NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Internal Revenue Service and Treasury

on the

Proposed FATCA Regulations dated 8 February 2012

30 April 2012

CC:PA:LPD:PR (REG-121647-10)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Via ELECTRONIC Mail
www.regulations.gov (IRS-REG-121647-10)

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Executive Summary

1. The New Zealand Bankers' Association (NZBA) appreciates this opportunity to comment on proposed Treasury regulations (REG-121647-10) (Proposed Regulations) issued on 8 February 2012 under Chapter 4 of Subtitle A of the Internal Revenue Code of 1986.

2. NZBA endorses the Australian Bankers' Association (ABA) submission on the Proposed Regulations dated 30 April 2012.[1] NZBA has also previously endorsed each of the submissions and communications made by the ABA to the Inland Revenue Service (IRS) and Treasury on 10 November 2010, 26 February 2011 and 7 June 2011.

3. NZBA is also, together with four other New Zealand financial services industry associations, separately submitting that certain exemptions from obligations under the Foreign Account Tax Compliance Act (FATCA) for retirement schemes under the Proposed Regulations should be extended to apply to New Zealand retirement schemes.[2]

4. In addition to the matters raised in the ABA submission on the Proposed Regulations, this submission:

   - outlines conflicts between FATCA and domestic laws in New Zealand,
   - describes why New Zealand financial institutions cannot legally comply with FATCA in its present form,
   - seeks transitional relief to allow for the development of intergovernmental FATCA solutions and in relation to passthru payments,
   - reiterates the need for changes in the Proposed Regulations to:
     - better align with local anti-money laundering/know your customer (AML/KYC) requirements, and
     - extend the benefit of exemptions designed for low-risk retirement schemes to New Zealand and Australian retirement schemes.

5. NZBA does not seek to be heard at the public hearing on the Proposed Regulations. However, should the IRS or Treasury have any questions on this submission, please contact:

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1 See Appendix 1.
2 See Appendix 2.

About NZBA

6. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a safe and successful banking system that benefits New Zealanders and the New Zealand economy.

7. The NZBA membership comprises of the following thirteen registered banks in New Zealand:

- ANZ National Bank Limited
- ASB Bank Limited
- Bank of New Zealand
- Bank of Tokyo-Mitsubishi, UFJ
- Citibank, N.A.
- The Hongkong and Shanghai Banking Corporation Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- The Co-operative Bank Limited
- TSB Bank Limited
- Westpac New Zealand Limited.

Submission

Conflicts with New Zealand Law

8. There are significant legal impediments to implementing FATCA in New Zealand. This puts New Zealand banks and other financial institutions in the difficult position whereby they would breach New Zealand law by entering into Foreign Financial Institution (FFI) agreements with the IRS and face significant withholding penalties if they do not. Under New Zealand law, banks and other financial institutions:

- are prohibited under domestic privacy laws (encapsulated in both statute and common law) from providing specified information to the IRS under FATCA without customer authorisation,

- are not permitted to withhold amounts from payments that they make to their customers as required by FATCA because there is no legal authority for such withholding, and

- are prohibited under domestic human rights laws from closing accounts or refusing to provide products and services to recalcitrant account holders as

required by FATCA on the basis that it would result in additional compliance costs under FATCA.[3]

Partnership Agreements

9. NZBA welcomes the intergovernmental approach to the FATCA implementation that was announced on 8 February 2012 ("Joint Statement") and the opportunity it provides for a similar approach to be agreed in other countries. We appreciate the recognition in the Joint Statement of the need to overcome legal impediments to compliance, such as those we have outlined above in relation to New Zealand domestic laws. We also appreciate the recognition of the need to reduce the burden of compliance costs globally, and the desire to achieve consistent reporting standards.

10. NZBA expects that it will take some time to finalise intergovernmental agreements, and it is likely that partnership arrangements will not be concluded before the implementation of FATCA begins in many jurisdictions. We consider it will be vital to agree transitional relief for FFIs in countries whose governments are in the process of agreeing partnership arrangements, so that those FFIs can implement FATCA on the basis of the concessions which are expected to apply once an intergovernmental agreement is signed.

Passthru Payments

11. NZBA welcomes the postponement of the effective date for passthru payment withholding until 1 January 2017.[4]

12. NZBA recognises the need for further engagement with US officials on viable alternatives to the passthru payment percentage methodology previously set out in Notice 2011-34 and is working with counterpart banking associations in countries including Australia, Canada, the United Kingdom and Japan to develop a proposal for Treasury and IRS.

13. In the meantime we note financial institutions will be unable to sign FFI agreements because of conflict with domestic laws relating to withholding. Accordingly, NZBA supports removing passthru withholding from the proposed FFI Agreement, pending any agreement on the nature of these obligations.

Due diligence procedures for identifying accounts

14. NZBA supports aligning the requirements for FATCA compliance with the procedures financial institutions currently follow to comply with domestic anti-money laundering customer due diligence (AML/KYC) rules.

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[3] See Appendix 3.

[4] See § 1.1474-(d)(2)(ii)(2) of the Proposed Regulations.

15. However, while the Proposed Regulations are intended to achieve this outcome, there remain inconsistencies which would impose significant burdens on financial institutions. These are outlined in the ABA submission on the Proposed Regulations. NZBA strongly endorses the proposals made in that submission, which we consider necessary to ensure Treasury's stated goal of minimising operational burdens is not frustrated.

Retirement funds

16. NZBA supports the proposal outlined in the ABA submission on the Proposed Regulations in relation to expanding the scope of exemptions for superannuation schemes. As is the case in Australia, most New Zealand retirement funds will not qualify for the exemptions outlined in the Proposed Regulations. They will therefore be required to comply with all aspects of the FATCA regime. This will place an unduly heavy burden on such funds and costs will ultimately be borne by New Zealand investors, despite the fact that these entities pose a very low risk of tax evasion. NZBA's separate submission[5] on this point:

- describes the characteristics of New Zealand retirement schemes and the regulatory environment in which they operate,
- outlines the reasons why the Proposed Regulations should, but do not, cover New Zealand retirement schemes, and
- recommends changes to the Proposed Regulations consistent with the intention of exempting superannuation schemes from FATCA compliance where there is a low risk that they can be used as vehicles for tax evasion.

[5] See Appendix 2.

APPENDIX 1: AUSTRALIAN BANKERS' ASSOCIATION INC SUBMISSION ON PROPOSED FATCA REGULATIONS DATED 30 APRIL 2012

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30 April 2012

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Room 5205
Internal Revenue Service
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United States of America

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Dear Internal Revenue Service,

Proposed Regulations Under the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden

Please find attached comments by the Australian Bankers' Association (ABA) on the *Proposed Regulations Under the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden* ("proposed regulations").

We have appreciated the opportunity to participate in the process leading to the development of the proposed regulations, especially the meetings with the lawyers at Treasury and IRS. The proposed regulations respond to many of our concerns, and we are pleased to see acceptance of the Inter-Governmental Agreement (IGA) concept for which we and others have advocated.

Our comments address topics where we think further changes are warranted. Central among these is a concern that to be effectively operable for the banks, the rules need to be further simplified. We believe, for example, that greater reliance on AML/KYC practices would reduce the burden on our banks and still produce the information the IRS is seeking.

We also have provided a preliminary proposal to address the passthru withholding issue, and look forward to working with you on this or other approaches to this difficult question. We are interested in learning what the Department and IRS consider the best organisational format for discussion and development of a passthru withholding regulation.

ABA members share a concern being expressed by many about the transition phases and timing of particular reporting and withholding obligations. If, as we hope, Australia enters into an IGA, we will want to minimise efforts that might be obviated by that agreement, since its effective date would be uncertain. We appreciate that this is an issue for all countries that will enter into IGAs, and further thought and guidance would be helpful. As the situation becomes more defined, we will be pleased to provide specific suggestions and engage in discussions with you about transition issues.

We are aware of suggestions by others for the creation of a mechanism for parties to obtain guidance on the many questions which are bound to arise during implementation. We agree that that would be helpful and look forward to testifying at the hearing on 15 May.

Yours sincerely,

Tony Burke

cc.

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AUSTRALIAN BANKERS' ASSOCIATION INC.

Proposed FATCA regulations

30 April 2012

Australian Bankers' Association Inc. ARBN 117 262 978
(Incorporated in New South Wales). Liability of members is limited.

AUSTRALIAN BANKERS' ASSOCIATION INC.

Contents

1 Reliance on Existing Anti Money Laundering/Know-Your-Client Protocols

The "Explanation of Provisions" section of the proposed FATCA regulations contains statements that indicate that US Treasury seeks to implement a number of "burden-reducing" measures in respect of the Due Diligence Procedures for the Identification of Accounts. These measures purport to be "burden-reducing" on the basis that they aim to align the due diligence requirements under FATCA with existing Anti-Money Laundering (AML) and Know Your Customer (KYC) procedures, both for pre-existing accounts and new accounts (subject to the threshold requirements set out below).

In respect of pre-existing accounts, the proposed FATCA regulations state that "FFIs can generally rely on AML/KYC records and other existing account information to determine whether the entity is an FFI, is a US person, is exempted from the requirement to document its substantial US owners (for example, because it is engaged in a nonfinancial trade or business), or is a passive investment entity."[1] Further, in relation to new accounts, proposed FATCA regulations state that "the proposed due diligence rules rely extensively on an FFI's existing customer intake procedures"[2], which are generally designed to ensure compliance with AML/KYC requirements.

The Australian Bankers' Association (ABA) strongly endorses the goal of minimising the operational burdens of implementing the FATCA requirements through ensuring that those requirements are in accordance with the AML/KYC requirements for each relevant jurisdiction of operation.[3] However, in reviewing the detailed FATCA regulations, the ABA has identified a number of inconsistencies between the verification procedures for both pre-existing accounts and new accounts under the proposed FATCA regulations, and the current AML/KYC requirements. Such inconsistencies would have the effect of significantly increasing the operational burdens associated with the implementation of FATCA.

These inconsistencies, and the ABA's proposals to align the FATCA requirements to applicable AML/KYC requirements, are set out below.

Some more detailed technical issues are included in Appendix 1.

1.1 Documentation

FFIs are required to obtain and collect documentation meeting the requirements of §1-1471-3(c)(5) as part of the individual account holder assessment process (in lieu of collecting a W-8BEN or W-9 Form)

- These documents are intended to approximate the documents an FFI would collect in the ordinary course of account opening to satisfy AML/KYC requirements
- FATCA should not specify the documents FFIs collect to satisfy AML/KYC requirements – these are determined by the relevant country's AML legislation
- The extra documentation requirement should refer instead to documentation an FFI is required to collect under a Financial Action Taskforce ("FATF") compliant and recognised AML regime.
- The FFI should only be required to document a new account holder, rather than a "new account" once only, unless a "change in circumstances" warrants the collection of additional documentation to support Chapter 4 status.
- The current approach will pose practical issues for many FFIs as it offers no flexibility:
  - Not all individuals hold government issued forms of identification.
  - Banks are increasingly using electronic forms of customer identification which comply with local AML laws but which do not involve the collection of physical documents from the customer. For example, instead of providing a physical passport, a customer may provide a unique identifier (such as a PIN) and other personal information which allows the FFI to confirm the customer's identification directly with a Government agency. FATCA should be flexible enough to recognise these alternative identification processes.

