sifma

Invested in America

April 30, 2012

Delivered Electronically

Emily McMahon
Acting Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
Emily.McMahon@do.treas.gov

Jesse Eggert
Attorney Advisor (Office of Int'l Tax Counsel)
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
jesse.eggert@do.treas.gov

Michael Plowgian
Attorney Advisor (Office of Int'l Tax Counsel)
United States Department of Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
Michael.plowgian@do.treasury.gov

John Sweeney
Senior Technical Reviewer
1111 Constitution Ave., NW
Washington, DC 20224
john.j.sweeney@irscounsel.treas.gov

RE: SIFMA Comments on the Proposed FATCA Regulations

Ladies and Gentlemen,

The Securities Industry and Financial Markets Association ("SIFMA")[1] welcomes the opportunity to submit comments on the proposed regulations being developed to implement the provisions of the Foreign Account Tax Compliance Act ("FATCA") that were included in section 501 of the Hiring Incentives to Restore Employment Act.

SIFMA appreciates the substantial and thoughtful efforts that the Department of the Treasury and the IRS put into the development of the recently released proposed regulations, as well

[1] SIFMA brings together the shared interests of securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

as the consideration that was given to many of SIFMA's previous comments and suggestions. In particular, SIFMA believes that the exemption for short-term debt and the extension of the cutoff date for grandfathered obligations under the proposed regulations represent significant steps forward.

The remainder of this letter comments on a number of issues that SIFMA's members have identified in the proposed regulations. As discussed in Comment I, however, this letter does not include all of the substantive comments that SIFMA expects to have. In particular, SIFMA anticipates submitting additional comments regarding passthru payments at a later date.

Summary

I. A thorough evaluation of the FATCA obligations proposed to apply to SIFMA's members under the proposed regulations will not be possible for some time.

II. There should be a uniform cutoff date for preexisting accounts, and it should be 1/1/2014; consistent with this date, implementation dates for related withholding and reporting duties should be extended appropriately. Further, certain transactions with respect to preexisting accounts should not change their status.

III. Grandfather protection should be extended to certain transactions under existing ISDA master agreements.

IV. FFIs that are US payors should be allowed to elect to be treated as just FFIs.

V. A certified DCFFI exemption should be created for certain existing securitization vehicles.

VI. The reason to know standard and account balance calculation should not require aggregation of information not linked through computerized systems or obtained by an agent for different principals.

VII. The treatment of DVP/COD transactions should be revised to be consistent with the existing Chapter 61 rules.

VIII. Certain other agent issues should be clarified.

IX. Reliance on trusted sources of information should be permitted.

X. The regulations should explain in more detail the requirements for FFI status.

XI. The regulations should not require certain clearly domestic "exempt recipient" corporations to be treated as FFIs.

XII. The regulations should provide that an inadvertent compliance failure by an FFI will not endanger the PFFI status of an entire group.

XIII. The regulations should treat certain additional retirement and benefit plans as DCFFIs.

XIV. The definition of gross proceeds for purposes of FATCA should be conformed to the definition of gross proceeds under section 6045.

Comments

I. A thorough evaluation of the FATCA obligations proposed to apply to SIFMA's members under the proposed regulations will not be possible for some time.

- As an initial matter, SIFMA would like to emphasize the very unsettled state in which its members find themselves with respect to the recently released proposed regulations.

- The proposed regulations are lengthy. They are also extremely complicated, both in themselves and in their potential application to various market transactions. Yet, there is a very short window to provide comments. As a consequence, SIFMA does not believe that all, or even most, of the potentially significant issues raised by the proposed regulations will be identified by market participants before the end of the comment period.

- In addition, it will be very difficult for SIFMA's members to make an accurate assessment of the effect of the proposed regulations, or even to begin efforts to design required compliance systems, until a proposed model agreement for the FATCA partnerships to be entered into with foreign countries is released (which SIFMA understands is expected to occur during the summer of 2012). In this regard, the development of the FATCA partnerships has thus far proceeded behind the scenes. Market participants should be given an opportunity to comment on the proposed provisions of the model agreement as soon as possible, so that issues raised by the partnerships and their interaction with the proposed regulations can be identified in a timely manner.

- Regarding the partnerships, it will be particularly important for the model agreement to be implemented in a consistent manner across jurisdictions, so that the duties of FFIs and USFIs with respect to each partnership jurisdiction are substantially the same; otherwise,

the already complex process for creating FATCA compliance systems could well spin out of control. Further, and for similar reasons, any additional reporting obligations to be imposed on USFIs under the FATCA partnerships should be strictly limited to the types of information reportable under the Chapter 3 rules (e.g., on Form 1042-S), for which USFIs already have compliance systems.

II. *There should be a uniform cutoff date for preexisting accounts, and it should be 1/1/2014; consistent with this date, implementation dates for related withholding and reporting duties should be extended appropriately. Further, certain transactions with respect to preexisting accounts should not change their status.*

- The proposed regulations would generally allow a PFFI that signs an FFI agreement on 7/1/2013 to apply transitional documentation and diligence requirements to certain "preexisting accounts" in existence on that date,[2] for both reporting and withholding purposes.[3]

- Although the transitional rule for withholding would apply to USFIs as well as PFFIs,[4] other aspects of the transitional documentation and diligence rules for PFFIs are not expressly

---

2 *See* Proposed Treasury regulation section 1.1471-1(b)(49) and (50) (defining "preexisting entity account" and "preexisting individual account" as applicable financial accounts that are "preexisting obligations"); Proposed Treasury regulation section 1.1471-1(b)(48) (defining "preexisting obligation", for a PFFI, to include an account maintained on the date the PFFI's FFI agreement becomes effective).

3 *See, e.g.,* Proposed Treasury regulation section 1.1471-2(a)(4)(ii) (providing an exception from FATCA withholding, until 1/1/2015, for certain preexisting accounts); Proposed Treasury regulation section 1.1471-4(c)(3) (providing a 1-year grace period from the date of a PFFI's FFI agreement for the documentation of certain preexisting entity accounts); Proposed Treasury regulation section 1.1471-4(c)(4) (providing exceptions from account documentation requirements for certain small preexisting individual accounts).

