



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

TAX SECTION

2013-2014 Executive Committee

DIANA L. WOLLMAN

Chair
Sullivan & Cromwell
125 Broad Street
New York, NY 10004-2498
212/558-4055

DAVID H. SCHNABEL

First Vice-Chair
212/909-6336

DAVID R. SICULAR

Second Vice-Chair
212/373-3082

STEPHEN B. LAND

Secretary
212/692-5991

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
Linda Z. Swartz

Compliance, Practice & Procedure

Elliot Pisem
Bryan C. Skarlatos

Complexity and Administrability

Edward E. Gonzalez
Joel Scharfstein

Consolidated Returns

Andrew H. Braiterman
Kathleen L. Ferrell

Corporations

Lawrence M. Garrett
Vadum Mahmoudov

Cross-Border Capital Markets

S. Douglas Borisky
Andrew Walker

Cross-Border M&A

Ansgar A. Simon
Yaron Z. Reich

Employee Benefits

Eric Hilfers
Andrew L. Oringer

Estates and Trusts

Alan S. Halperin
Laura M. Twomey

Financial Instruments

Michael S. Farber
William L. McRae

"Inbound" U.S. Activities of Foreign

Taxpayers

Lee Allison
Peter J. Connors

Individuals

Sherry S. Kraus
Joseph Septimus

Investment Funds

Marcy G. Geller
Amanda Nussbaum

New York City Taxes

Maria T. Jones
Irwin M. Slomka

New York State Taxes

Paul R. Comeau
Arthur R. Rosen

"Outbound" Foreign Activities of

U.S. Taxpayers

Peter F.G. Schuur
Philip Wagman

Partnerships

John T. Lutz
Eric Sloan

Pass-Through Entities

James R. Brown
Matthew Lay

Real Property

Robert Cassanos
Elizabeth T. Kessenides

Reorganizations

Joshua Holmes
Eric Solomon

Securitizations and Structured

Finance

Jiyeon Lee-Lim
Lisa A. Levy

Spin Offs

Deborah L. Paul
Karen Gilbreath Sowell

Tax Exempt Entities

Stuart Rosow
Richard R. Upton

Treaties and Intergovernmental

Agreements

David R. Hardy
Andrew P. Solomon

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

Janet A. Andolina

Robert E. Brown

Steven A. Dean

Charles I. Kingson

Robert J. Levinsohn

Charles M. Morgan

David M. Schizer

Stephen E. Shay

Jack Trachtenberg

Gordon Warnke

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.

FORMER CHAIRS OF SECTION:

John E. Morrissey, Jr.

Peter L. Faber

Hon. Renato Beghe

Alfred D. Youngwood

Gordon D. Henderson

David Sachs

J. Roger Mentz

Willard B. Taylor

Richard J. Hiegel

Dale S. Collinson

Richard G. Cohen

Donald Schapiro

Herbert L. Camp

William L. Burke

Arthur A. Feder

James M. Peaslee

John A. Corry

Peter C. Canellos

Michael L. Schler

Carolyn Joy Lee

Richard L. Reinhold

Richard O. Loengard

Steven C. Todrys

Harold R. Handler

Robert H. Scarborough

Robert A. Jacobs

Samuel J. Dimon

Andrew N. Berg

Lewis R. Steinberg

David P. Hariton

Kimberly S. Blanchard

Patrick C. Gallagher

David S. Miller

Erika W. Nijenhuis

Peter H. Blessing

Jodi J. Schwartz

Andrew W. Needham

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

Mr. Mazur
Mr. Miller
Mr. Wilkins
April 29, 2013
Page 3

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

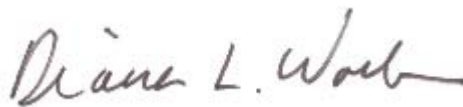
- The transitional relief provision treating certain securitization vehicles formed before 2012 as deemed-compliant FFIs until the end of 2016 should be revised so that it better achieves its intended goals.

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 the 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 issued 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,

A handwritten signature in dark ink, appearing to read "Diana L. Wollman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Diana L. Wollman
Chair

Enclosure

Mr. Mazur
Mr. Miller
Mr. Wilkins
April 29, 2013
Page 4

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