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[1] Proposed FATCA regulations, Explanation of Provisions, Part B. Summary of Obligations of FFIs, c. Preexisting Entity Accounts
[2] Proposed FATCA regulations, Explanation of Provisions, Part B. Summary of Obligations of FFIs, b. New Individual Accounts
[3] Only for countries included on the IRS's List of Approved KYC Rules: http://www.irs.gov/businesses/international/article/0,,id=96618,00.html. This condition applies to all ABA recommendations for alignment with AML/CTF.

- FATCA should recognise the particular AML requirements of local jurisdictions, to the extent that such requirements meet international AML standards consistent with FATF recommendations. FATCA should not impose document collection requirements over and above those required by local AML laws in FATF compliant jurisdictions.
- As currently drafted, the procedures for account documentation are effectively increasing an FFI's customer intake procedures in many instances, frustrating the objective of aligning FATCA requirements with internationally recognised AML standards.

1.1.1 Three year expiry of documentation

The proposed FATCA regulations provide that documentary evidence "is valid until the earlier of the last day of the third calendar year following the year in which the documentary evidence is provided...or the day on which a change in circumstance occurs that makes the documentary evidence incorrect"[4]. The ABA understands that this requirement is consistent with the current IRS documentation process, under which W-8 forms are valid for a three year period.

In the ABA's view, it is not clear from reviewing the proposed FATCA regulations whether the three year shelf life of documentary evidence applies only where the documentary evidence that is provided is a W-8 form, or whether the expiry period applies to all documentary evidence. We request confirmation that the three year expiry period in respect of documentary evidence only applies to W-8 documentation and no other types of documentary evidence permissible under the FATCA regulations (for example, documentary evidence required to be examined under §1.1471-4(c)(4)(i) and/or documentary evidence provided by a customer with a Form W8-BEN, in response from a request from the FFI under §1.1471-4(c)(4)(i)(B)).

Assuming that the three year expiry period is intended to apply to all documentary evidence, the ABA submits that given that current AML/KYC procedures do not require re-verification of documentary evidence on a three year basis, the FATCA requirements should be aligned to the AML/KYC procedures. This would mean that once an account holder is verified with appropriate AML/KYC documentary evidence then there is no further requirement to verify the status of the account holder unless there is a material change in circumstances[5]. Any requirement for FFIs to effectively update documentary evidence used to establish an account/account holder's status upon expiry of these documents is unreasonable for the following reasons:

- It would require substantial development of AML/KYC systems that generally do not have the capacity to flag and track the age of documents held on system;
- The documentary evidence potentially subject to the expiry requirements would rarely become out of date (e.g. it is rare for someone to change their citizenship or country of residence);
- Such changes are in any event likely to be caught as a 'change in circumstance' triggering a re-documentation of the relevant account; and
- Such a requirement exceeds accepted international AML/KYC standards.

In the alternative, assuming the expiry periods are to apply to all documentary evidence collected and held by an FFI in support of the classification of an account/account holder, the regulations should clarify that an FFI discharging its obligations under an FFI Agreement need only have regard to the validity of these documents where it is later seeking to rely on them – that is, where there is a change in circumstances, then the validity of documents may require new documentary evidence to be obtained.

In summary, the ABA recommends that once an individual or entity has been identified using valid documentation under the AML/KYC requirements in the FFI's country of residence, no further due diligence or obligation to re-document should be required unless there is a material change in circumstances[6].

1.1.2 Account by Account Basis

Existing AML/KYC procedures require verification on a client-by-client basis, which means that in the absence of any risk factors being triggered, there are no further requirements to re-verify once a client has been on-boarded.

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[4] §1.1471-3(c)(6)
[5] Ibid
[6] Proposed FATCA Regulation 1.1471-3(c)(6)(ii)(D)

This is different from FATCA, which appears to require that verification occur on an account-by-account basis and that the FATCA status be determined for each account, with the basis of such determination depending on the legal nature of the account holder and the account balances relative to the appropriate thresholds.

The ABA recommends that FATCA regulations governing the verification procedures refer specifically to, and are aligned with, the AML/KYC requirements of the FFI's local jurisdiction. Specifically, we propose that the FATCA regulations specify adherence to the verification procedures for AML/KYC purposes is sufficient for the purpose of verifying FATCA status. For example, if an existing customer opens a new account, banks do not need to re-identify/re-collect any further information other than that required by their existing AML/KYC procedures. If an existing customer has been previously identified as a US account holder, all subsequent accounts linked via system aggregation that are opened post the FFI Agreement effective date will be automatically classified as US accounts unless a change in circumstances (and accompanying required verification documents) occurs.

The proposed amendment is included in Appendix 2.

1.1.3 Verification of Individuals Based on Government Issued Documentation

The proposed FATCA regulations state, in respect of the documentary evidence acceptable to verify an individual may include "any valid documentation issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and address and is typically used for identification purposes.[7]"

Under existing AML/KYC processes, permissible documentation may not in all cases specify the individual's address. Examples include passports, certificates of citizenship and birth certificates. The ABA recommends that the proposed regulations be amended to allow identity documents issued by a government body, which are acceptable for AML/KYC, to be used for identity verification for FATCA purposes. The proposed amendment is included in Appendix 2.

1.2 Determination of Substantial US Owner

The proposed FATCA regulations define the term "Substantial United States owner" as meaning:

> *"With respect to any foreign corporation, any specified US person that owns, directly or indirectly, more than ten percent of the stock of such corporation (by vote or by value),[8]"*

Similar definitions apply with respect to partnerships and trusts.

Under existing AML/KYC standards, the threshold for verifying the identity of an entity's beneficial owners is direct ownership in excess of 25%. Adherence to the FATCA thresholds would require in respect of pre-existing entity accounts of $1,000,000 or more and any new accounts associated with any pre-existing accounts, held by entities which are not identified as having US owners pursuant to the AML/KYC criteria, be re-verified to establish their FATCA status.

This would impose significant costs, system/process changes and time to be expended. The ABA recommends that the definition of "Substantial United States owner" be aligned to the existing AML/KYC definition. It is also recommended that once an entity's beneficial ownership has been established under the FFIs existing AML/KYC protocols, no further identification or verification is required at the point of opening an account, unless a change of circumstances occurs.

The proposed amendment is included in Appendix 2.

1.3 Participation and withholding documentation and retention

The proposed regulations require a participating FFI to retain the original, a certified copy or a photocopy of the documentation obtained to confirm the Chapter 4 status of its account holders. There is a further requirement that the FFI retain for a period of six years copies of the account statements that summarise the activity which has given rise to a reporting/withholding obligation.

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[7] §1.1471, 1-3(c)(5)(ii)
[8] §1.1473-1(b)

These requirements will create a significantly onerous operational impact, particularly given that current AML/KYC processes only require that the documentation be sighted and/or that certain details associated with the documentation be recorded. The storage of the documentation and the requirement to be able to collect and provide the documentation to the IRS within a limited timeframe will be very onerous to implement, and would be in addition to the existing AML/KYC procedures undertaken by FFIs.

The ABA recommends that such documentation be required to be retained only in respect of financial accounts in excess of USD1 million and that otherwise the sighting of compliant documentation and the recording of key details (as per existing AML/KYC processes) to support the individual's or entity's Chapter 4 status should be sufficient.

In relation to the period for which the records need to be maintained, the proposed FATCA regulations specify that the period is at least six years, and could be extended indefinitely at the request of the IRS. In many instances, this period is longer than the requirements imposed by the AML/KYC requirements of the FFI's jurisdiction of residence. The ABA recommends that the period for which records are required to be retained is aligned with the requirement under the AML/KYC requirements of the FFI's country of residence. Further, given the significant burdens associated with the maintaining of records, it is requested that the ability of the IRS to extend the record keeping requirements indefinitely "on request" be removed. The proposed amendment is included in Appendix 2.

2 Entities deemed compliant or posing low risk of tax evasion

We welcome Treasury's effort in providing further guidance on deemed compliant status for entities posing a low risk of tax evasion. The proposed regulations include Treasury's proposal to exempt certain retirement plans from the scope of FATCA and the scope of that exemption seems to be much wider than those proposed in Notice 2011-34. However, based on our current analysis, the ABA is of the view that most regulated superannuation entities in Australia will not qualify under the exemption. Compliance with the participation status for many Australian superannuation entities would impose a disproportionate burden on these entities and would have a detrimental impact on the life of ordinary Australians. We believe that, the current proposal could be augmented by the addition of some universal aspects of regulated retirement plans in many advanced economies which taken together would embrace the original purpose of the exemption where there is clearly a low risk of tax evasion. Amending the definition of deemed compliant FFIs to include Australian superannuation funds would be consistent with Treasury's ongoing policy that FATCA is not intended to impose compliance burdens on organisations that pose a clearly low risk of being used for the purposes of evading tax.

The characteristics of Australia's retirement saving systems and the appropriate regulatory framework are described below.

2.1 Australian Super Funds

2.1.1 Australia's retirement saving system

Australia's superannuation system has evolved throughout the last 25 years with changes being introduced by successive governments. Australian government policy encourages consumer flexibility by allowing employees and the self employed to choose a fund of their choice, including the option to establish their own individual self managed superannuation funds (SMSF) or opting for industry funds. These funds are not necessarily sponsored by government or employers. SMSFs are funds that have less than five members and each member is a trustee or a director of the trustee company.

However, in order to receive concessional tax treatment, superannuation funds are required to be regulated by the prudential regulator and the Australian Tax Office (ATO) and each fund is required to satisfy a residency requirement. The residency test requires the fund to be established in Australia, have its central management and control in Australia and have the majority of interests held by members that are Australian residents. Further, contributions are required to be reported to the ATO through the requirement for the contributor to quote the Australian Tax File Number (TFN) to the superannuation entities, which is the equivalent of a TIN.

Based on the latest statistics compiled by the Australian Prudential Regulatory Authority (APRA), there are more than 460,000 superannuation entities in Australia, with the majority being SMSFs (450,000). The number of employer and government sponsored funds totals less than 200. The requirement for all 460,000 funds to enter into separate FFI Agreements with the IRS would be a massive compliance burden for both the funds and the IRS.

2.1.2 Regulatory Environment in Australia

Taxation of Contributions

There are restrictions on the types of contributions that can be accepted by a superannuation entity. The common form of contribution is compulsory contributions payable by employers to the chosen superannuation fund at a prescribed rate of their ordinary earnings (currently 9%). Employers can make additional contributions for the employees based on employment contracts. Employers claim tax deductions for contributions made. Self employed persons can also make a deduction for contributions made to a superannuation entity.

In addition, employees can make additional voluntary contributions for themselves and their spouses from after tax income.

Subject to age based capping rules, contributions (other than voluntary employee or spousal contributions) are subject to tax in the hands of the superannuation trustee at a rate of 15%. Contributions above the concessional cap are taxed at the highest marginal rate of 46.5%. Contributions made by persons that do not quote their Australian TFN to the superannuation entity would also be taxed at a rate of 46.5%. Further, superannuation entities are required to report to the regulators on contributions made by members. Therefore, it is highly unlikely that non-residents of Australia that have not registered with the ATO would make contributions to any superannuation entities in Australia.

Taxation of Investment Income

Superannuation entities are taxable entities in Australia. Investment income earned by the superannuation entities that are attributable to plan members are subject to tax annually at the rate of 15%. However, distributions made by funds from taxed income are not subject to further tax in the hands of the beneficiaries.

Regulatory Framework

APRA has the responsibility for regulating superannuation entities other than SMSFs. The ATO regulates the SMSFs.