4 *See* Proposed Treasury regulation section 1.1471-2(a)(4)(ii) (applying the transitional withholding rule to all withholding agents).

mirrored for USFIs.[5] Furthermore, in the case of USFIs, preexisting accounts are defined as accounts in existence on 1/1/2013, rather than 7/1/2013, with no discernible rationale for the different cutoff.[6]

- Just like PFFIs, USFIs will need to build substantial new systems in order to determine the FATCA status of their account holders (PFFIs, NPFFIs, DCFFIs, NFFEs, etc.), and to withhold and/or report on such accounts as appropriate. To ensure a level playing field, it is critical that PFFIs and USFIs have consistent starting dates and transitional periods for FATCA compliance, to the maximum extent relevant and possible.

- Further, the proposed cutoff dates are simply not achievable, for PFFIs or USFIs. For SIFMA's members, both FFIs and USFIs, it will take longer than the allotted time to build the necessary systems to implement FATCA's documentation and diligence requirements for new accounts, and such work can not begin in earnest until the final regulations, forms, and instructions that such systems would implement are issued. Further, reengineering such systems to implement any modifications to such requirements under the FATCA partnerships can be expected to give rise to additional complexity and delay.

- It will also greatly complicate compliance efforts if cutoff dates happen midyear or are not coordinated.[7]

---

[5] For example, the 1-year grace period for certain preexisting entity accounts in Proposed Treasury regulation section 1.1471-4(c)(3).

[6] *See* Proposed Treasury regulation section 1.1471-1(b)(48) (defining "preexisting obligation", for a USFI, to include an account maintained on 1/1/2013); Proposed Treasury regulation section 1.1471-2(a)(4)(ii) (providing an exception from FATCA withholding, until 1/1/2015, for certain preexisting accounts).

[7] In the case of USFIs trying to document accounts of FFIs established after 1/1/2013, note that FFI EINs would not be available under the proposed regulations until 7/1.

- In this regard, it is important to understand that, for a large financial institution, creating and implementing any documentation, withholding, or similar system on the order of those required for FATCA will be a very a complicated process, and will involve not just the design, programming, and testing of relevant IT systems, but also the creation, vetting, and implementation of internal process, compliance, and certification procedures, as well as the organized education of business units and clients. Appendix I contains detailed indicative project plans for the development of FATCA documentation and withholding systems by a multinational financial institution group. These indicative project plans were derived from the actual planning efforts of SIFMA's members, but of course represent an amalgam of the specific plans of individual firms.

- Further, many USFIs and FFIs have long established practices that require substantial new compliance systems only to be brought online at 1/1 or a very limited number of other dates during the year, and only after a substantial lead time. For example, many USFI and FFI groups would typically only bring a substantial new account compliance system online at 1/1, and only if the new system were fully scoped by the previous 4/30. These schedules are important for ensuring compliance with financial regulatory requirements, which they achieve, among other ways, by minimizing the potential for system changes to disrupt customer accounts and transactions. Under the noted typical schedule, it would of course already be too late for a USFI or FFI group to bring a FATCA compliance system online at 1/1/2013. Taking into account the quite complicated process for implementing FATCA documentation and withholding systems outlined in Appendix I, these existing schedules will simply make it impossible, regardless of resource allocations, to arbitrarily accelerate the implementation of FATCA documentation and withholding systems.

- Taking the above into account, and assuming that all relevant final FATCA regulations, forms, instructions, and model agreements are issued by 9/1/2012, the proposed transition timeframe should be revised to provide transitional documentation and diligence rules, with respect to both USFIs and PFFIs, for preexisting accounts in existence on 1/1/2014,[8] and such rules should be made as uniform as possible.[9] As outlined in Appendix I, the development of FATCA withholding systems is intricately tied to the development of documentation systems for new accounts, and it will not be possible to develop certain aspects of the withholding systems before completion of the documentation systems. As such, the general 1/1/2014 start date for FATCA withholding should also be pushed back, to 1/1/2015, and similar conforming delays should be implemented for all related reporting start dates (so that, e.g., PFFI reporting on US account balances would not occur until 2015, with respect to 2014 balances).[10] These proposed dates again assume that all relevant final FATCA regulations, forms, instructions, and model agreements are issued as noted above.

- As a further measure to enhance the preexisting account rules, SIFMA would also suggest that the following accounts continue to be treated as preexisting accounts:

  (i) preexisting accounts moved from one PFFI or USFI to another USFI or PFFI in the same expanded affiliated group;

---

8 In particular, the definition of "preexisting obligation" in Proposed Treasury regulation section 1.1471-1(b)(48) should be revised to include accounts maintained on 1/1/2014 for both PFFIs and USFIs.

9 In particular, the 1-year grace period for certain preexisting entity accounts in Proposed Treasury regulation section 1.1471-4(c)(3) should be made applicable to USFIs for withholding purposes, and the period should start, for both PFFIs and USFIs, on 1/1/2014.

10 In this regard, and as suggested in previous SIFMA comments, it should be possible to move PFFI reporting on US account balances to March, rather than September, which would reduce the reporting delay to just 6 months.

(ii) preexisting accounts moved from one PFFI or USFI to another PFFI or USFI as part of a bulk transfer of accounts between unrelated parties (and accounts so transferred should be presumed preexisting unless there is a reason to know otherwise, after a diligent search of available account records);[11] and

(iii) more generally, any accounts for which preexisting AML/KYC may be relied upon, and no new AML/KYC information would need to be sought (e.g., new subaccounts under a preexisting master account).

In case (ii), the regulations should further make clear that a USFI or PFFI may rely on the FATCA characterization of relevant accounts in the business records associated therewith for all FATCA purposes, absent a reason to know that such characterization is unreliable.

