeds to U.S. or foreign corporations. Chapter 4 does not change this exception. Under *section 1471(c)(2)*, the election to be subject to the same reporting as a USFI requires the FFI to treat "each holder of such account which is a specified United States person or United States owned foreign entity [as if it] were a natural person and citizen of the United States." This would mean that a U.S. branch making the election would be required to perform full Form 1099 reporting on all U.S.-owned foreign entities while a USFI would not be required to do so. Thus, the reporting requirements for U.S. branches of FFIs would be significantly more costly than those for USFIs.

Because, like USFIs, U.S. branches are already U.S. withholding and reporting agents, TEI recommends that U.S. branches be permitted to make an election either on a separate form or as part of the FFI agreement to be treated in the same manner as a USFI for all chapter 4 reporting obligations.

*B. Use of Form W-8BEN.* To facilitate compliance with the obligations imposed by chapter 4, the Notice states that participating FFIs will be permitted to rely on Forms W-9 they collect for other U.S. tax purposes (*i.e.*, for purposes of chapters 3 and 61 of the Code), and will generally be required to treat accounts of individuals that are so documented as U.S. accounts for purposes of chapter 4. Participating FFIs will also be required under chapter 4 to collect Form W-8BEN or Form W-9 (or acceptable substitute forms) from certain account holders, but this requirement will be limited. n21 TEI recommends that these procedures be extended to NFFEs.

TEI agrees that, rather than creating a new reporting format, current information reporting rules should be used. The Form W-8BEN should be expanded to include the information required under both *sections 1471 and 1472*.

As noted above, foreign vendors that provide goods and services in locations outside the United States must provide detailed information to U.S. payors before receiving payment to document foreign status or to claim treaty benefits. Future guidance should clarify that no additional reporting is required in these circumstances. In addition, adding a box or series of boxes on Form W-8BEN to help payors determine whether a payment for goods or services is U.S. source would assist payors in determining their U.S. reporting or withholding obligations. Alternatively, the form could allow the payee to attach a statement that none of the goods or services is sold or provided in the United States.

Current rules for filing Form W-8BEN require that a payor obtain new documentation every three years if a U.S. taxpayer identification number (TIN) is not used and within 30 days of a change in circumstances. If a TIN is used, the documentation remains valid until there is a change in circumstances. A change in circumstances includes a change of address if treaty benefits are claimed. Although a provider's ultimate owners and the location where it provides goods or services may change over time, the *section 1472* guidance should not impose a requirement to obtain the required ownership information more frequently than is required under current law with respect to foreign status information.

*C. Electronic Receipt of Form W-8BEN.* Section 522 of the HIRE Act amends *section 6011(e)* to the Code to permit the Secretary to require electronic filing by financial institutions with respect to the tax for which such institutions are liable under chapters 3 and 4 of the Code, without regard to the general rule under *section 6011(e)(2)* that limits the authority of the Secretary to require electronic filing. According to the

Notice, Treasury and the IRS will issue regulations that would require all or most financial institutions to electronically file their returns with respect to these taxes. n22 TEI supports this requirement.

TEI recommends that electronic filing be extended to entities required to obtain Forms W-8BEN, *i.e.*, the requirement to obtain paper copies of the form should be eliminated. In today's global electronic environment, most businesses are required to file income tax returns and provide audit information to tax authorities in electronic format. Legal documents are executed electronically through facsimile signatures and most businesses store and process information electronically. It is impractical and costly to use the postal services in many countries to send Forms W-8BEN, which may take months to arrive. The government should therefore consider eliminating the paper copy requirement.

## V. TRANSITION RULES

FATCA is generally effective for payments made after December 31, 2012. The new law will require an unprecedented level of U.S. tax information gathering and reporting by foreign entities that have not traditionally engaged in such efforts. This will be particularly true for NFFEs. The ability of companies to successfully complete such efforts in a short time frame (or, indeed, at all) cannot be presumed. Time will also be needed to implement systems changes and to educate vendors on the new requirements.

NFFEs will need considerably more time than foreign financial institutions to make the necessary systems changes to comply with these new provisions and to train their employees to understand these complex rules. Such companies generally have little or no familiarity with this reporting environment. Therefore, implementing these new rules will be significantly more time-consuming for them than it will be for FFIs. For this reason, TEI recommends that the effective date of *section 1472* for payments by non-financial institutions to NFFEs be delayed until two years after FFIs must comply with these provisions.