In order for a superannuation entity to obtain the 15% tax concession on contributions and investment income, it is required to satisfy a sole purpose test and other regulatory reporting requirements. Non compliance with the requirements results in 46.5% tax being imposed. Further, it is a requirement that the superannuation entity's compliance with the regulations is subject to an annual audit by an approved auditor.

The sole purpose test requires a regulated superannuation entity to be maintained solely for the core purpose of providing benefits on or after the member's retirement or earlier death. Other allowable secondary purposes include employment termination insurance, income protection and other benefits. The legislation stipulates that a regulated entity cannot be used to provide pre-retirement benefits to members, employer sponsors or to facilitate estate planning.

In tandem with the sole purpose test, the preservation rules apply to ensure that the superannuation system can only be used for retirement purposes. The preservation rules restrict the payment of benefits until the member reaches the preservation age.

In Australia, superannuation entities generally operate as trusts, with trustees being responsible for the prudential operation of their entities and for the investment of assets. The duties and obligations of the trustees are set out in the relevant trust deeds and are regulated under the relevant legislation by the regulators.

The trustees can be a natural person or a company. For SMSFs, all members are trustees of the fund. For a complying fund in Australia, the central management and control of the fund is required to be ordinarily exercised in Australia. In this case, non-residents cannot establish a complying SMSF in Australia as the fund would fail the residency test as the members/trustees would not ordinarily be Australian residents. Non-complying funds are subject to tax on contributions and income at the rate of 46.5%.

In essence, although the trustees are required to act in the best interest of members, trustees, in fulfilling their responsibilities, cannot be subject to direction of members and are required to lodge annual returns to the regulators. Trustees that fail to fulfil the requirements of the regulators can be banned from acting as trustees or directors of trustee companies.

Given Australia's complex regulatory environment and penalty tax rate on non-compliance, it is unlikely that the superannuation system would be used by US persons for the purposes of tax avoidance.

Australia's superannuation system poses a relatively low risk of tax avoidance, therefore, within the intent of the exemption, regulated superannuation entities should be treated as deemed compliant.

2.1.3 Issues with the proposed regulations

Deemed Compliant Retirement Plan

The proposed regulations provide for a deemed compliant status for FFIs that are organised for the provision of retirement or pension benefits under the laws of the country in which they are established or in which they operate and meet the criteria as outlined in §1.1471-5 Paragraph (f)(2)(ii)(A)(1) and (2).

Australian superannuation funds do not meet some of the elements of the criteria. As explained above, in Australia, superannuation contributions, although subject to annual capping, are not limited by reference to earned income and are not limited to governments, employers and employees. Voluntary spousal contributions are encouraged. In addition, SMSFs do not need to be sponsored by employers.

Exception to the definition of financial account

The proposed regulations provide an exception to the definition of financial accounts, where they are held by a deemed compliant retirement fund or are personal retirement accounts or regulated as an account for the provision of retirement pension benefits that meets the following:

- The account is tax favoured;
- All of the contributions are made by employer, government or employee contributions are limited by reference to earned income; and
- Annual contributions are limited to US50,000 and limits or penalties apply to excessive contributions and early withdrawals.

For the reasons explained above, most Australian superannuation funds do not qualify for the above exemptions.

2.1.4 Proposed changes

We acknowledge that Australia's superannuation system shares many attributes with other OECD countries. Further, superannuation and retirement systems around the world are subject to constant changes and it would be necessary to develop more versatile and generic rules which would have more universal application while preserving the integrity of intention of Chapter 4.

We propose that a new category of exemptions be included in paragraph (f)(2)(ii)(A) and paragraph (b)(2)(i)(A)(2) of Section1.1471-5. In addition, a simplified identification process should be adopted for §1.1471-3(d)(6)(B) for retirement plans in FATF-compliant countries. Please refer to Appendix 2 for detail.

2.2 De minimis rule

The proposed FATCA regulations provide that an entity will be a "registered deemed compliant FFI" where:

> *"at least 98% of the accounts maintained by the FFI must be held by residents (including residents that are entities) of the country in which the FFI is organized."*[9]

Further, and importantly, the proposed regulations state that for the purpose of demonstrating compliance with the 98% criterion, an FFI that is organised in an EU member state is able to treat account holders that are residents (including corporate residents) of other EU member states as residents of the country in which the FFI is incorporated or organized.

It is the ABA's view that the ambit of this rule can be expanded without derogating the integrity of the FATCA regime. For example, an FFI with at least 98% of its accounts held by entities that are resident of:

- The country in which the FFI is organised; or
- A country that is a signatory to a Double Taxation Agreement with the US; or

[9] §1.1471-5(f)(1)(i)(A)

- A country that has entered into a FATCA Intergovernmental Agreement with the US

should be treated as a "registered deemed compliant FFI".

Under this proposed amendment, FFIs with more than 2% of their accounts held by owners that are resident of the US or "tax haven" jurisdictions would continue to be subject to the FATCA regime.

There does not appear to be a compelling rationale to permit aggregation of EU member states in terms of satisfying the criterion, particularly noting that there are EU member states that do not have a Double Taxation Treaty with the US, namely Bulgaria and Malta. The ABA recommends that allowing aggregation based on adherence to OECD principles (for Double Tax Treaty countries) and/or the FATCA requirements (for countries that have entered into an Intergovernmental Agreement) will promote compliance in a more effective manner than aggregation based on geography.

Proposed wording of Regulation 1-5(f)(1)(i) is set out in Appendix 2.

3 "Foreign Passthru Payment" ("FPP") withholding

US Treasury is proposing postponement of the date when foreign passthru payment ("FPP") withholding would apply (per preamble to proposed regulations at XIX.E, indicating that such withholding will commence no sooner than 1 January 2017) and aligned with this transitional phase, is the requirement to report annually for each calendar year 2015 and 2016, the aggregate amount of certain payments, that is "other financial payments" (proposed regulations at para 1.1474-(d)(2)(ii)(2)), made to each non-participating FFI.

US Treasury is also seeking comments on the ultimate implementation of FPP withholding, and identifies potential alternatives still being considered in relation to the passthru payment percentage methodology previously canvassed in Notice 2011-34. Among the alternatives is the possibility of using a simplified computational approach, or "safe harbor" percentage (as well as the imposition of a limitation on the number of possible passthru percentages that could apply), to determine withholding liabilities.

While the ABA welcomes the postponement of the date of effect for FPP withholding, it is recognised that industry must engage further with the US Treasury in the coming months on the implementation of potential alternative models in dealing with FPPs and devising ways of eliminating concerns the US Treasury has, in regard to the development of so-called "blockers" undermining the effective implementation of the FATCA regime.

The ABA's previous submission of 7 June 2011, also commented upon the technical and practical difficulties in using a pass thru payment percentage methodology, and proposed possible alternatives. Although the concept of a safe harbour rate might have the appeal of simplicity, it does not fully address concerns in the creation of a perceived solution that is not anchored to the technical problem to be solved (e.g. correctly identifying situations where there exists an "...other payment to the extent attributable to a withholdable payment").

The follow-up ABA submission of 29 September 2011 provided additional suggestions on defining the terms "withholding agent" and "passthru payment", so as to:

1. **Include** only bank originated investment income payments; and
2. **Exclude** all other payments.

However, it is also recognised that the FPP concepts are very complex and the methodologies proposed to date have not appropriately addressed the very real concerns of the global financial industry, in setting forth a viable, workable solution.

This problem is an issue on a global scale and would benefit from the formation of an international working group, with industry financial experts from the US and FFIs, with the aim of devising workable solutions for FPPs and anti-avoidance concepts, to combat the potential for "blockers" being created. We understand that Treasury and the IRS may not be able to commit resources to such a working group, but our intention would be for the group to develop proposals for the agencies' consideration.

In the following section we table one possible approach.

3.1 Possible Approach

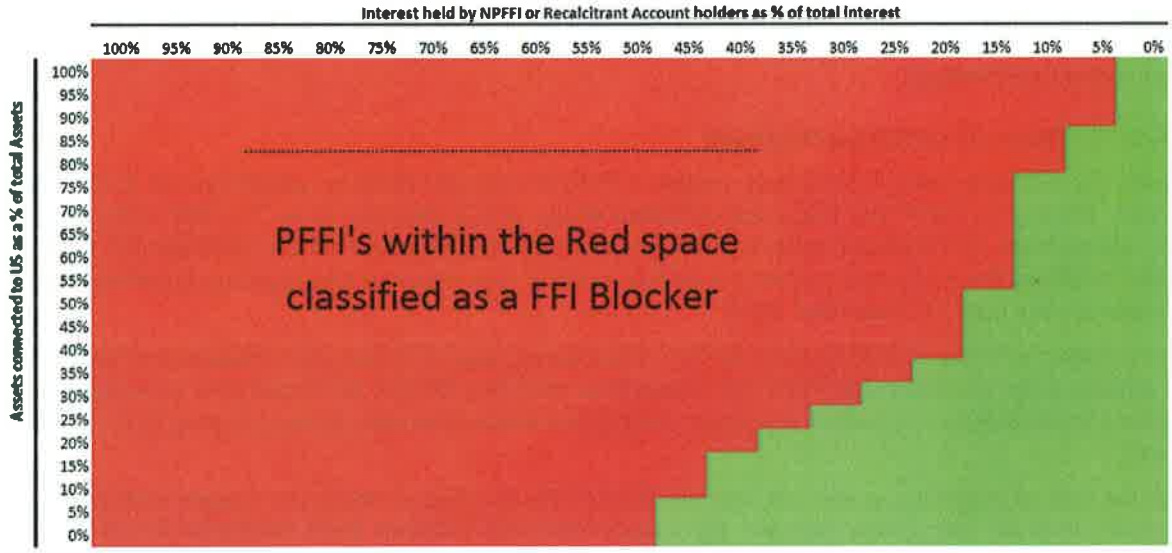
FATCA Blocker Concept

An FFI Blocker (FFIB) can be broadly defined as an entity whose "primary" business is re-characterising US-source income as foreign source income. In order to qualify as a FFIB the following needs to apply:

- Entity must be a Participating FFI (PFFI)
- It would not apply to a FFI as defined in section 1.1471.5(e) (i) (an FFI that accepts deposits in the ordinary course of a banking or similar business), on the basis that it is highly unlikely that the Prudential Regulator of an FFI would approve risk management practices that allow for a disproportionately large allocation of the FFIs assets to be invested in a single market, especially outside their home jurisdiction - ie: US assets.
- A PFFI classification as a Participating Foreign Financial Institution Blocker ("PFFIB") will be determined by reference to specified tests, such as:

  Ownership Test - interest held in the entity by non-participating FFIs or Recalcitrant account holders / total interest; and
  Assets Test – Assets connected to US/total assets.

Any PFFI with more than 50% of interest held by NPFFIs or recalcitrant account holders will automatically be classified as an FFI Blocker, with classification of PFFI with a lesser % to be determined by the level of assets connected to the US as illustrated in the table below.



(NOTE: For illustrative purposes only – the ranges would need to be defined)

When the tests are performed

The two tests could be performed annually[10] at the end of each calendar year, commencing 31 December 2016.

Passthru Payment Percentage (PPP)

PPP will be the result of the Asset Test rounded up to the nearest 2.5% interval.