III. Grandfather protection should be extended to certain transactions under existing ISDA master agreements.

- SIFMA appreciates the extension of the cutoff date for grandfathered obligations to 1/1/2013,[12] which will help USFIs and FFIs to implement the requirements of FATCA in an orderly way.

- SIFMA remains concerned, however, that the grandfather rule will give rise to significant market disruption in the case of ISDA master agreements entered before 1/1/2013, since such agreements would not qualify for grandfather protection because they lack a term.

[11] A bulk transfer would occur, for example, in connection with a sale of a business unit from one financial institution to another. Such transactions may involve the transfer of literally thousands of accounts. Regarding the proposed assumption, *cf.* Treasury regulation section 31.3406(d)-1(b)(2) (containing a similar rule for pre-1984 accounts under the Chapter 61 rules). In this regard, it should of course be noted that the benefits of an account being treated as a preexisting account are limited, and disappear after only a few years in any event.

[12] *See* Proposed Treasury regulation section 1.1471-2(b)(2)(i).

- Thousands of existing ISDA master agreements do not contemplate FATCA withholding, and it will be extremely difficult for market participants to renegotiate all such agreements by 1/1/2013. In order to address this problem, SIFMA would suggest that the grandfathered obligation definition be extended to include a transaction entered into under an ISDA master agreement that is in effect on 1/1/2013 (but regardless of when such transaction is entered into), so long as such transaction terminates no later than, e.g., 4 years from 1/1/2013.[13]

- In this regard, SIFMA believes that extending the definition to cover such transactions would be similar to the existing coverage under the proposed regulations for borrowings under revolving credit facilities in effect on 1/1/2013. A 4-year period from 1/1/2013 for applicable ISDA transactions would also coordinate with the proposed 1/1/2017 effective date for expanded passthru payment withholding.

IV. FFIs that are US payors should be allowed to elect to be treated as just FFIs.

- The proposed regulations provide some coordination of the Chapter 4 and Chapter 61 obligations of an FFI that is a US payor;[14] nonetheless, such an FFI would still essentially be required to comply with both systems.

- This double obligation would place FFIs owned by US financial groups on an unlevel playing field as compared to foreign-owned FFIs operating in the same markets. It is also hard to see how requiring such FFIs to continue to comply with their Chapter 61 obligations, in

[13] To be clear, SIFMA does not mean to suggest that there be any grandfather exemption, under FATCA or otherwise, for swap payments properly characterized as US source dividends under section 871(m).

[14] *See* Proposed Treasury regulation section 1.1471-4(d)(2)(iii)(A).

addition to their much more extensive FATCA obligations, would provide any benefit to the US government.

- Taking the above into account, the proposed regulations should be revised to allow an FFI that is a US payor to elect to be treated just as an FFI (and not a US payor), for all purposes under the Code. Further, to ensure a true level playing field, an entity making such an election should be treated the same as other FFIs located in the same jurisdiction, including under FATCA partnerships entered into between the United States and foreign governments.

V. A certified DCFFI exemption should be created for certain existing securitization vehicles.[15]

- The preamble to the proposed regulations requests comments on a potential exemption for existing securitization vehicles, under which equity interests in such vehicles could be treated as grandfathered obligations. As noted in SIFMA's prior comment letters, it is critical that an exemption from FATCA be created for existing securitization vehicles, but the exemption must go much farther than the grandfather proposal to be useful.

- In particular, the exemption must allow an appropriate existing securitization vehicle to be treated as a DCFFI that is exempt from the requirement to enter into an FFI agreement, and that may certify its status as a DCFFI to applicable withholding agents.

- The reason is that most existing securitization vehicles simply do not have mechanisms in place that would allow them to enter into FFI agreements or comply with the requirements thereof, or to pay for such activities. Although it might in theory be possible for the

[15] Although the key points are discussed in this comment, an updated version of the more detailed background information regarding securitization vehicles contained in SIFMA's prior comment letters is attached as Appendix II.

documents for an existing securitization vehicle to be amended by a vote of the investors to permit the vehicle to enter into and comply with an FFI agreement, no party is likely to be designated to initiate such an amendment process, and there can be no guarantee that investors would agree to the required changes.

- As a consequence, if required to enter into and comply with an FFI agreement, most existing securitization vehicles simply would not, which may lead to substantial withholding on relevant assets and/or securitization vehicle securities, which may lead to large-scale, disruptive liquidations of the hundreds of billions of dollars of US assets held by such vehicles.[16] In the case of the many securitization vehicles that may be treated as members of an expanded affiliated group of PFFIs, the failure to sign an FFI agreement could also cause the other PFFIs in the group to become NPFFIs, with further disastrous consequences.

- In its prior comment letters, SIFMA suggested that a DCFFI exemption be created for existing securitization vehicles, and that such exemption apply to limited-purpose, limited-duration vehicles that are established to hold a specific type of investment asset and to sell debt and/or equity interests to investors that receive payments generated by the assets of the vehicle. To address anti-abuse concerns, including concerns noted in the

[16] In this regard, it is true that a noncompliant securitization vehicle would generally not be subject to withholding under FATCA in respect of grandfathered obligations. Many existing securitization vehicles will be required to acquire a modest but significant amount of assets for a few years after 12/31/2012, however, mainly to replace existing assets that are unexpectedly repaid early. It can of course not be assumed that it will be possible to find appropriate grandfathered obligations for all such replacement assets. More importantly, it is expected that a substantial portion of existing securitization vehicle assets may lose grandfathered status in the years after 12/31/2012 as a result of material modifications. And, to the extent that existing securitization vehicle assets become subject to significant amounts of withholding in the years after 12/31/2012, for whatever reason, SIFMA anticipates that certain holders of such vehicles' securities will frequently be permitted (and motivated) to trigger liquidations of such vehicles under the vehicles' governing documents. Alternatively, in the case of modifications, existing securitization vehicles may just refuse to agree to any modification that results in a material modification, which may result in increased defaults and bankruptcies of distressed companies that are unable to obtain needed relief from creditors that would otherwise be available.

