

MEMO# 25181

May 11, 2011

Draft Outline of ICI Comment Letter on FATCA and Notice 2011-34

[25181]

May 11, 2011

TO: TAX MEMBERS No. 8-11

INTERNATIONAL MEMBERS No. 14-11

INTERNATIONAL OPERATIONS ADVISORY COMMITTEE No. 7-11

TRANSFER AGENT ADVISORY COMMITTEE No. 32-11

BROKER/DEALER ADVISORY COMMITTEE No. 23-11 RE: DRAFT OUTLINE OF ICI COMMENT LETTER ON FATCA AND NOTICE 2011-34

Attached for your review is a draft outline of a comment letter to be filed by the ICI on the Foreign Account Tax Compliance Act ("FATCA") [\[1\]](#) and the recently-issued Notice 2011-34. [\[2\]](#) This Notice, which supplements IRS Notice 2010-60, [\[3\]](#) provides additional guidance regarding proposed regulations that will be drafted to permit foreign financial institutions ("FFIs") to invest in U.S. securities without incurring "Chapter 4" withholding that will be imposed by FATCA on "recalcitrant account holders." The ICI's comment letter will be filed by Friday, June 3. [\[4\]](#)

A preliminary call to discuss the outline will be held on Friday, May 13, at 2:30 p.m. (Eastern). Supplemental calls will be scheduled to discuss the draft letter and any substantial revisions thereto. To participate in the May 13 call, please dial 1-888-935-0262 and use passcode 50803.

The draft outline urges the Treasury Department and the IRS to draft proposed regulations that address issues of particular interest to U.S. funds (but also, in some cases, of interest to non-U.S. funds) by:

- providing a U.S. fund with an option to determine a passthru payment percentage (for withholding purposes) based upon the portion of its assets treated as having a U.S. source (rather than being required to treat the passthru payment percentage as 100% because the fund is organized in the U.S.);
- permitting all funds to calculate a passthru payment percentage for distributions based upon the source of the income being distributed (rather than based upon the assets of the fund, which might overstate the portion of the distribution attributable to

U.S. sources); and

- providing administrable rules for treating retirement accounts – employer-sponsored defined benefit plans, employer-sponsored defined contribution plans, and individual accounts – as “low-risk investors.”

In addition, the draft outline urges the Treasury Department and the IRS to draft proposed regulations that address issues of particular interest to non-U.S. funds by:

- crafting an administrable system for “deemed compliant funds” (e.g., non-U.S. funds that exclude U.S. investors) by:
 - permitting nonparticipating FFIs to distribute shares of deemed compliant funds so long as various conditions (including adhering to distribution agreement obligations not to sell to U.S. persons and certain others) are met; and
 - allowing nonparticipating FFIs either to:
 - close the accounts of U.S. persons and recalcitrant account holders who either are preexisting account holders or inappropriately acquire shares of deemed compliant funds after FATCA’s effective date; or
 - report these investors to the IRS (and, subsequently, withhold on them);
- crafting an administrable system for distributor networks by providing deemed compliant FFI treatment for local distributors;
- providing an administrable passthru payments mechanism;
- providing administrable procedures for identifying U.S. accounts among all preexisting accounts of both individuals and nonfinancial foreign entities (“NFFEs”);
- clarifying how the private banking rules will be applied to money managers and fund distributors;
- providing appropriate treatment of umbrella funds; and
- allowing CIVs to prevent participating FFIs from forcing CIVs to withhold on amounts otherwise subject to withholding by the participating FFI.

The outline highlights in *italics* the tentative ICI proposals. Issues for which factual support is requested likewise are *italicized*. Please feel free – before, during, or after the May 13 conference call – to provide comments on the outline, the tentative proposals, and/or the factual requests to the undersigned at lawson@ici.org or 202/326-5832.

Keith Lawson
Senior Counsel - Tax Law

[Attachment](#)

endnotes

[1] See Institute [Memorandum](#) (24186) to Tax Members No. 7-10 and International Members No. 5-10, dated March 17, 2010.; FATCA is the acronym for “Foreign Account Tax Compliance Act,” which was an earlier version of the Chapter 4 withholding regime enacted as part of the HIRE Act. FATCA’s reporting and withholding provisions generally will apply to payments made after December 31, 2012.

[2] See Institute [Memorandum](#) (25134) to Tax Members No. 7-11 and International Members No. 12-11, dated April 21, 2011.

[3] See Institute [Memorandum](#) (24517) to Tax Members No. 27-10 and International Members No. 18-10, dated August 30, 2010, which discusses the first IRS Notice (2010-60) describing the proposed regulations to be issued.

[4] Because the ICI's Tax Committee meeting will be held on June 6 and 7 in San Francisco, the ICI's comments effectively must be filed in advance of the June 7 deadline provided by the Notice.

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