Foreign Passthru Payment

The FFIB will be obliged to deduct and withhold tax with respect to foreign passthru payments by applying the Passthru Payment Percentage (made to recalcitrant account holders and non-participating FFIs) if payment and

[10] Frequency of testing to be further considered.

withholding tax levels are above a specified, but realistic and practical de minimis level. We suggest that withholding tax be deducted on any payment if the withholding tax amount exceeds the de minimis level.

Withholding on a PFFIB

A PFFIB will not be subject to withholding as long as it satisfies all its obligations as a PFFIB and deducts and withholds tax with respect to foreign passthru payments. Failure to comply will result in the PFFIB itself being classified as a NPFFI, resulting in Chapter 4 withholding tax applying.

3.2 Foreign Passthru Payments and Grandfathered Obligations

§1.1471-2(b) excludes from a withholdable payment or passthru obligation, any payment made under a grandfathered obligation or any gross proceeds from the disposition of such an obligation, in relation to obligations outstanding on 1 January 2013.

Practical difficulties arise in the identification of "Foreign Passthru Payments" (FPP), since the nature of these payments is yet to be resolved and the concept has been "reserved" in the proposed regulations. Since there has not been a date for final definition, capture of validating data on obligations will need to be more extensive, and involve tracking all long term obligations, to ensure data is available once Foreign Passthru Payments withholding commences in 2017.

§1.1471-2(b) should be revised to provide an extended grandfather period for obligations with respect to which Foreign Passthru Payment withholding may be required. In order to provide FFIs with sufficient time to implement the required procedures and where necessary renegotiate relevant documentation, it is recommended that withholding not apply with respect to any obligation entered into prior to the later of: (i) the date on which Foreign Passthru Payment withholding commences; and (ii) 12 months following the final regulations relating to Foreign Passthru Payment withholding."

4 Compliance in certain countries

The proposed regulations (para 1.1471-4(e)), enable a PFFI in Australia to be in compliance for a time, even if it has "Limited" affiliates in the PFFIs Expanded Affiliated Group (EAG) and any of its "Limited" Branches in other countries, whose laws or regulations prohibit them from fully complying with FATCA (provided the PFFI and its Limited affiliates/Branches undertake certain conditions, such as due diligence and reporting functions), however a sunset clause applies from 31 December 2015.

While an Australian FFI may wish to become a PFFI, many banks have branches and affiliates in other jurisdictions and has already been identified that there are interactions between FATCA and local laws and regulations that would make it impossible to fully comply in certain jurisdictions with all the requirements flowing from a FATCA FFI Agreement.

Even with the best of intentions, it may not be possible for FFIs to influence local law makers and regulators in a foreign country to make appropriate changes, particularly within the relatively short timeframe of two years. In the interim, this uncertainty would still see a PFFI in Australia expending considerable amounts on personnel time and technology costs in addressing all the changes required under FATCA, but with the prospect that a single breach in a foreign jurisdiction, through a continuing inability of a foreign affiliate or branch to fully comply with FATCA, may result in the Expanded Affiliated Group (EAG) losing its FATCA status (as not all members of the EAG will be either a participating or deemed compliant FFI as is required by §1.1471-4(e)), as from 1 January 2016.

Additional flexibility is needed and in particular the EAG should not lose its FATCA status.

The ABA requests an extension of the transitional period for Limited FFIs/Limited Branches from 2 years to 4 years to allow sufficient time for participating FFIs to respond to the extent practicable given jurisdictional limitations. If after this extended timeframe has expired, the EAG should be able to "orphan" the Limited FFI/Branch and treat them as a NPFFI, without impacting on the overall compliant status of the EAG.

The following exclusions should evidently apply: any related party payments, or intra-Group transactions with the parent/branch, or other affiliated entities should be excluded from FATCA reporting or withholding requirements.

The exclusions should for example cover intra-Group services, including financial services, any transactions under an ISDA agreement, any funding (debt) and any equity transactions, intercompany loans etc. In effect transactions undertaken by that overseas jurisdiction with an external counterparty would still be subject to FATCA so the remainder of the group should remain a PFFI.

5 Information reporting – Inter Governmental Agreement ("IGA")

The ABA's original objective was to ease the burden on its members of dual and inconsistent reporting to the Australian Taxation Office (ATO) and to IRS. Entry by Australia and the US into a reciprocal automatic exchange agreement based on existing bilateral tax treaties would achieve that, and eliminate the requirement that banks enter into FFI (Foreign Financial Institution) Agreements with IRS.

The opportunity currently proposed under the Joint Statement is for multilateral reporting with countries entering into a partnership arrangement with the IRS. The ABA supports this development and is engaging the Australian Government to encourage Australia's participation.

It is requested that favourable consideration be given to an Australian Government approach on this matter.

The proposed partnership arrangements would significantly reduce the reporting, withholding and recalcitrant client requirements and are very much a desired outcome. However, if these arrangements are introduced during FATCA implementation it may introduce new requirements and impact work and costs.

It will take time for intergovernmental agreements to be completed. It would provide greater planning certainty for the rules to state that once a memorandum of understanding is signed, then each entity/branch operating in that country can work on the assumption that the concessions in an IGA would apply and work can be undertaken on that basis. The FATCA Partner Status Agreement needs to have an "in principle" step that allows for governments to agree and then have a "grace" period that allows for changes to local laws/treaty arrangements to accommodate FATCA reporting. This will also need to take account of the timing of release of the model partner agreement.

6 Thresholds, due diligence and verification

Under the proposed FATCA regulations, a Participating FFI (PFFI) is required to determine whether pre-existing individual account holders are US Persons or are not US Persons unless:

- The account is a depository account and the balance is less than USD50,000 at the end of the previous calendar year; or
- The account is an account other than an insurance contract, the balance is less than USD50,000 and the account holder has not previously been documented as a US, Person; or
- The account is a cash value insurance or annuity contract with a balance of less than USD250,000.

However, in relation to entities, the relevant threshold for pre-existing account holders is USD250,000, such that entity accounts with a balance in excess of that threshold will need to have their Chapter 4 status determined.

The ABA believes that there is no compelling reason from a compliance perspective to distinguish (by value) between individual accounts and entity accounts and that by separating the thresholds based on entity type, the proposed FATCA regulations are providing an incentive for persons to structure themselves as entities to take advantage of the higher threshold. We submit that the thresholds for entities and individuals should be the same, and set at USD250,000.

7 Timing and transition

7.1 Opening of new accounts

The timeframes required by the proposed regulations for documenting new accounts causes significant issues. Some key examples follow.

7.1.1 Development and changes to onboarding systems

We acknowledge the efforts the IRS has made in addressing issues concerning the documenting of new accounts and alignment to existing AML/KYC procedures, however there are certain changes required to existing systems,

procedures and policies that will be required, to the extent that the requirements under FATCA do not align with those imposed by Australian AML requirements.

Pursuant to the proposed FATCA regulations, FFIs will be required to:

- capture new FATCA data for new customers (individuals and in particular, entities – which requires significantly more information than currently collected);
- ensure linkage to new data requirements for existing customers opening new accounts;
- ensure FATCA status of counterparties, third parties, custodians and other arrangements are captured (and, in the case of other FFIs – verification of FFI-EIN on an automated basis by linkage to IRS) ; and
- align and embed within existing AML/KYC systems and procedures

In the case of many FFIs, such system changes will need an 18-24 month lead time from the date of issue of the final regulations. In the case of FATCA, implementing system changes across multiple jurisdictions for global FFIs with disparate systems will be extremely complex and almost impossible within the time required by the proposed regulations, even if the various proposals to align FATCA with AML are agreed.

We are not expecting the final regulations (or the final versions of forms or the FFI Agreement) to be released until late in the third quarter of 2012. Therefore, given the lead times for the above systems changes, we propose that the existing compliance date be extended by a minimum of six months.

The ABA recommends that the documenting of new accounts timeframe be extended six months from the effective date of the FFI Agreement as a minimum.

7.1.2 Disparity between USFI and PFFIs implementation dates

United States Financial Institutions (USFIs) must document new accounts from 1 January 2013. However the equivalent date for PFFIs is 1 July 2013. For global organisations with US businesses, this will require similar process and system changes being implemented according to two separate timeframes.

The ABA recommends that the dates for documenting new accounts (USFIs and PFFIs) be harmonised to 6 months after the effective date of the FFI Agreement, but no earlier than 1 July 2013.

This will significantly reduce the cost and simplify what must be in place for global organisations with both US withholding agents and PFFIs. We believe that harmonising new account due diligence commencement dates does not dilute the objectives of FATCA.

7.1.3 Clarity of dates for identification commencement

Throughout the proposed regulations, in relation to standards of knowledge, the date of reference for accounts opened is 1 January 2013 rather than 1 July 2013, the earliest commencement date for FFIs. It is recommended that the date be standardised to 1 July 2013.

7.2 Alignment of other key dates

We propose extending key date compliance requirements to reflect the proposed positions in this submission. This would include:

1. Combining FDAP and Gross Proceeds withholding to commence from the common date of 1 January 2015.
2. Limited FFI/Limited Branch withholding – to commence for substantially compliant EAG members from 1 January 2016 or a date aligned with IGA developments or legislative changes occurring in each jurisdiction.

Appendix One: Technical Issues

(1) Election to be withheld upon

The proposed FATCA regulations explicitly refer to the ability of a PFFI acting as a Qualified Intermediary (QI) to make an "election to be withheld upon" under Section 1471(b)(3). Where such an election occurs, the regulations require a withholding agent to make a withholding under §1.1471-2(a)(2)(iii) with regards to any withholdable payment made to the PFFI after 31 December 2013, where that payment involves US source FDAP income subject to withholding. However, the ABA requests that the operation of this "election to be withheld upon" (which is also extended to the foreign branches of USFIs acting as QIs that are not PFFIs) be limited to circumstances where a withholding agent formally agrees to perform withholding activities with respect to the relevant entity.

The ABA recommends that the provisions of the proposed regulations be amended to place a consultative caveat on the "election to be withheld upon", i.e. such an election should be legislatively confined to circumstances where "a withholding agent formally agrees to the terms of the proposed election" or otherwise "formally agrees to assume withholding responsibility on behalf of" the other party.

The ability of certain PFFIs to make an election unilaterally may give rise to situations where a withholding agent is necessarily forced to assume the added risks and potentially significant operational costs associated with withholding. This could prove particularly burdensome for some withholding agents, especially in circumstances where they have already taken steps to modify their risk appetite, customer base or commercial activities to meet FATCA compliance and avoid the complexities associated with dealing with recalcitrant or non-participating FFIs.

It is proposed that these wording changes would achieve an equivalent level of FATCA coverage, whilst protecting withholding agents from being unnecessarily burdened with performing withholding responsibilities (and building the internal systems and capabilities needed to perform such responsibilities) on behalf of a PFFI that has autonomously elected not to perform withholding themselves.

(2) Standards of knowledge - Regularly traded

The definition of "financial account" under the proposed FATCA regulations includes an "equity or debt interest" of the FFI "other than interests that are regularly traded on an established securities market."[11] This term is defined as being satisfied if:

> *"(A) Trades in such interests are effected, other than in de minimis quantities, on such market or markets on at least 60 days during the prior calendar year; and*
>
> *(B) The aggregate number of such interests that were traded on such market or markets during the prior calendar year was at least ten percent of the average number of such interests outstanding during the prior calendar year.[12]"*

It is the ABA's view that the requirements to be adhered to in order for a debt or equity interest in the FFI to qualify for the exemption from the definition of financial account are beyond the control of the FFI, as the requirements are dependent on market liquidity. Further, the current drafting of the requirements for the exemption may result in a debt or equity interest in the FFI switching between a financial account or exempt on a year to year basis. This may produce outcomes that create significant confusion from an operational and compliance perspective. Such confusion would be exacerbated by the fact that the tests for satisfaction of the exemption are based on a calendar year, while the financial and tax year ends of all Australian FFIs will not be 31 December.