discussion of the securitization vehicle grandfather proposal in the preamble to the proposed regulations, SIFMA would further suggest that:

(i) the exemption should not apply if a securitization vehicle has a wide investment mandate;

(ii) the exemption should not apply if the securitization vehicle has reason to know, in connection with the initial marketing of its debt and equity securities, that the majority thereof are intended to, or likely to, be held by related parties, such as family members;

(iii) the exemption should only apply to securitization vehicles created before the date that the portion of the FATCA regulations containing the exemption is issued in final form;

(iv) the exemption should only apply to securitization vehicles that were required at creation to wind up within 30 years;

(v) the exemption should not apply if more than a de minimis amount of the securitization vehicle's assets were acquired with an intent to dispose of them prior to the wind-up of the vehicle (as opposed to an intent to hold such assets to their maturity and/or until the wind-up of the vehicle);[17] and

(vi) the exemption should only apply if substantially all payments by the securitization vehicle in respect of its debt and equity securities are made through a trustee, paying

[17] *Cf.* section 743(f) (applying a similar condition in the case of a special rule for "securitization partnerships").

agent, or clearing organization that is either a PFFI acting as a full withholding QI or a responsible USFI.

- Point (vi) would ensure that a responsible USFI or PFFI was always in an appropriate position to report and/or withhold on payments from a securitization vehicle, as and to the extent required by the IRS; as such, the participation of the vehicle itself in the FATCA reporting and withholding scheme would not be necessary.[18] The proposed certified DCFFI exemption would also represent only a modest substantive expansion of the rules already proposed to apply in respect of cleared securities, and, consistent with those rules, SIFMA would expect the implementation of its proposal to place primary FATCA compliance responsibility on the clearing organizations for all such securities (rather than trustees or paying agents, which SIFMA would expect to have responsibility only for non-cleared securities).[19]

---

[18] And, such participation would be unlikely to be useful in any event, as the vehicles themselves generally have limited, if any, information as to who their security holders might be, at least after the initial issuance thereof.

[19] In this regard, most securities issued by securitization vehicles are held through clearing organizations, and the proposed regulations would generally allow a securitization vehicle to treat payments made on such a security as paid to the clearing organization. *See* Proposed Treasury regulation section 1.1471-5(a)(3)(iii) (treating an account of an FFI held by a financial institution acting as an agent for beneficial owners as held by the financial institution for FATCA purposes); Proposed Treasury regulation section 1.1471-3(a)(2) (generally treating the account holder as the payee of payments made on the account for FATCA purposes); Proposed Treasury regulation section 1.1471-3(a)(3)(i)(A)(2) (providing an exception to the general payee rule for account holders that are PFFI intermediaries in some cases, but continuing to treat such a PFFI intermediary as the payee where it is acting as a full withholding QI); Proposed Treasury regulation section 1.1471-3(a)(3)(iii) (providing an exception to the general payee rule for account holders that are US intermediaries in some cases, but continuing to treat such a US intermediary as the payee where it is a financial institution that is expected to comply with its FATCA obligations). SIFMA would suggest, however, that the requirement that a PFFI be acting as a full withholding QI in Proposed Treasury regulation section 1.1471-3(a)(3)(i)(A)(2) is unnecessary and should be eliminated. With regard to securitization vehicles, SIFMA expects that the clearing organizations through which their cleared securities are held will almost always be either PFFIs that routinely act as full withholding QIs (like Euroclear or Clearstream) or responsible US financial institutions (like DTC). As such, an existing securitization vehicle would itself generally not have substantive FATCA information reporting or withholding duties with respect to its securities that could be US accounts, except for securities that may be held outside of clearing organizations. Unfortunately, there is a significant investor base with strong regulatory reasons to hold securitization vehicle equity and equity-like securities in non-cleared form (mainly US institutional investors subject to ERISA), and

- It should be noted that a requirement for a securitization vehicle to register as a DCFFI with the IRS would pose the same problems as a requirement to enter into an FFI agreement. SIFMA believes that a certification requirement, however, would not pose such problems.

- Assuming that the proposed DCFFI rule for existing securitization vehicles is implemented as described above, SIFMA would also suggest that there would be no clear harm to the US government, and much potential administrative benefit to both the US government and the financial community (e.g., by reducing unnecessary FFI agreements), if the exemption were also applied to new securitization vehicles.

VI. The reason to know standard and account balance calculation should not require aggregation of information not linked through computerized systems or obtained by an agent for different principals.

- The proposed regulations would in certain cases treat a person as having reason to know that a document (e.g., a withholding statement) is unreliable or incorrect based on "other documentation", as well as based on all of the knowledge of an agent.[20]

- It will not be possible for USFIs or FFIs to consult all possible documentation to which they may in theory have access. Further, it will not be possible, or in many cases legal, for an agent to share with one principal information obtained for another principal.

---

there accordingly exists a small but significant amount of non-cleared securities of existing securitization vehicles. As a consequence, an expansion of the existing exemptions is needed to deal with such non-cleared securities.

[20] Proposed Treasury regulation sections 1.1471-3(e)(3) and (4); Proposed Treasury regulation section 1.1471-3(e)(4)(i)(A).

- Taking the above into account, the proposed regulations should be revised to provide a uniform rule, for both USFIs and FFIs, that confirms that, for purposes of determining reason to know with respect to an account:

  (i) no USFI or FFI will be required to consult information or documentation except to the extent that the USFI's or FFI's computerized systems link the information or documentation to such account by reference to a data element such as client number or taxpayer identification number (including an EIN);[21] and

  (ii) no USFI or FFI will be treated as having any information or knowledge of an agent that the agent obtained for another principal (and did not also obtain for the USFI or FFI).

- This rule should also apply in the case of information relating to determination of account balances (so that no USFI or FFI will be treated as having information relating to account balances from such sources).