## VI. CONCLUSION

Tax Executives Institute appreciates this opportunity to present its views on *Notice 2010-60* and the Foreign Account Tax Compliance Act. If you have any questions, please do not hesitate to call Mark C. Silbiger, chair of TEI's IRS Administrative Affairs Committee, at 440.347.5781, or [mark.silbiger@lubrizol.com](mailto:mark.silbiger@lubrizol.com); or Mary L. Fahey of the Institute's professional staff at 202.638.5601, or [mfahey@tei.org](mailto:mfahey@tei.org).

Respectfully submitted,

Tax Executives Institute, Inc.

By: Paul O'Connor  
TEI International President

## FOOTNOTES:

Pub. L. No. 111-147, 124 STAT. 71 (2010).

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In 2009, a predecessor to Subtitle A was drafted. This proposed legislation was later modified and subsequently incorporated into the HIRE Act. *See generally*, Tello, Carol, *Reporting, Withholding, and More Reporting: HIRE Act Reporting and Withholding Requirements*, 39 TAX MGM'T INT'L J. 243 (May 14, 2010).

n3

*See* 156 Cong. Rec. S1745 (Mar. 18, 2010).

n4

2010-37 I.R.B. 329 (Sept. 10, 2010).

n5

In contrast, there are only about 5,500 Qualified Intermediaries registered under Code *section 1441*. Staples, John, & Edward Tanenbaum, *Hot Topics in Withholding Tax and Reporting Rules: The FATCA Provisions of the HIRE Act*, ABA Section of Taxation, Slides 11 & 24 (May 2010). *See also* Bennett, Allison, *U.S. Institutions, Agents Affected by FATCA As Focus on Reporting Increases, E&Y Says*, BNA Int'l Tax Monitor (Sept. 22, 2010) (FATCA "dwarfs the qualified intermediary regime in the financial institutions it covers").

n6

Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate* (JCX-4-10), 44 (Feb. 23, 2010) (hereinafter cited as the "Technical Explanation"). Since the underlying statute expressly applies to *foreign* financial institutions, the reference to "affiliated group" in the Technical Explanation is presumably to the term "expanded affiliated group" as defined in *section 1471(e)(2)*; that provision states that the exclusion for foreign corporations in *section 1504(b)(3)* is to be disregarded.

n7

2010-37 I.R.B. at 331.

n8

*Id.*

n9

A decision to make an election under *section 1221(a)(7)* or 1256(e) is based on many practical considerations that do not affect whether the underlying instrument was executed to manage business risks. For example, for financial reporting purposes, hedges are generally marked to market. To avoid book-tax differences, a taxpayer may decide not to make an election under *section 1256(e)*.

n10

*2010-37 I.R.B. at 331.*

n11

*Id.*

n12

*2010-37 I.R.B. at 333.*

n13

Technical Explanation at 41 (emphasis added).

n14

The other exceptions specified in *section 1472(c)(1)* are: any entity organized under the laws of a possession of the United States wholly owned by one or more bona fide residents of such possession; any foreign government, political subdivision of a foreign government, or wholly owned agency or instrumentality of one or more of the foregoing; any international organization or wholly owned agency or instrumentality thereof; any foreign central bank of issue; or any other class of persons identified by the Secretary for purposes of this subsection.

n15

Technical Explanation at 46. Chapter 3 (Withholding of Tax on Non-Resident Aliens and Foreign Corporations) and chapter 61 (Information and Returns) will, however, continue to apply to foreign vendor payments.

n16

*2010-37 I.R.B. at 344* ("Treasury and the IRS contemplate permitting U.S. withholding agents other than USFIs to rely on a foreign entity's certification as to its classification for chapter 4 purposes, absent reason to know that such certification is unreliable or incorrect. These require-

ments would also apply with respect to withholdable payments made by FFIs and USFIs to NFFEs that are not holders of financial accounts maintained by the financial institution. Treasury and IRS request comments on the form of such certifications, their renewal provisions, and circumstances under which a withholding agent should not be required to solicit such certifications from certain classes of persons or with respect to certain classes of payments, such as arm's length payments made for goods or services in the ordinary course of the withholding agent's trade or business.").

n17

*Id.*

n18

*Id.* ("Treasury and the IRS also anticipate providing an exception in guidance to the withholding required under *section 1472* for payments made to an NFFE engaged in an active trade or business by withholding agents other than financial institutions. Comments are requested regarding the appropriateness of such an exception, how a withholding agent may determine whether an NFFE is engaged in an active trade or business, and other exceptions to withholding under *section 1472* that may be appropriate.").

n19

Pending legislation would raise the *de minimis* amount under *section 6041* to \$ 5,000. If the legislation passes, the amount here should be the same.

n20

*2010-37 I.R.B. at 333* (emphasis added).

n21

*2010-37 I.R.B. at 335.*

n22

*2010-37 I.R.B. at 344.*