It is the ABA's submission that a more equitable approach to determining whether a debt or equity interest in the FFI qualifies for the exemption from being a "financial account" would be where the interest is listed on an "approved" securities exchange and hence subject to the Listing Rules of that Exchange. This approach would enable US Treasury to publish a list of approved exchanges, and provide the FFI with the necessary comfort as to whether its debt or equity interests need to be included as Financial Accounts and prevent a change in characterisation from one year to the next. In addition, in respect of Debt instruments such as Global Bonds that

[11] §1.1473-1(c)
[12] §1-1471-5(f)(z)(iv)

are issued to a recognised registry being a FFI (ie. Euroclear), then the instrument should be treated as not being a Financial Account for the issuance FFI as the registry will ultimately be responsible for identifying the end holder of interest in such instruments.

Included at Appendix 3 is a list of the approved securities exchanges under the Australian *Income Tax Assessment Regulations* 1936.

(3) US 144A and other wholesale funding programs

Many institutions, financial institutions in particular, rely heavily on the ability to access liquidity and relatively easily raise funds in the wholesale markets in order to operate. As a result of the global financial crisis, it has been a challenging market for funding and liquidity. Indeed, as a result of a number of factors, including difficulty accessing funding, many governments were ultimately required to intervene to support financial markets by providing deposit guarantees, providing liquidity facilities and even to fully or partially nationalise some financial institutions. It is important therefore that the FATCA rules do not undermine or otherwise disrupt financial markets and the ability for institutions to raise funds. We have concerns that the current rules may undermine, distort or implement serious practical impediments to institutions to effectively and efficiently access liquidity and funding.

To improve access to funding and liquidity, many countries have implemented concessions to enable institutions to access wholesale markets. Rule 144A of the US Securities Act for example, was implemented to provide a concessionary exemption from the requirements of registration/listing where the dealing in those instruments is restricted to Qualified Institutional Buyers (QIBs). Rule 144A has significantly aided liquidity in instruments that qualify as many of the regulations contained in the US Securities Act are designed to protect retail investors and therefore are not relevant. As a result, the raising of funds from the US Institutional market through the issuance of Rule 144A compliant securities has become increasingly prevalent and cost efficient.

In addition, by definition, Rule 144A securities are not "listed" on an approved exchange as they are traded off-market. Further, a Rule 144A Security may, prima facie, meet the definition of a "financial account" under Section 1471(d)(2) as it would represent a debt interest in the FFI, other than an interest that is "regularly traded on an established securities market."

Many overseas developed markets have exemptions from registration/listing and disclosure requirements where the acquisition of the securities is restricted to "wholesale" investors, which are generally equivalent to QIBs. Not all of these instruments are traded on a "listed" market.

The policy behind these various wholesale exemption rules is to reduce the regulatory burden and to efficiently enable the issuance of instruments that are not available to retail investors. The only way a retail investor could obtain exposure to these instruments would be indirectly through a QIB, or in other jurisdictions, through another wholesale investor. As a result, that retail client of the wholesale institution would already be required to meet any relevant AML/KYC and FATCA obligations.

It is accepted in the latest proposed regulations that it is important that FATCA doesn't interfere with listed instruments including wholesale funding transactions that occur on "listed" exchanges. For the same reason, it is our view that it is vital that other wholesale funding (even if not "listed") is not adversely impacted by FATCA (e.g. commercial paper or bonds acquired by wholesale investors). In addition, in some instances an issuer deals through a third party clearing entity and will not have direct knowledge and ability to identify wholesale investors, so it is also important that any FATCA requirements are applied at the same level as the AML/KYC obligations to ensure the party with the information is practically able to undertake the FATCA identification and reporting.

There are some entities that will be exempt from obligations under FATCA. Those entities will be competing in the same wholesale funding markets as other entities that are subject to FATCA resulting in a competitive disadvantage for the institutions that are compelled to comply with the FATCA obligations.

An exemption from the obligations under FATCA should therefore be provided to any instrument to the extent that it is acquired by a wholesale investor as defined in the FATCA regulations.

A general "wholesale" definition would then exclude from any FATCA obligation, any investor who is a QIB and/or any other wholesale acquirer who meets all of the following requirements:

- the acquirer is a investor who is either a registered financial institution, custodian, clearing agent, licensed dealer, regulated pension or retirement or managed fund;
- the instrument is only offered in parcel values equal or greater than USD 200,000; and
- the acquirer is not an individual.

It is the ABA's view that a specific exemption be included in the FATCA regulations to exempt any wholesale and 144A instruments from the definition of "financial account" and additionally if a particular instrument doesn't wholly satisfy those criteria, the identification and reporting obligations in FATCA should be restricted to only the retail investors in those instruments (i.e. non-wholesale investors).

(4) Information reporting

FATCA requires reporting of income to be broken out by type due to different types of income having different tax treatments in the US. However, it is difficult - especially within the superannuation and wealth areas - to reliably break out income by type without expending significant time and costs to this end.

ABA member banks appreciate the opportunity to provide income information as per that submitted to the Australian Tax Office.

US Person, 1042 and transitional transaction reporting all require breakdowns of transactions based on FDAP types. Many FFIs do not hold this type of granular transaction information unless the transaction has been electronically generated. As such, FFIs will not be able to meet this reporting requirement.

(5) Thresholds, due diligence and verification

(a) $50,000 threshold for depository accounts

There are two practical issues in applying the US account exception for depository accounts not exceeding $50,000 (§1.471-5(a)(4)) in the context of account classification. This exemption should be modified so it can more clearly be applied upon account assessment.

First, the threshold exemption is a 'retrospective test', based on the account balance at the end of a calendar year and governing the treatment of the account during that year. Despite §1.1471-4(c)(4)(ii), it seems difficult, if not impossible, to apply such a test when assessing the status of a pre-existing depository account. For example, if an FFI is assessing a pre-existing depository account on 1 July 2013 and has resolved to apply the depository account threshold exemption, it is not clear what date the FFI is to use to calculate the relevant account balance. It obviously cannot use the balance as at the end of 2013 for the point of assessment. The regulations should be clearer about the relevant balance to use in this context.

Second, contrary to Guidance Notice 2010-60, it appears for similar reasons that the threshold cannot be used upon the opening of a new financial account. There is little point documenting a depository account that has a balance under $50,000 upon account opening if at the end of the relevant calendar year, the account can be treated as a non-US account for the purposes of reporting. Even if FFIs are permitted to apply this threshold upon account opening, they will be required to document the account as soon as the balance exceeds $50,000 – therefore there appears to be no policy reason to remove the threshold from the account opening process.

Furthermore, the introduction of the $1m aggregation testing for "other financial accounts" (except for cash value insurance and annuity contracts) for pre-existing accounts as at the end of the year preceding the effective date of the PFFIs Agreement (e.g. 31 December 2012), again introduces complexity. It is submitted that for simplicity there should be a common test date for all pre-existing accounts and that be 1 July 2013, the first date of effect for FFI Agreements, and that the threshold amount be set at $250K regardless of the type of financial account or type of account holder (refer to section 6 in the main body of this submission.

(b) Undocumented NFFEs deemed NPFFI

Under the proposed regulations (§1.1472–1), undocumented Non-Financial Foreign Entities ("NFFEs") are deemed to be NPFFIs. NPFFIs are subject to withholding in respect of all accounts, not just financial accounts. This is opposite to the handling of the equivalent individual status of 'recalcitrant' where only financial accounts are subject to withholding.

For example, based on our understanding of the proposed FATCA regulations, as from 1 January 2017 an FFI would potentially need to withhold on payments to an undocumented NFFE under a contract of general insurance and would require withholding, notwithstanding that such a contract would not qualify as a "financial account" under the proposed FATCA regulations[13] (where there is no investment component). However, a payment under such a contract to an individual would not attract withholding, since no financial account is directly involved.

Given that the approach to developing withholding and reporting systems for FFIs to ensure compliance with the FATCA regime is to identify financial accounts (and the holders of such financial accounts), it will significantly increase the operational impact to expand the ambit of withholding to all accounts (as opposed to just financial accounts) to cater for undocumented NFFEs. The ABA recommends that the treatment of withholding for undocumented NFFEs that are deemed NPFFIs is in respect of financial accounts only.

(c) Grace Period for Entity Account Opening

Under the proposed FATCA regulations, there is no grace period provided for determining an entity's appropriate FATCA classification. Entities are more complex to characterise, particularly given it may be necessary to trace through intermediate entities to determine the percentage of ultimate US ownership. It is likely that not all requirements to appropriately classify an entity will be able to be met immediately upon account opening, and this would be restrictive to existing business functions.

The ABA recommends that a grace period for the identification of entities be allowed in a manner consistent with the identification of individuals. It is, in our view, anomalous to include a grace period for individuals and not entities given that, in our view, the verification procedures for entities are more onerous and potentially more at odds with existing AML/KYC requirements.

(d) Extension of Grace Period for Account Opening

It is also the ABA's view that the grace periods specified in the proposed FATCA regulations are overly restrictive and do not provide appropriate time to verify (to the standard required) the FATCA status of account holders. The ABA recommends that the grace periods be extended from 90 days to 180 days.

(e) Simplify FATCA Entity Status

The multiple FATCA entity types are extensive (potentially 30+ classifications and sub-classifications) and complex for operational staff to understand and implement with the necessary precision required under the proposed FATCA regulations. We believe that there are three broad categories of entities under the proposed FATCA regime, namely:

- Participating/Compliant;
- Exempt; and
- Non-Compliant.

We believe that the entity classification should be refined to reduce the operational burdens imposed in terms of identification of account holders, through simplifying the entity type and restrict to the above 3 categories.

In addition, the proposed FATCA regulations impose upon the FFI the requirement to resolve any conflicts or contradictory information. Such conflicts or contradictions may not be readily apparent to the operational personnel responsible for determining an account holder's FATCA status. Accordingly, the ABA submits that FFIs not have the onus to resolve conflicts/contradictions and that the FFI is able to accept the verification documentation at face value.

(f) Clarity of US Indicia

The preamble in the proposed regulations highlights "in care of" and "hold mail" being US address; specifically Item 7 of the US indicia states that such indicia includes US "in care of" or "hold mail" addresses[14]. However, the proposed regulations themselves make no reference to the US. For example, the indicia under §1.1471-

[13] §1.1471-5(b)(1)
[14] Preamble to proposed regulations B. Summary of obligations of FFIs (1)(a)

4(c)(4)(i)(A) refer only to "An 'in care of' or 'hold mail' address that is the sole address the FFI has identified for the account holder."

The regulations themselves need to stipulate that in order to be "US Indicia" the "in care of" or "hold mail" addresses need to be US addresses.

There is also an issue with using US telephone numbers as the country code "01" is not unique to the US (it also covers Canada and much of the Caribbean) and this will complicate the implementation of US indicia searching criteria and lead to false positives from countries not linked to the US.