VII. The treatment of DVP/COD transactions should be revised to be consistent with the existing Chapter 61 rules.

- The proposed regulations contain clear rules delineating responsibility for information reporting and withholding in the case of delivery-versus-payment/cash-on-delivery

[21] *Cf.* Proposed Treasury regulation section 1.1471-4(c)(3)(ii)(B)(2) (containing a similar aggregation rule for information relating to account balances).

transactions.[22] Unfortunately, the proposed rules would not be consistent with the existing Chapter 61 rules for such transactions, and could lead to substantial market disruption.[23]

- There is a staggering volume of DVP/COD transactions every day, and any change to current practices would require very substantial efforts. In such transactions, executing brokers are agents that simply execute trading instructions, and have no customer relationship with the receiving broker. Consistent with this fact and the rules under Chapter 61 (which place information reporting and withholding responsibility on the receiving broker), it is currently the universal practice of executing brokers not to obtain tax documentation from receiving brokers. As such, executing brokers have absolutely no systems in place to document the receiving brokers on the millions of such transactions that occur every day, or to perform any information reporting or withholding in respect of such transactions.

- DVP/COD transactions are the heart of the US equity and debt markets. They occur across a wide variety of broker trading platforms (often through numerous systems in a single firm), and may be either public or private transactions, cleared or uncleared. It is unlikely that executing brokers would be able to develop the new systems that would be necessary to ensure proper, trade-specific documentation, reporting, and withholding with respect to each and every DVP/COD transaction before the current proposed start dates for FATCA withholding and reporting (whether under the proposed regulations or under SIFMA's proposal above). If that scenario occurs, millions of trades may start either to fail or to be

[22] *See, e.g.,* Proposed Treasury regulation section 1.1471-2(a)(2)(v) (requiring all brokers involved in such a transaction to withhold).

[23] *See* Treasury regulation section 1.6045-1(c)(3)(iv) (generally only requiring information reporting and backup withholding by the broker receiving the gross proceeds from a sale against delivery of the securities sold (as opposed to the executing broker)).

refused with the onset of FATCA requirements, as executing brokers either withhold on all DVP/COD payments in the absence of documentation, or simply leave the market; this would, of course, result in substantial market disruption.

- Accordingly, and consistent with the current Chapter 61 rules, it is critical that information reporting and withholding under FATCA in respect of DVP/COD transactions generally be required only for a USFI or PFFI that receives the gross proceeds from the executing broker in respect of a sale against delivery of the securities sold.[24]

- As an anti-abuse measure, the Department of the Treasury and the IRS could consider limiting the above rule to situations where the transaction is executed through a clearing organization that is a USFI or PFFI, or the executing broker has documented that the receiving broker is a PFFI or USFI (since in both cases the IRS could of course look to such other USFI or PFFI for FATCA compliance in the first instance).

- In this regard, a large portion of DVP/COD transactions are executed through clearing organizations that are either USFIs (like DTC) or that can be expected to be PFFIs (like Euroclear and Clearstream). For the relatively limited volume of uncleared transactions, SIFMA believes that it should be possible for executing brokers to develop and put in place appropriate documentation, reporting, and withholding systems on a timely basis, assuming that the start date for FATCA withholding is extended to 1/1/2015 as suggested above, so that they can either confirm that their receiving broker counterparty is a USFI or PFFI, or

[24] As in the case of the Chapter 61 rules, the regulations should confirm that the receiving broker in this situation is treated as the payee for FATCA purposes, regardless of whether the broker is acting for a customer and regardless of the broker's status. In this regard, under the current text of Proposed Treasury regulation section 1.1471-3(a)(3)(i)(A)(2), a PFFI receiving broker would appear not to be treated as the payee in such a transaction with respect to any portion of a DVP/COD payment constituting FDAP unless it is acting as a full withholding QI. SIFMA would suggest that the requirement to be acting as a full withholding QI is unnecessary and should be eliminated.

report and/or withhold. For all transactions executed through clearing organizations or directly with PFFI or USFI receiving brokers, there should be no need for additional reporting and withholding obligations to be imposed on the executing broker, as long as the regulations make clear that such obligations rest on the applicable clearing organization or USFI/PFFI receiving broker.

VIII. Certain other agent issues should be clarified.

- Consistent with SIFMA's prior comments, the regulations should make clear that, where one FFI (or USFI) agrees, under a contract, to act as a FATCA paying, reporting, withholding, or other similar agent for a USFI, PFFI, or DCFFI, the financial accounts of the principal should not be treated as financial accounts of the agent for which the agent has statutory (as opposed to contractual) responsibility under FATCA.[25]

- In this regard, such treatment would be consistent with the practice of paying agents that perform Chapter 61 duties for principals; in the event that paying agents were to acquire additional liability under FATCA, principals would be less likely to hire USFIs and PFFIs to serve as paying agents, which would not be productive for the US government.

- As a further measure to facilitate FATCA compliance through paying agents, and consistent with the Chapter 3 rules, SIFMA would also suggest that the proposed regulations be

[25] In this regard, SIFMA notes that such a rule would generally not apply in the case of existing securitization vehicle treated as DCFFIs per SIFMA's proposal in IV above, as such DCFFIs would not have entered into FATCA agent agreements.

clarified to allow reliance, by any USFI or PFFI, on documentation obtained through any introducing broker or other agent that is either a USFI or PFFI.[26]

IX. Reliance on trusted sources of information should be permitted.

- In many cases, the proposed regulations allow a USFI or PFFI to rely on certain documentary evidence, written statements, or other information regarding an account holder (e.g., listing/trading status, governmental status, whether an entity has a non-financial business, etc.), but only if obtained from the account holder.[27] For AML and KYC purposes, it is generally permissible to rely on certain trusted sources of information, such as government databases, information collected by regulated exchanges and credit rating agencies, etc., for similar purposes.

