

MEMO# 25267

June 9, 2011

ICI Comment Letter on FATCA and Notice 2011-34

[25267]

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TO: TAX MEMBERS No. 14-11
INTERNATIONAL MEMBERS No. 24-11
INTERNATIONAL OPERATIONS ADVISORY COMMITTEE No. 10-11
TRANSFER AGENT ADVISORY COMMITTEE No. 45-11
BROKER/DEALER ADVISORY COMMITTEE No. 35-11 RE: ICI COMMENT LETTER ON FATCA
AND NOTICE 2011-34

The attached ICI comment letter makes several recommendations for enhancing the administrability of the Foreign Account Tax Compliance Act ("FATCA"). [\[1\]](#) This legislation, as we previously informed you, was designed to ensure that U.S. persons holding assets through foreign financial institution ("FFI") accounts comply with their U.S. tax obligations. The ICI letter focuses on recently-issued guidance (IRS Notice 2011-34 [\[2\]](#)) that describes various elements of the FATCA reporting and withholding regime that will be incorporated into proposed regulations.

The ICI urges that proposed regulations 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 the amount of a withholdable payment or the passthru payment percentage (for FATCA withholding purposes) based upon the portion of its assets treated as having a U.S. source (rather than being required to treat the payment as 100 percent U.S.-source simply 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 retirement accounts – and charities as "low-risk investors."

In addition, the letter urges that proposed regulations address issues of particular interest to non-U.S. funds by:

- crafting an administrable system for “deemed compliant funds” by:
 - permitting FFIs that do not enter into FFI agreements and are not treated as deemed compliant (nonparticipating FFIs or “NPFFIs”) 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 NPFFIs 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 administrable timing, calculation, and reporting rules for passthru payments;
- providing administrable procedures for identifying U.S. accounts among all preexisting accounts of both individuals and NFFEs;
- clarifying how the private banking rules will be applied to money managers;
- applying FATCA to umbrella funds at the sub-fund level;
- requiring a fund to consent affirmatively to an election made by an FFI that enters into an FFI agreement (a participating FFI or “PFFI”) to be withheld on;
- providing funds with a centralized compliance option; and
- providing necessary and appropriate transition relief.

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[Attachment \(in .pdf format\)](#)

endnotes

[1] See Institute Memorandum # [24186](#), 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](#), dated April 21, 2011. This Notice, which supplements IRS Notice 2010-60, provides additional guidance regarding proposed regulations that will be drafted to permit foreign financial institutions (“FFIs”) may invest in U.S. securities without incurring “Chapter 4” withholding that will be imposed by FATCA on “recalcitrant account holders.”