(g) Owner Documented FFIs

Under the proposed FATCA regulations, non-commercial passive investment entities are intended to be addressed as "Owner Documented FFIs." Such entities could include entities that do not undertake a commercial activity, such as Family Trusts, which therefore would be exposed to significant operational requirements, such as Annual Certification by US accounting and legal firms and documentation requirements.

The proposed regulations do not offer sufficient treatment of small non-commercial investment entities that could fall within the definition of a Type 3 FFI ((§ 1471-5(e)(4)). Even though such entities are often set up merely to receive returns from investments (often outsourced to a trustee or investment manager), they currently face either full FFI compliance or onerous requirements of the owner-documented FFI exemption.

It is submitted that non-business investment entities be excluded from the definition of FFIs.

The ABA believes these entities should be subject to treatment as a passive NFFE, requiring the relevant participating FFI to inquire into the potential US ownership. This treatment is consistent with the treatment of private individual investors and should sufficiently mitigate the tax evasion risk of these entities.

(h) Requirements for Documentary Evidence

Regulation 1.1471, Reference 1-3(c)(5)(i) of the proposed FATCA regulations refers to a "certificate of residence issued by an appropriate tax official of the country in which the payee claims to be a resident that indicates that the payee has filed its most recent income tax return as a resident of that country.[15]" There are practical difficulties associated with these evidentiary requirements as a Certificate of Residence does not generally include a statement regarding tax return filing. It is therefore submitted that the proposed regulation be amended to exclude the words ""that indicates that the payee as filed its most recent income tax return as a resident of that country."

(i) Dormant accounts

The ABA proposes that dormant accounts should not be considered as recalcitrant accounts and should be exempt from FATCA requirements altogether as long as they fulfil a specified period of inactivity.

The proposed regulations only make reference to dormant accounts as a subset of the accounts held by recalcitrant account holders, and in relation to a special rule for dormant accounts, under which a PFFI that withholds on passthru payments to such accounts may, in lieu of depositing the tax withheld, set aside the amount withheld in escrow until the date that the account ceases to be a dormant account. There is neither express provision for non-recalcitrant dormant accounts nor exemption of dormant accounts from FATCA altogether after a period of inactivity. Since there are problems with closing dormant accounts as banks are unlikely to return money to uncontactable account holders, and it would be unjust to terminate an FFI Agreement or to treat an account as recalcitrant just because it is dormant, we propose that dormant accounts should not be considered as recalcitrant accounts, and furthermore, that provision be made for them to be exempt from FATCA requirements altogether as long as they fulfil a specified period of inactivity.

[15] §1.1471-3(c)(5)

Appendix Two: Suggested amendments to regulations

Due diligence upon expiry of ID documents

Period of Validity – Documentary Evidence

§1.1471-3 (c) (6)(ii)(C)

We propose to include the following:

"Notwithstanding the above, the withholding agent may treat the documentary evidence as sufficient if (I) it meets the requirements of the existing AML/KYC due diligence rules of the jurisdiction in which the withholding agent maintains the account; (II) the jurisdiction meets the standards set by the Financial Action Task Force; and (III) there have been no substantial changes to the circumstances of the customer as described in paragraph (c)(6)(ii)(D) that have been brought to the attention of the withholding agent since the documentary evidence was last reviewed".

Account by Account Basis

Standards of Knowledge

§1.1471-4 (c) (2)(ii)

We propose to include the following after the first sentence:

"Notwithstanding the preceding sentence, a participating FFI may rely on documentation, written statements or documentary evidence collected in relation to any account associated with such account, provided that there have been no substantial changes to the circumstances of the customer as described in paragraph (c)(2)(iii) that have been brought to the attention of the withholding agent since the documentary evidence was last reviewed".

Verification of Individuals Based on Government Issued Documentation

§1.1471-3 (c) (5)(ii)

"With respect to accounts that are maintained in jurisdictions that meet the standards set by the Financial Action Task Force, other valid identification that is acceptable in the jurisdiction for AML/KYC due diligence requirements."

Determination of Substantial US Owner

Required owner certification for passive NFFE

§1.1471-3 (d)(11)(iv)(D)(2)

We propose to replace the paragraph with the following:

"(2) Exception for pre-existing obligations. A withholding agent that makes a payment in respect to a pre-existing obligation or any other associated accounts, applying the aggregation rule, may rely upon its review conducted for AML due diligence purposes to identify substantial US owners of the payee in lieu of the certification required In paragraph (d)(11)(vi)(D)(1) of this section if the withholding agent is subject, with respect to such account, to the laws of a jurisdiction that is FATF-compliant."

Participation and withholding documentation and retention

Record Retention

We propose to include the following:

§1.1471-3 (c) (6)(iii)

"With respect to documentary evidence, as an alternative, the withholding agent may rely on its account information in an electronic format if it has complied with all other aspects of its AML due diligence requirements of the jurisdiction in which the withholding agent maintains the account (which must be FATF-compliant) regarding establishment of an account holder's identity and it has a record that the documentation required was actually examined in accordance with the AML due diligence requirement and it has no information in its possession that would treat the documentary evidence as invalid."

§1.1471-4 (c) (2)(iv)

"With respect to documentary evidence, as an alternative, the withholding agent may rely on its account information in an electronic format if it has complied with all other aspects of its AML due diligence requirements of the jurisdiction in which the withholding agent maintains the account (which must be FATF-compliant) regarding establishment of an account holder's identity and it has a record that the documentation required was actually examined in accordance with the AML due diligence requirement and it has no information in its possession that would treat the documentary evidence as invalid."

Retirement Fund – Superannuation Entities as Certified Deemed Compliant FFIs

§1.1471-5 (f)(2)(ii)(A)

We propose either replacing the existing criteria or including a third criterion for highly regulated retirement plan in countries that have an information exchange agreement, double tax agreement or inter governmental agreement with the US for the implementation of Chapter 4.

An FFI meets the requirements of this paragraph (f)(2)(ii)(A)(3) if—

(i) The FFI is supervised by a relevant government authority in the country in which the FFI is established or in which it operates for the purpose of providing of retirement or pension benefits;
(ii) The FFI is established or operates in a country with which the United States has an income tax treaty or an information exchange agreement; or has entered into an intergovernmental agreement with the United States in relation to the implementation of Chapter 4;
(iii) Limits and/ or penalties apply under the law of the jurisdiction in which the FFI is established or in which it operates to withdrawals made from the FFI (except for transfers to other funds that satisfy paragraph (f)(2)(ii) or exempt beneficial owner retirement funds under §1.1471-6(f) or accounts described in paragraph (b)(2)(i)(A)) before the beneficiary reaches the specified minimum retirement or preservation age (whichever is earlier) under the law of that jurisdiction or other circumstances as approved under the law of that jurisdiction;
(iv) Limits and/or penalties apply under the law of the jurisdiction in which the FFI is established or in which it operates to contributions made to the FFI for a beneficiary which exceed the specified contributions limits under the law of that jurisdiction;
(v) The FFI is required to report regularly (at least on an annual basis) to the relevant government authority under the law of the jurisdiction in which the FFI is established or in which it operates the member account and contributions data for each member, including any identifiers held by the FFI which are used to identify the individual for income tax purposes in the jurisdiction in which the FFI is established or in which it operates; and
(vi) At least two of the following applies:
    (a) The FFI is unable to accept personal contributions for a beneficiary under the law of the jurisdiction in which the FFI is established or in which it operates without the FFI having identifiers to identify the individual for income tax purposes in the jurisdiction in which the FFI is established or in which it operates;

(b) Contributions to the FFI that would otherwise be subject to tax under the laws of the jurisdiction where the FFI is established or operates are deductible or excluded from gross income of the beneficiary;

(c) Contributions made to the FFI are subject to tax when contributed (whether as a tax imposed on the contributor or the FFI) or such payments are deferred when paid to the beneficiaries;

(d) The FFI is subject to tax-preferred rules on its investment income from its assets under the laws of the country in which the FFI is established or operates due to its status as a retirement/pension fund; or the taxation of investment income attributable to the beneficiary is deferred under the laws of such jurisdiction when the benefits are paid to the beneficiary;

(e) 50 percent or more of the total contributions to the FFI (other than transfers of assets from other plans described in this paragraph (f)(2)(ii) or §1.1471-6(f) or accounts described in paragraph (b)(2)(i)(A)) are from the government and the employer; or

(f) No single beneficiary has a right to more than 20% of the FFI's assets.

We believe that the above amendment, while providing the necessary safeguard for tax avoidance, should provide a more universal and flexible criteria for regulated and licensed retirement plans in countries where the US has information exchange arrangements should information access be required.

Retirement and pension accounts

§1.1471-5 (b)(2)(i)(A)(2)

Similar to the criteria for deemed compliant retirement plan, we propose that the definition of financial account exemption be amended by the inclusion of an additional category.

1. The FFI is established or operates in a country with which the United States has an income tax treaty or an information exchange agreement; or has entered into an intergovernmental agreement with the United States in relation to the implementation of Chapter 4;
2. The FFI is required to report regularly (at least on an annual basis) to the relevant government authority under the law of the jurisdiction in which the account is maintained;
3. Limits and/or penalties apply under the law of the jurisdiction in which the account is maintained which operates to allow withdrawals made from the account (except for transfers to other funds that satisfy paragraph (f)(2)(ii) or exempt beneficial owner retirement funds under §1.1471-6(f) or accounts described in paragraph (b)(2)(i)(A)) before the beneficiary reaches the specified minimum retirement or preservation age (whichever is earlier) under the law of that jurisdiction or other circumstances as approved under the law of that jurisdiction; and
4. The account is subject to tax-preferred rules on income under the laws of the country in which the account is maintained or established or operates due to its status as a retirement/pension account; or the taxation of investment income attributable to the beneficiary is deferred under the laws of such jurisdiction when the benefits are paid to the beneficiary; or contributions made to the account are subject to tax when contributed (whether as a tax imposed on the contributor or the FFI which maintains the account) or such payments are tax deferred when paid to the beneficiaries.

Identification of Retirement Plan

§1.1471-3 (d)(6)(B), include the below:

If the retirement plan is established or operates in a FATF-compliant country, a withholding agent that makes a payment with respect to an offshore obligation may treat the payee as a retirement plan described in §1.1471-5(f)((2)(ii) if the payee is generally known to be a retirement plan in which the withholding agent is located and the withholding agent has documentary evidence, including an organizational document associated with the payee (or other documents as required for AML due diligence) that establishes that the payee is a foreign entity that qualifies as a retirement plan in the country in which the payee is organized or operates, provided that no information in the documentary evidence contradicts the payee's status as a retirement plan under §1.1471-5(f)((2)(ii).

De Minimis Rule

§1.1471-5(f)(1)(i) *Registered Deemed Compliant FFI Categories*

(A) Local FFIs

An FFI is described in this paragraph (f)(1)(i)(A) if the FFI meets the requirements of paragraphs (f)(i)(i)(A)(1) through (8):

(1) The FFI must be licensed and regulated under the laws of its country of organization (which must be FATF-compliant at the time the FFI registers for deemed-compliant status) as a bank or similar organization authorized to accept deposits in the ordinary course of its business, a securities broker or dealer, or a financial planner or investment adviser, but must not qualify as an FFI solely because it is an entity described in paragraph (e)(1)(iii) of this section.

(2) The FFI must have no fixed place of business outside of its country of residence or, if it does, such fixed place of business must meet the requirements of paragraphs (f)(1)(i)(A)(1) through (8) independently.