- SIFMA would suggest that the regulations be revised to allow a USFI or PFFI to rely upon documentary evidence or other applicable information obtained from a source that may be relied upon under the AML/KYC rules applicable to the USFI or PFFI, to the same extent as if obtained directly from the account holder. Such treatment should, of course, be subject to a condition that the USFI or PFFI not have reason to know that the information or documentation is not correct. In addition, SIFMA would suggest that any information or documentation so obtained be subject to renewal in accordance with the requirements of the applicable AML/KYC rules. Allowing USFIs and PFFIs to leverage their existing

[26] *See* Proposed Treasury regulation section 1.1471-3(c)(6)(vi) (currently only referencing U.S. brokers); Treasury regulation section 1.1441-1(e)(4)(ix)(A) through (C) (allowing reliance on documentation held through coordinated account systems, families of mutual funds, or certain brokers for Chapter 3 purposes).

[27] *See, e.g.,* Proposed Treasury regulation section 1.1471-3(c)(6)(ii)(C) (documentary information).

AML/KYC processes in this way would greatly assist them in building FATCA compliance systems, with no detriment to the US government.

X. The regulations should explain in more detail the requirements for FFI status.

- The regulations should explain in more detail the requirements for FFI status under subsections 1471(d)(5)(A), (B), and (C). In this regard, whether an entity is an FFI under subsection (A), (B), or (C) can affect its FATCA compliance duties,[28] so it will be particularly important to clarify the lines between the three types of FFIs.

- As an example, it would be helpful if the regulations could clarify whether an entity must accept deposits to be treated as an FFI by reason of subsection 1471(d)(5)(A). The regulations should also define what it means to accept deposits. In this regard, many institutions hold cash for clients in brokerage or collateral accounts.[29] Such holdings should not be treated as deposits for this purpose.

- In addition, the regulations should identify the types of activities that give rise to FFI status under subsections (B) and (C), and should confirm whether brokerage, investment advisory, clearing, and/or settlement fees should be taken into account when applying the various income tests for FFI status in the proposed regulations. In this regard, SIFMA would anticipate that the regulations would confirm that neither a pure investment advisory

[28] For example, the definition of financial account is different for different types of FFI under Proposed Treasury regulation section 1.1471-5(b)(1).

[29] Given that a banking or similar business includes accepting deposits, an institution that holds cash collateral in the ordinary course of its business would be accepting deposits in a banking or similar business if holding cash collateral constitutes accepting deposits.

business nor a pure transfer agent business will give rise to FFI status under either subsection.[30]

XI. The regulations should not require certain clearly domestic "exempt recipient" corporations to be treated as FFIs.

- The proposed regulations would require certain "exempt recipient" corporations, in the absence of documentation, to be treated as foreign persons and FFIs even in situations where they are obviously domestic. SIFMA would submit that it makes no sense to treat, e.g., General Motors or Coca-Cola as FFIs in the absence of a Form W-9.

- Rather, SIFMA would suggest that a revised "eyeball" test be provided, under which an exempt recipient corporation may be treated as domestic (and thus not an FFI) if a withholding agent has sufficient information (including from trusted sources) to reasonably determine that it is domestic. Examples of sufficient information would include a copy of a certificate of incorporation from a trusted source; an SEC filing stating that the corporation is incorporated in a US state; and a document from the corporation or a trusted source showing that the corporation's EIN does not begin with 98.

XII. The regulations should provide that an inadvertent compliance failure by an FFI will not endanger the PFFI status of an entire group.

- The proposed regulations would appear to potentially disqualify all PFFIs in an expanded affiliated group if a single FFI in the group fails to sign an FFI agreement, register as a DCFFI,

[30] Specifically, further guidance is requested regarding the types of activities that qualify as "related financial services" within the meaning of Proposed Treasury regulation section 1.1471-5(e)(3)(i) or that give rise to "gross income attributable to" investing, reinvesting, and trading within the meaning of Proposed Treasury regulation section 1.1471-5(e)(4).

properly comply with its obligations, etc.[31] In groups with thousands of FFIs, it is likely that there will be inadvertent failures to identify FFIs, appropriately register them, or otherwise ensure perfect compliance.

- SIFMA believes that it is critical that the regulations be revised to prevent such inadvertent failures from endangering the status of an entire group. One solution to this problem would be to allow an inadvertent failure to be cured within a reasonable time of discovery.[32]

XIII. The regulations should treat certain additional retirement and benefit plans as DCFFIs.

- The proposed regulations would treat certain retirement plans as DCFFIs. Such treatment would only apply, however, if the contributions to the retirement plan / FFI would otherwise be taxable "under the laws of the jurisdiction where the FFI is established or operates." Many plans are established as legal entities in one jurisdiction but provide benefits on a multijurisdictional basis or otherwise to employees in another jurisdiction. SIFMA does not believe that there is any reason that DCFFI status could not be extended to such cross-jurisdiction plans.

- In addition, the DCFFI rule for retirement plans would not extend to benefit plans. Even benefit plans without financial accounts (e.g., flexible spending health plans, housing plans) may be FFIs required to enter into FFI agreements absent an exemption. SIFMA believes that such benefit plans serve a purpose similar to retirement plans and do not pose a risk

[31] *See, e.g.,* Proposed Treasury regulation section 1.1471-4(e)(1).

[32] *Cf.* Section 11.05 of the Qualified Intermediary Withholding Agreement (setting forth such a cure process). This provision could serve as a model.

for tax evasion. SIFMA would accordingly suggest that the retirement plan DCFFI rule be extended to benefit plans without financial accounts.

XIV. The definition of gross proceeds for purposes of FATCA should be conformed to the definition of gross proceeds under section 6045.

- In order to facilitate the development of FATCA compliance systems, and consistent with SIFMA's prior comments, SIFMA would continue to strongly suggest that the definition of gross proceeds for purposes of FATCA be conformed to the definition of gross proceeds under section 6045, excepting items of gross proceeds that are not subject to reporting thereunder (which existing compliance systems of course exclude).[33]

* * *

SIFMA appreciates your consideration of its collective views and concerns on the regulations that are being developed to implement the provisions of FATCA. Please do not hesitate to contact me at (202) 962-7300 or ppeabody@sifma.org if you have any questions or if we can be of further assistance.

