NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

April 29, 2013

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Steven Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Report on the Definitions of "FFI," "Financial Account" and Related Terms in the Final FATCA Regulations

Dear Messrs. Mazur, Miller and Wilkins:

I am pleased to submit to you the enclosed New York State Bar Association Tax Section report addressing the definitions of "FFI," "financial account," and related terms in the final regulations under Sections 1471 through 1474 of the Internal Revenue Code (commonly referred to as "**FATCA**") issued on January 28, 2013 (the "**Final Regulations**").

The issuance of the Final Regulations represents an enormous achievement on the part of the Department of the Treasury ("**Treasury**") and the Internal Revenue Service (the "**IRS**") and we commend you and your staffs. We also commend you and your staffs on all of your other successes in connection with implementing FATCA, including finalizing numerous intergovernmental agreements with other countries to implement FATCA.

In deciding what to address in this Report, we focused on the fact that the preamble to the Final Regulations indicates that Treasury and the IRS expect to open, no later than July 15, 2013, an electronic portal through which foreign financial institutions ("**FFIs**") that decide to participate in the FATCA reporting regime can register as "participating FFIs". Understanding the definitions of "FFI" and "financial account" will be key to a foreign entity's decision as to whether to register, and to its understanding the scope of its responsibilities if it becomes a participating FFI. At present, the Final Regulations' definitions of these terms (and certain related terms) are unclear in important respects and, in a number of cases, will lead to results apparently not intended by Treasury or the IRS. We believe that, with modest changes, these provisions in the Final Regulations can better achieve their intended purposes. Our recommendations are, in many cases, in the nature of technical corrections which can be made without reconsidering the policies that appear to underlie the relevant provisions in the Final Regulations. Accordingly, we believe and hope that most of these recommendations could be implemented in the near term, prior to the opening of the electronic portal.

Our recommendations relating to the definition of FFI can be summarized as follows:

- The definition of "investment entity", which is one type of financial institution, should be clarified in several respects:

  (A) it should be clarified whether an investment advisor must have authority to make investment decisions on behalf of customers in order to be considered an "investment entity" under paragraph (A) of the definition; and, if such authority is not required, then the nature of the services that an entity must perform in order to qualify under paragraph (A) should be clarified;

  (B) it should be clarified whether all, or only some specified minimum portion, of an entity's financial assets must be managed in order for the entity to be treated as an investment entity under paragraph (B) of the definition. It also should be clarified that an entity will fall within paragraph (B) if multiple professional managers together manage the specified amount of the entity's assets; and

  (C) it should be clarified in paragraph (C) of the definition that in order for an entity to be an investment entity under that paragraph, the entity's gross income must be primarily attributable to investing, reinvesting or trading in financial assets, and equity interests in the entity must have been "held out" to investors .

- In the definition of "custodial institution," another type of financial institution, the application of the income test to fees for providing financial advice should be clarified.

- The provisions addressing when a holding company or treasury center in a corporate group will be considered a "financial institution" should be tailored and clarified, including revisions to clarify the rule for holding companies and treasury centers formed in connection with or availed of by an investment fund. In addition, the rule excluding holding companies, treasury centers and captive finance companies that are members of a "nonfinancial group" from the

definition of "financial institution" should be clarified to ensure it applies in the manner intended.

- The transitional relief provision treating certain securitization vehicles formed before 2012 as deemed-compliant FFIs until the end of 2016 should be revised so that it better achieves its intended goals.

Our recommendations relating to the definition of "financial account" and related terms can be summarized as follows:

- The rule that excludes debt or equity interests issued by an FFI from the definition of financial account if those particular debt or equity interests are publicly-traded should be clarified, because the rule relies upon a test (set out elsewhere in the Final Regulations) for determining when an entity as a whole is eligible for a publicly-traded exception.

- The rule that treats a non-publicly traded debt or equity interest in a bank, custodian or insurance company as a financial account only if the interest's value is determined primarily by reference to assets that give rise to withholdable payments (or if the interest is otherwise issued with a principal purpose of avoiding FATCA reporting or withholding), should be modified so that the rule applies even if he bank, custodian or insurance company is also an investment entity.

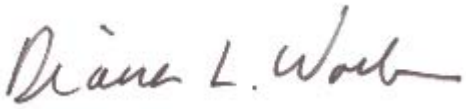
- The rules addressing when certain non-publicly traded debt or equity is treated as a financial account because its value is determined primarily by reference to assets that give rise to withholdable payments should be clarified.

- The rules determining when debt or equity issue by a holding company or treasury center is treated as a financial account should be clarified.

- The definitions of "U.S.-owned foreign entity," "owner," and "offshore obligation" should be clarified.

We very much appreciate your consideration of our recommendations and look forward to continuing to work with you.

Respectfully submitted,



Diana L. Wollman
Chair

Enclosure

cc: Ronald Dabrowski
Deputy Associate Chief Counsel (International)
Internal Revenue Service

Michael Danilack
Deputy Commissioner (International) LB&I
Internal Revenue Service

Jesse Eggert
Associate International Tax Counsel (Office of International Tax Counsel)
Department of the Treasury

Michael Hara
Attorney (Office of the Associate Chief Counsel (Administrative and Procedure))
Internal Revenue Service

Emily McMahon
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury

Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service

Danielle Nishida
Attorney Advisor (Office of the Associate Chief Counsel (International))
Internal Revenue Service

Danielle Rolfes
International Tax Counsel (Office of International Tax Counsel)
Department of the Treasury

Robert Stack
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

John Sweeney
Senior Technical Reviewer (Office of the Associate Chief Counsel (International))
Internal Revenue Service