(3) The FFI must not solicit account holders outside its country of incorporation or organization, or the country of organization of any fixed place of business referred to in paragraph (f)(1)(i)(A)(2). For this purpose, an FFI will not be considered to have solicited account holders outside of its country of organization merely because it operates a website, provided that the website does not specifically state that non-residents may hold deposit accounts with the FFI, does not advertise the availability of US. dollar denominated deposit accounts or other US. dollar denominated investments and does not target US. customers.

(4) The FFI must be required under the tax laws of the country in which the FFI is incorporated or organized to perform either information reporting or withholding of tax with respect to accounts held by residents.

(5) At least 98% of the accounts maintained by the FFI, including places of business referred to in (f)(1)(i)(A)(2) above, must be held by residents (including residents that are entities) of:
   i. The country in which the FFI is organized; or
   ii. A country that is a signatory to a Double Taxation treaty with the US.; or
   iii. A country that has entered into a FATCA Intergovernmental Agreement with the US.

(6) [As drafted]

(7) [As drafted]

(8) [As drafted]

Appendix Three: List of Approved Securities Exchanges

Argentina

Buenos Aires stock exchange
Cordoba stock exchange
La Plata stock exchange
Mendoza stock exchange
Rosario stock exchange

Australia

Australian Stock Exchange Limited
Bendigo Stock Exchange Limited
Stock Exchange of Newcastle Limited

Austria

Vienna stock exchange

Belgium

Antwerp stock exchange
Brussels stock exchange
Liege stock exchange

Bermuda

Bermuda stock exchange

Brazil

Belo Horizonte stock exchange
Curitiba stock exchange
Fortaleza stock exchange
Porto Alegre stock exchange
Recife stock exchange
Rio de Janeiro stock exchange
Salvador stock exchange
Santos stock exchange
Sao Paulo stock exchange

Canada

Calgary stock exchange
Montreal stock exchange
Toronto stock exchange
Vancouver stock exchange
Winnipeg stock exchange

Chile

Santiago stock exchange
Valparaiso stock exchange

China

Shanghai stock exchange
Shenzhen stock exchange

Colombia

Bogota stock exchange

Denmark

Copenhagen stock exchange

Finland

Helsinki stock exchange

France

Bordeaux stock exchange
Lille stock exchange
Lyon stock exchange
Marseille stock exchange
Paris stock exchange

Germany

Berlin stock exchange
Dusseldorf stock exchange
Frankfurt stock exchange
Hamburg stock exchange
Hannover stock exchange
Munich stock exchange
Stuttgart stock exchange

Greece

Athens stock exchange

Hong Kong

Hong Kong stock exchange

Hungary

Budapest stock exchange

India

Bombay stock exchange
Calcutta stock exchange
Delhi stock exchange
Madras stock exchange

Indonesia

Jakarta stock exchange
Surabaya stock exchange

Ireland

Dublin stock exchange

Israel

Tel Aviv stock exchange

Italy

Bologna stock exchange
Florence stock exchange
Genoa stock exchange
Milan stock exchange
Naples stock exchange
Palermo stock exchange
Rome stock exchange
Trieste stock exchange
Turin stock exchange
Venice stock exchange

Jamaica

Jamaica stock exchange

Japan

Hiroshima stock exchange
Kyoto stock exchange
Nagoya stock exchange
Niigata stock exchange
Osaka stock exchange
Fukuoka stock exchange
Sapporo stock exchange
Tokyo stock exchange

Korea, Republic of

Seoul stock exchange

Luxembourg

Luxembourg stock exchange

Malaysia

Kuala Lumpur stock exchange

Mexico

Mexican stock exchange

Netherlands

Amsterdam stock exchange

New Zealand

New Zealand stock exchange

Nigeria

Nigerian stock exchange

Norway

Oslo stock exchange

Pakistan

Karachi stock exchange

Peru

Lima Stock Exchange

Philippines

Makati stock exchange
Manila stock exchange

Poland

Warsaw Stock Exchange

Portugal

Lisbon stock exchange
Oporto stock exchange

Singapore

Singapore stock exchange

Slovakia

Bratislava stock exchange

Slovenia

Ljubljana stock exchange

South Africa

Johannesburg stock exchange

Spain

Barcelona stock exchange
Bilbao stock exchange
Madrid stock exchange
Valencia stock exchange

Sri Lanka
Colombo stock exchange

Sweden

Stockholm stock exchange

Switzerland

Basel stock exchange
Geneva stock exchange
Zurich stock exchange

Taiwan

Taiwan stock exchange

Thailand

Thailand stock exchange

Trinidad and Tobago

Trinidad and Tobago stock exchange

Turkey

Istanbul stock exchange

United Kingdom

London stock exchange

United States

American stock exchange
Boston stock exchange
Cincinnati stock exchange
Midwest stock exchange
NASDAQ stock exchange
New York stock exchange
Pacific stock exchange
Philadelphia stock exchange

Uruguay

Montevideo stock exchange

Venezuela

Caracas stock exchange
Maracaibo stock exchange

Yugoslavia, Federal Republic of

Belgrade stock exchange

Zimbabwe

Zimbabwe stock exchange

APPENDIX 2: SUBMISSION ON BEHALF OF NEW ZEALAND FINANCIAL SERVICES INDUSTRY BODIES (filed electronically on 30 April, tracking number 810013e2)

We refer to the Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities ("the Draft Regulations") and attach our submissions for consideration by the Department of the Treasury and the Internal Revenue Service. We appreciate the opportunity to make such submissions and would be happy to discuss any matters arising with officials if they wish, but do not otherwise wish to appear at the public hearings.

This submission is made on behalf of the leading financial services industry bodies in New Zealand, namely:

- Financial Services Council (industry body for the fund management industry),
- Financial Services Federation (industry body for the building societies and finance companies),
- Workplace Savings NZ (industry body representing employers and commercial product providers who offer workplace retirement savings schemes);
- the Trustee Corporations Association of New Zealand (industry body representing Trustee Corporations); and
- the New Zealand Bankers' Association.

While we understand and empathise with the desire of the US government to address issues of tax evasion by its citizens, the Draft Regulations present significant practical difficulties for the New Zealand funds management and retirement savings industry.

In particular we note that:

- Provision of much of the information required by the Draft Regulations by a New Zealand based FFI is likely to put that entity in breach of its obligations under the New Zealand Privacy Act 1993 unless that release is specifically authorised by the account holder. Obtaining consent from existing account holders is likely to be a complicated, time consuming and expensive process particularly where there are multiple holders on an account or nominee shareholders.
- The requirement to close accounts of 'recalcitrant' account holders on the basis the FFI considers the account holder is likely to be or may be a US citizen is likely to be a breach of the New Zealand Human Rights Act 1993.

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- There would appear to be no basis under New Zealand law for withholding amounts from distributions made by a New Zealand FFI without this obligation being enshrined in separate New Zealand legislation (such as the New Zealand Income Tax Act). Any affected account holder could seek legal recourse against the New Zealand FFI that complied with its FATCA obligations at the account holder's expense.

Although some of these issues will only be resolved through an inter-government agreement between our respective countries, much can be done to improve the situation through simple amendments to the Draft Regulations.

Background on the New Zealand retirement savings system

New Zealand operates a well regulated and monitored retirement savings system in New Zealand. Schemes fall under two broad categories:

- "superannuation schemes" which are schemes registered under the Superannuation Schemes Act 1989 set up principally for the purpose of providing retirement benefits and registered with the Financial Markets Authority (the New Zealand regulator); and

- "KiwiSaver schemes", which are established under the KiwiSaver Act 2006. KiwiSaver schemes are open to all New Zealand residents under the age of 65 (the New Zealand retirement age) with contributions matched in part by the government and the employer (the latter only if the member is an employee) with withdrawals from the scheme not permitted until age 65 other than in narrowly defined circumstances, including "significant financial hardship" or "serious illness".

New Zealand provides very little in the way of tax concessions for retirement savings schemes. Contributions to either a registered superannuation scheme or a KiwiSaver fund are made from after tax income. Income of the fund is taxed on an ongoing basis as it is earned (at a rate that is the proxy for the marginal tax rate of the investor, but capped at 28%, being the company tax rate in New Zealand)[1] with distributions from the fund being exempt from tax (sometimes referred to as the TTE model of taxation).

KiwiSaver

KiwiSaver is a partly-government funded scheme that is intended to encourage New Zealanders to save for their retirement.[2] KiwiSaver is intended to complement a New Zealander's current entitlement to New Zealand Superannuation.[3] Only New Zealand citizens and permanent residents that are living in New Zealand at the time of enrolment are eligible to join KiwiSaver. While KiwiSaver is available to both employees and the self

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1 The top personal tax rate in New Zealand is 33%

2 See the definition of a KiwiSaver scheme in Appendix 1

3 New Zealand has a universal government funded superannuation scheme (New Zealand Superannuation) available to all New Zealand citizens and permanent residents at the age of 65 provided they are living in New Zealand at the time of applying. Eligibility for this superannuation benefit is not income or means tested. The payment is set at 65% of the net average full time wage in New Zealand.

employed, the key benefit of being a member is the entitlement to matching contributions from New Zealand employers (up to 3% of the employee's gross salary and wages from 1 April 2013). The New Zealand government provides a small (up to NZ$521.43) annual contribution to the scheme to encourage New Zealand tax residents to continue making contributions to the scheme. Once a person has become a member of KiwiSaver they must remain a member until the age of 65 and are only entitled to make withdrawals from the scheme in limited circumstances.

Given the narrow criteria for KiwiSaver membership, the absence of any significant tax incentives, the significance of employer contributions and the restrictions on withdrawing funds from the scheme it is highly unlikely that KiwiSaver would be used by US taxpayers for the purpose of evading their US tax obligations.

New Zealand Superannuation

Superannuation schemes are registered schemes that are set up principally for providing retirement benefits[6]. These schemes are typically work-based schemes that impose restrictions on the ability of members to withdraw their funds before leaving their employment (the precise terms vary from one scheme to the next). Superannuation schemes offer even fewer incentives than KiwiSaver. There is no tax deduction, credit or subsidy given for contributions and the income derived by the fund is taxable annually at the investor's marginal rate on such income (capped at 28%). A significant number of superannuation schemes have now been closed to new members following the introduction of KiwiSaver in 2007. Both superannuation and KiwiSaver schemes have regular reporting requirements to the Inland Revenue Department regarding their members, income relating to each member, and tax that has been paid on income in the fund. The New Zealand and US revenue services already operate a system of automatic information sharing in respect of passive income (such as interest and dividends) earned by US persons in New Zealand.

Given that:

- registered superannuation schemes must be established for the principal purpose of providing retirement savings;
- contributions are made from after-tax income and receive no concessional treatment on the way into the fund; and
- income earned in the fund is taxed at the investor's marginal rate in the year it is earned by the fund;
- most schemes have restrictions on membership and many schemes are now closed to new members;

it is highly unlikely that New Zealand superannuation schemes would be used by US taxpayers as a vehicle for evading their US tax obligations.

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6 See the definition of Superannuation scheme in Appendix 1

Since New Zealand's superannuation system poses a relatively low risk of tax avoidance, within the intent of the exemption, regulated superannuation funds (that is, registered superannuation schemes and KiwiSaver funds) should be deemed compliant under Draft Treasury Regulation §1.1471-5(f) and/or deemed to be an "Exempt Beneficial Owner" under Draft Treasury Regulation §1.1471-6(f).