Sincerely,

Payson R. Peabody
Managing Director & Tax Counsel
Securities Industry and Financial Markets Association

[33] *See* Treasury regulations section 1.6045-1(d)(5) (definition of gross proceeds); Treasury regulations section 1.6045-1(c)(3) (exceptions from reporting).

Cc:

Manal Corwin
Deputy Assistant Secretary (Int'l Tax Affairs)
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
Manal.corwin@do.treas.gov

Michael Caballero
Deputy International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220
Michael.caballero@do.treas.gov

Michael Danilack
Deputy Commissioner (Int'l) LB&I
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224
Michael.danilack@irs.gov

Steven Musher
Associate Chief Counsel (Int'l)
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224
Steven.a.musher@irscounsel.treas.gov

Appendix I

[Please see attached diagram]

Appendix II

Background on Securitization Vehicles

- As a general financial matter, a "securitization vehicle" is an entity that issues equity and/or debt securities the payments on which are primarily funded by the payments from a discrete pool of financial assets, generally debt instruments, either fixed or revolving, that are acquired by the vehicle at formation with the proceeds of the sale of its securities. In most cases, some replacement of assets that default or become impaired is allowed. In less common cases, there may be issuances of additional securities and acquisitions of additional assets after formation.[34]

- Securitization vehicles generally issue one or more classes of debt and a single class of equity, using subordination to achieve a lower risk profile (and lower stated return) for the most senior debt classes, and a higher risk profile (and higher stated or potential return) for the lowest debt classes and equity; the risk with respect to the vehicle's assets is essentially concentrated in the vehicle's less senior securities.

- Securitization vehicles are typically designed to wind up after no more than 30 years, either as a requirement or based on the expected retirement of the vehicle's assets at their maturities.

- In a typical securitization vehicle transaction, all aspects of the securitization vehicle's activities are governed by a detailed trust indenture. The indenture specifies everything from the required features of the securitization vehicle's assets to the making of payments to trustees and other service providers. As a practical matter, amendments to securitization vehicle indenture are very difficult, as they require the consent of substantial supermajorities of affected investors.

- Non-US securitization vehicles have invested hundreds of billions of dollars in the US economy, particularly in loans issued by small and mid-sized US companies. SIFMA's members have participated in transactions involving many thousands of non-US securitization vehicles that have not yet wound up and will not do so for some years.

Interaction with FATCA

- In the absence of an exemption, a typical non-US securitization vehicle that holds US assets and issues its own securities would generally be treated as an FFI. Unfortunately, it is quite likely that all or most existing securitization vehicles would be unable to enter into and comply with FFI agreements as a result of their trust indentures.

[34] *Cf.* section 743(f) (defining a "securitization partnership" as a partnership "the sole business activity of which is to issue securities which provide for a fixed principal (or similar) amount and which are primarily serviced by the payments from a discrete pool (either fixed or revolving) of receivables or other financial assets that by their terms convert into cash in a finite period, but only if the sponsor of the pool reasonably believes that the receivables and other financial assets comprising the pool are not acquired so as to be disposed of").

- The trust indentures for existing securitization vehicles predate FATCA and/or the proposed regulations. With the exception of a small number of recent securitization vehicles, such trust indentures do not authorize or require any party on behalf of the securitization vehicles to perform the actions required of FFIs.[35] Most such trust indentures also do not provide a means of paying for such activities. Although it might in theory be possible for the trust indenture of an existing securitization vehicle to be amended by a vote of the investors to permit the vehicle to enter into and comply with an FFI agreement, no party is likely to be designated to initiate such an amendment process, and there can be no guarantee that investors would agree to the required changes.

- Securitization vehicles that cannot enter into FFI agreements would generally become subject to the FATCA withholding tax on non-grandfathered US assets. If such withholding becomes significant, the trust indentures may allow or require the vehicles to be immediately liquidated, since withholding of this type is generally not anticipated in securitization vehicle transactions.

- In addition, even if an existing securitization vehicle could enter into an FFI agreement, it would in most cases be impossible for it to force holders of outstanding debt and equity interests to comply with applicable identification and documentation requirements that were not contemplated at the time the trust indenture was executed and the securities were issued. And if an existing securitization vehicle subjected recalcitrant account holders to withholding under an FFI agreement,[36] the trust indenture may again allow or require the vehicle to be immediately liquidated, since withholding of this type was not anticipated.