Problems with the existing Draft Regulations

Under the Draft Treasury Regulation § 1.1471-6(f)(1), a retirement fund will be an Exempt Beneficial Owner if either i) or ii) below are met:

i) The fund:

(A) Is established in a country with which the United States has an income tax treaty in force and is generally exempt from income taxation in that country;
(B) Is operated principally to administer or provide pension or retirement benefits; and
(A) Is entitled to benefits under the treaty on income that the fund derives from US sources as a resident of the other country that satisfies any applicable limitation on benefits requirement; or

[emphasis added]

ii) The fund:

(B) Is formed for the provision of retirement or pension benefits under the law of the country which is established;
(C) Receives all of its contributions (other than transfers of assets from certain accounts and other plans) from government, employer, or employee contributions that are limited by reference to earned income;
(D) Does not have single beneficiary with a right to more than five percent of the entity's assets; and
(E) Is exempt from tax on investment income under the laws of the country in which it is established or in which it operates due to its status as a retirement or pension plan, or receives 50 percent or more of its total contributions (other than transfers of assets from certain other accounts or other plans) from the government and the employer.

[emphasis added]

KiwiSaver schemes do not meet the requirements of 1.1471-6(f)(i)

KiwiSaver schemes are not exempt from tax and will therefore not meet requirement (A) of the first category of exemption (1.1471-6(f)(1)(i)). Such schemes will also not generally meet the requirement (B) or (D) of the second category of exemption (1.1471-6(f)(1)(ii)). This is because members can contribute more to the scheme than their employers and are not prevented from making voluntary contributions to the fund in excess of their earned income.

We understand that, in many countries, Governments seek to encourage workers to save for their retirement by offering them the opportunity to defer tax on their pension until those funds are withdrawn in retirement (the so-called EET schemes). The first exemption in 1.1471-6(f) appears designed to capture such schemes and take them outside the FATCA regime. While KiwiSaver provides for a TTE model (rather than EET) it has many of the same features which we surmise are being targeted by this exemption. KiwiSaver is retirement savings scheme for New Zealand citizens and permanent residents that live and work in New Zealand. A person who joins KiwiSaver must remain a member until the age of 65 and is only entitled to make withdrawals in very limited circumstances. In these circumstances KiwiSaver is not likely to be a vehicle which can be readily used by a US person to evade their US tax obligations.

Retirement schemes will generally not meet the requirements of 1.1471-6(f)(1)(ii)

We surmise that part of what the second category of exemption is intended to capture are those schemes where an account holder's ability to make contributions to the scheme is restricted: either because contributions are limited by reference to the member's earned income or capped at the same amount contributed by third parties (government and employers). New Zealand superannuation schemes are not tax exempt and will not meet the requirement (B) or (D) of the second category of exemption (1.1471-6(f)(1)(ii)) because members are generally entitled to make voluntary contributions to the fund and employer contributions may not equal those of the employee.

It is unnecessary and unduly burdensome to bring a large number of (often small and medium sized) New Zealand superannuation funds within FATCA's reporting requirements simply because they fail to meet the strict literal wording of 1.1471-6(f)(1)(ii).

Recommended Changes

In our submission the categories of exemption 1.1471-6(f)(1) should be extended to include retirement and KiwiSaver Schemes. KiwiSaver could be included by removing the reference to a tax exemption in the country of establishment and replacing it with a more reliable indicator (or range of indicators) of the sort of government sponsored retirement schemes the Treasury have identified as eligible to be treated as Exempt Beneficial Owners. Alternatively the Treasury could draw up a list of deemed compliant schemes that are identified by reference to their governing statute (in this case the KiwiSaver Act 2006) – such an approach was adopted by the Treasury in relation to identification of entities that are ineligible for check the box status under Treasury Regulation §301.7701-2(b)(8).

Regulated superannuation schemes could be included as Exempt Beneficial Owners by creating a further exemption category which covers regulated retirement schemes established in treaty countries primarily for the benefit of residents located in that country that meet certain tax information reporting requirements in their own country. Technical requirements imposed on the regulated funds themselves should be confined to meeting one or more criteria directed at ensuring there is a low risk of tax evasion. Such criteria could include:

(i) maximum contribution ratios linked or limited to earned income in that year but, recognising the nature of superannuation regimes like New Zealand's, no requirement for the contribution to be sourced out of that earned income;

(ii) tax benefits or concessions extended to contributions, fund income or withdrawals;

(iii) restrictions on withdrawal;

(iv) restrictions on membership (i.e. only offered to employees in a certain corporate group);

(v) restrictions on further contributions once employment ceases;

Schemes that are closed to new members or impose suitable restrictions on new members on or prior to 1 January 2014 should also be grandfathered under these rules. Section 9 of The Superannuation Schemes Act implies into every superannuation scheme trust deed a provision that no amendment can be made which reduces/adversely affects benefits under that scheme without the written consent of every member adversely affected by the amendment. This means it will be practically be impossible for existing superannuation schemes to change the terms of that scheme as it applies to existing members.

Certified Deemed Compliant FFIs

If a retirement fund is a certified deemed compliant FFI, the retirement fund will not have to sign up to an FFI agreement and the retirement fund would be able to certify to withholding agents or other FFIs that it is a certified deemed compliant FFI (and, therefore, they are not required to withhold any tax on payments to the retirement fund).

The criteria for larger retirement funds (more than 20 participants) to be certified deemed compliant includes (Draft Treasury Regulation § 1.1471-5(f)(2)(ii)(A)(1)):

- All contributions to the FFI (other than transfers of assets from accounts or other plans) are employer, government or employees limited by reference to earned income;
- No single beneficiary has a right to more than five percent of the FFI's assets;
- Contributions to the FFI that would otherwise be subject to tax under the laws of New Zealand are deductible or excluded from gross income of the beneficiary, the taxation of investment income attributable to the beneficiary is deferred under the laws of New Zealand, or 50 percent or more of the total contributions to the FFI are from the government or the employer.

As with the Exempt Beneficial Owner exemption above, New Zealand superannuation funds (including KiwiSaver funds) would not be eligible for "deemed compliant" exemption since they permit voluntary contributions to exceed earned income. Furthermore contributions are made out of gross income with no deferral of tax at the fund level. We submit the definition of "retirement funds" should be amended by replacing the existing criteria or including a third criterion for regulated retirement schemes that are established in information exchange countries. Such retirement schemes (particularly those with low-risk indicia identified above)

ought to be treated as deemed compliant if they meet information reporting requirements to their local tax authority.

Ernst & Young New Zealand is performing a secretariat function for the various industry groups and any questions or requests for further information should be directed in the first instance to:

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Appendix

Meaning of Superannuation Scheme (from section 2 of the Superannuation Schemes Act 1989)

(1) In this Act, unless the context otherwise requires, superannuation scheme or scheme—

(a) means—

(i) any trust established by its trust deed principally for the purpose of providing retirement benefits to beneficiaries who are natural persons or paying benefits to persons who are the trustees of a registered superannuation scheme or a KiwiSaver scheme; or

(ii) any arrangement constituted under an Act of the Parliament of New Zealand, other than the Social Security Act 1964, principally for the purpose of providing retirement benefits to natural persons; but

(b) does not include any scheme that is registered as a KiwiSaver scheme.

Meaning of KiwiSaver Scheme (from the KiwiSaver Act 2006)

(1) The purpose of this KiwiSaver Act 2006 is to encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits.

(2) To that end, this Act enables the establishment of schemes (*KiwiSaver schemes*) to facilitate individuals' savings, principally through the workplace.

KiwiSaver Scheme means

"a scheme that is registered in the KiwiSaver schemes register under Part 4 of the Act."

APPENDIX 3: CONFLICTS WITH NEW ZEALAND LAWS

Provision of specified information to the IRS under FATCA without customer authorisation is prohibited under NZ privacy laws

1. All NZ banks and other financial institutions are required to comply with New Zealand's Privacy Act 1993. The Privacy Act establishes 12 privacy principles with respect to the collection, use and disclosure by an agency of personal information about identifiable individuals and the individuals' access to such information.

2. The collection and provision of information required by the FFI Agreements would, if specific customer authorisation is not obtained, cause NZ banks and other financial institutions to breach one or more of the following privacy principles:

   (a) Principle 1 (Purpose of collection of personal information), which requires a person collecting personal information to ensure that the information is collected for a lawful purpose connected with the person's function or activity and the collection is necessary for that purpose;

   (b) Principle 3 (Collection of information from subject), which requires a person collecting personal information to, at the time of collecting the information, take such steps as are reasonable in the circumstances to ensure that the individual concerned is aware of, among other things:

      (i) the fact that the information is being collected;

      (ii) the purpose for which the information is being collected;

      (iii) the intended recipients of the information; and

      (iv) if collection of the information is authorised or required by law, the particular law, whether the supply of information is voluntary or mandatory, and the consequences (if any) if the requested information is not provided;

   (c) Principle 10 (Limits on use of personal information), which prohibits a person from using personal information that was obtained in connection with one purpose for any other purpose;

   (d) Principle 11 (Limits on disclosure of personal information), which prohibits a person in possession of personal information from disclosing the information to another person, body or agency.

3. NZ banks also owe a general duty to their customers to preserve the confidentiality of information obtained in the course of the banker-customer relationship. This duty is implied into the banker-customer contract by common law and exists alongside the statutory prohibitions imposed by the Privacy Act. The provision of specified information by NZ Banks under FATCA without customer authorisation would also be in breach of this common law duty of confidentiality.

No legal authority in NZ for banks and financial institutions to withhold amounts from payments to their customers as required by FATCA

4. Although NZ law specifically allows a payer to deduct NZ withholding taxes and deems such withholding to have been received by the person to whom the payment is made, this treatment does not extend to a withholding under FATCA because a FATCA withholding is fundamentally different in nature from a NZ withholding tax.

5. Most standard terms and conditions in account agreements specify that NZ withholding tax may be deducted from payments made under the agreement, but they are not sufficiently broad to cover a FATCA withholding. Even if the terms and conditions are amended to specifically refer to a withholding required by FATCA, there is a risk that any such term could still be void under NZ law, for example as an unfair term.

NZ banks and financial institutions are prohibited under NZ human rights laws from closing accounts or refusing to provide products and services to recalcitrant account holders

6. Human Rights Act 1993 aims to ensure that all people in New Zealand are treated fairly by providing legal protection for people who are victims of unlawful discrimination. Unlawful discrimination occurs where, under the same or similar circumstances, one person is treated less favourably than another based on a prohibited ground of discrimination.

7. Under the Human Rights Act, it is unlawful for a person who supplies goods, facilities or services to the public (or to any section of the public) to, by reason of any of the prohibited grounds of discrimination:

   (a) refuse or fail on demand to provide any other person with those goods, facilities or services; or

   (b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case.

8. National origin, including nationality and citizenship, is a specified prohibited ground of discrimination.

9. As the FATCA disclosure and consent requirements apply only in respect of the US national customers of an FFI, a NZ bank or financial institution would be in breach of the Human Rights Act if it were to close the account of, or decline to provide an account to, certain persons on the basis that provision of the account would result in additional compliance costs under FATCA.

10. Although the Human Rights Review Tribunal has the power to declare an act that would otherwise be unlawful to be lawful by reason of a genuine justification, this power is exercisable only after an inquiry has been initiated against a person or a complaint has been made about a person and there is very little guidance as to what constitutes a genuine justification sufficient to support such a declaration.