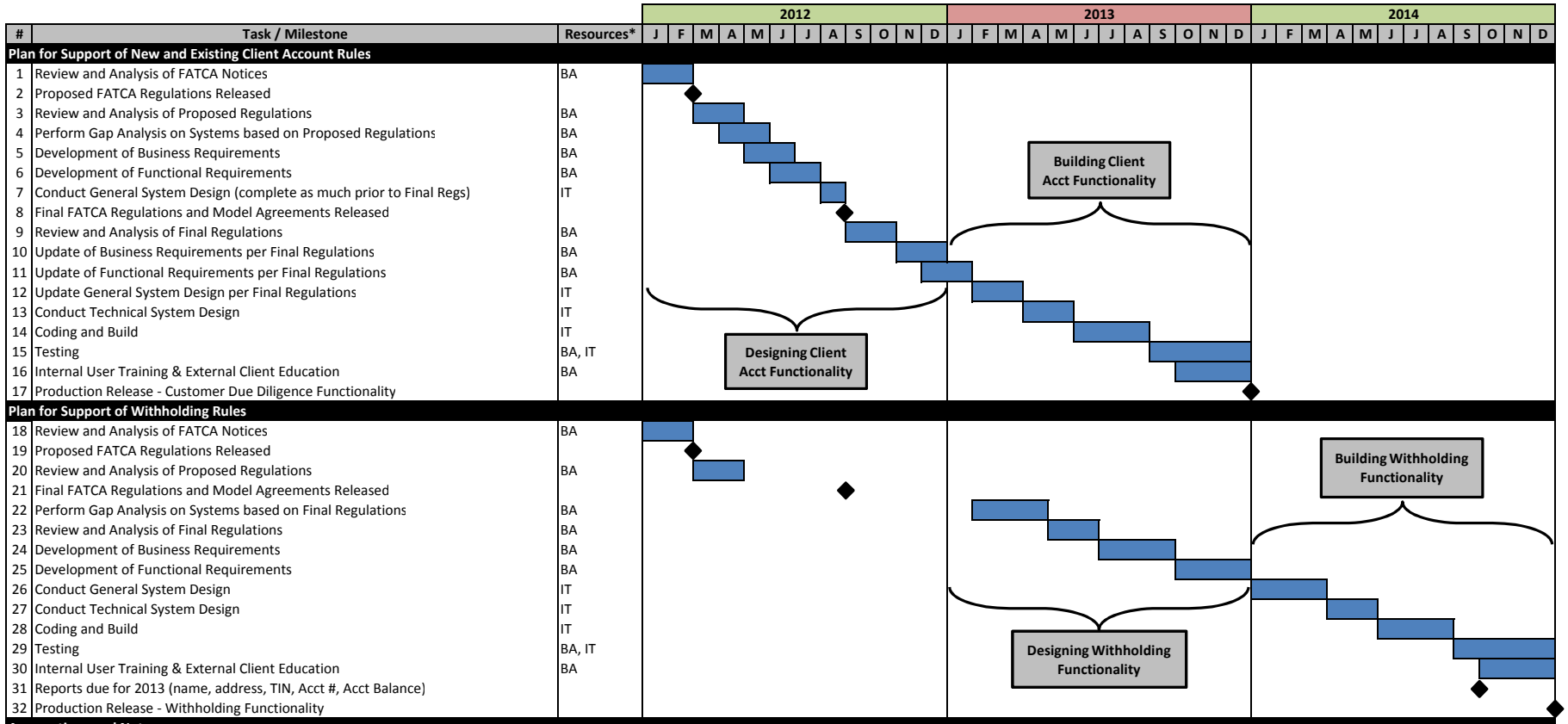
- In this regard, SIFMA's members anticipate that some holders of interests in existing securitization vehicles may actually desire the vehicles to be liquidated early, and may be in a position to block the amendments to the trust indentures necessary to avoid such liquidations.

- Regardless of the exact mechanism, however, if large numbers of existing securitization vehicles begin to simultaneously liquidate as a result of FATCA, such liquidations could lead to large amounts of US-issued securities being disgorged into the secondary market, flooding the market with assets and depressing the prices of such securities. Such an event could seriously disrupt the US capital markets, particularly the loan market for small and mid-sized US companies, with unknown consequences.

---

[35] And even the trust indentures for recent vehicles are and will continue to be imperfect, since they of course were not able to take into account the requirements and procedures of the final FATCA regulations.

[36] These issues would also generally prevent an existing securitization vehicle from complying with NFFE documentation and withholding requirements.



#	Task / Milestone	Resources*
Plan for Support of New and Existing Client Account Rules		
1	Review and Analysis of FATCA Notices	BA
2	Proposed FATCA Regulations Released	
3	Review and Analysis of Proposed Regulations	BA
4	Perform Gap Analysis on Systems based on Proposed Regulations	BA
5	Development of Business Requirements	BA
6	Development of Functional Requirements	BA
7	Conduct General System Design (complete as much prior to Final Regs)	IT
8	Final FATCA Regulations and Model Agreements Released	
9	Review and Analysis of Final Regulations	BA
10	Update of Business Requirements per Final Regulations	BA
11	Update of Functional Requirements per Final Regulations	BA
12	Update General System Design per Final Regulations	IT
13	Conduct Technical System Design	IT
14	Coding and Build	IT
15	Testing	BA, IT
16	Internal User Training & External Client Education	BA
17	Production Release - Customer Due Diligence Functionality	
Plan for Support of Withholding Rules		
18	Review and Analysis of FATCA Notices	BA
19	Proposed FATCA Regulations Released	
20	Review and Analysis of Proposed Regulations	BA
21	Final FATCA Regulations and Model Agreements Released	
22	Perform Gap Analysis on Systems based on Final Regulations	BA
23	Review and Analysis of Final Regulations	BA
24	Development of Business Requirements	BA
25	Development of Functional Requirements	BA
26	Conduct General System Design	IT
27	Conduct Technical System Design	IT
28	Coding and Build	IT
29	Testing	BA, IT
30	Internal User Training & External Client Education	BA
31	Reports due for 2013 (name, address, TIN, Acct #, Acct Balance)	
32	Production Release - Withholding Functionality	

Assumptions and Notes:

* BA = Business Analyst Resource, IT = Information Technology Resource

1. Final regulations, forms, instructions and model agreements will be published at the end of August 2012.
2. There is a dependency on IRS system work that must be completed prior to firm side system development. We assume that this work will be completed by December 2012
3. In parallel with proposed and final regulations analysis there is significant resource training and education that needs to occur on the new regulations
4. The plan above is a composite based on feedback from multiple members and is a medium size firm with a global footprint
5. The plan above does not reflect code freezes that are specific to individual firms and could limit the number of opportunities to release code within their system environments
6. Resource availability will be an issue for implementation as tax resources are currently finishing Cost Basis implementation and new resources can require up to one year to train and onboard
7. The plan has been optimized to limit the rework required for firms with a global footprint so they perform one design/development cycle vs. two in which US and non-US clients would be handled separately
8. For withholding rules we assume there is a dependency on the client account plan and that withholding functional requirement development can't start until client account technical system design has been completed
9. The plan assumes that the example firm has one set of the resources that are required to perform the functions of business analysis and technology work and that parallel development isn't supportable
10. In addition to the two work streams listed above there is other work associated to FATCA implementation that is not captured in this plan (e.g. grandfathering, classification, reporting, etc.
11. One of the drivers of the scope and complexity of the withholding work stream is the number of systems that will be affected. Current estimates range from 40 for a medium size firm to over 100 for a large global firm
12. Along the lines of the number of systems affected, the number of products that a firm supports will correlate to the work effort required. Basically each product will have their system flow affected by FATCA