Further Guidance on the Implementation of FATCA and Related Withholding Provisions

Notice 2014-33

I. PURPOSE

This notice announces that calendar years 2014 and 2015 will be regarded as a transition period for purposes of Internal Revenue Service (IRS) enforcement and administration with respect to the implementation of FATCA by withholding agents, foreign financial institutions (FFIs), and other entities with chapter 4 responsibilities, and with respect to certain related due diligence and withholding provisions under chapters 3 and 61, and section 3406, that were revised in regulations issued earlier this year as referenced in section II of this notice. This notice also announces the intention of the Department of the Treasury (Treasury) and the IRS to further amend the regulations under sections 1441, 1442, 1471, and 1472, as applicable, to provide: (i) that a withholding agent or FFI may treat an obligation (which includes an account) held by an entity that is opened, executed, or issued on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation for purposes of sections 1471 and 1472, subject to certain modifications described in section IV of this notice; (ii) additional guidance under section 1471 concerning the requirements for an FFI (or a branch of an FFI, including a disregarded entity owned by an FFI) that is a member of an expanded affiliated group of FFIs to be treated as a limited FFI or limited branch, including the requirement for a limited FFI to register on the FATCA registration website; (iii) a modification to the standards of knowledge for withholding agents under §1.1441-7(b) for accounts documented before July 1, 2014; and (iv) a revision to the definition of a reasonable explanation of foreign status in §1.1471-3(e)(4)(viii). Prior to the issuance of these amendments, taxpayers may rely on the provisions of this notice regarding these proposed amendments to the regulations.

The transition period and other guidance described in this notice is intended to facilitate an orderly transition for withholding agent and FFI compliance with FATCA's requirements, and responds to comments regarding certain aspects of the regulations under chapters 3 and 4.

II. BACKGROUND

A. Final and Temporary Regulations under Chapter 4

On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847), added chapter 4 to Subtitle A of the Code. Chapter 4 generally requires withholding agents to withhold at a 30 percent rate on certain payments to an FFI unless the FFI has entered into an agreement (FFI agreement) to obtain status as a participating FFI and to, among other things, report certain information with respect to U.S. accounts. Chapter 4 also imposes on withholding agents certain withholding, documentation, and reporting

requirements with respect to certain payments made to certain non-financial foreign entities (NFFEs).

On January 17, 2013, Treasury and the IRS published final regulations under chapter 4 (TD 9610, 78 Fed. Reg. 5873) (final chapter 4 regulations). Following the publication of the final chapter 4 regulations, Treasury and the IRS issued Notice 2013-43 (2013-31 I.R.B. 113) to preview, among other things, a revised timeline for implementation of the FATCA requirements. On February 20, 2014, Treasury and the IRS released temporary regulations under chapter 4 (T.D. 9657, 79 Fed. Reg. 12,812) (temporary chapter 4 regulations) that clarify and modify certain provisions of the final chapter 4 regulations, including incorporating the revised timeline for the implementation of FATCA set forth in Notice 2013-43. The temporary chapter 4 regulations accordingly require that withholding agents (including participating FFIs, qualified intermediaries, withholding foreign partnerships, and withholding foreign trusts) begin withholding with respect to withholdable payments made on or after July 1, 2014, unless the withholding agent can reliably associate the payment with documentation upon which it is permitted to rely to treat the payment as exempt from withholding under chapter 4. On February 20, 2014, Treasury and the IRS also released temporary regulations under chapters 3 and 61, and section 3406 (T.D. 9658, 79 Fed. Reg. 12,726) (temporary coordination regulations), to coordinate those regulations with the requirements provided in the final and temporary chapter 4 regulations.

To date, the IRS has published updated final versions of all forms in the Forms W-8 series and certain instructions to these forms to incorporate the documentation requirements of chapter 4. The IRS expects to publish all of the remaining instructions in this series in the near future.

B. Intergovernmental Agreements (IGAs)

During 2012, Treasury first released Model 1 and Model 2 intergovernmental agreements (IGAs) to facilitate the implementation of FATCA and to avoid legal impediments under local law that would otherwise limit an FFI's ability to comply with the requirements under chapter 4. On April 2, 2014, Treasury and the IRS published Announcement 2014-17 (2014-18 I.R.B. 1001), providing that the jurisdictions treated as having an IGA in effect would include jurisdictions that, before July 1, 2014, have reached agreements in substance with the United States on the terms of an IGA and that have consented to be included on the Treasury and IRS lists of such jurisdictions, in addition to jurisdictions that have already signed IGAs. An FFI that is resident in, or organized under the laws of, a jurisdiction that is included on the Treasury and IRS lists as having an IGA in effect is permitted to register on the FATCA registration website and is permitted to certify to a withholding agent its status as an FFI covered by an IGA. As of May 1, 2014, Treasury had signed 30 IGAs, and had agreements in substance with 29 jurisdictions. A

complete list can be found on Treasury's website, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

III. TRANSITION PERIOD FOR ENFORCEMENT AND ADMINISTRATION OF COMPLIANCE

Calendar years 2014 and 2015 will be regarded as a transition period for purposes of IRS enforcement and administration of the due diligence, reporting, and withholding provisions under chapter 4, as well as the provisions under chapters 3 and 61, and section 3406, to the extent those rules were modified by the temporary coordination regulations. With respect to this transition period, the IRS will take into account the extent to which a participating or deemed-compliant FFI, direct reporting NFFE, sponsoring entity, sponsored FFI, sponsored direct reporting NFFE, or withholding agent has made good faith efforts to comply with the requirements of the chapter 4 regulations and the temporary coordination regulations.

For example, the IRS will take into account whether a withholding agent has made reasonable efforts during the transition period to modify its account opening practices and procedures to document the chapter 4 status of payees, apply the standards of knowledge provided in chapter 4, and, in the absence of reliable documentation, apply the presumption rules of §1.1471-3(f). Additionally, for example, the IRS will consider the good faith efforts of a participating FFI, registered deemed-compliant FFI, or limited FFI to identify and facilitate the registration of each other member of its expanded affiliated group as required for purposes of satisfying the expanded affiliated group requirement under §1.1471-4(e)(1).

An entity that has not made good faith efforts to comply with the new requirements will not be given any relief from IRS enforcement during the transition period. Further, the IRS will not regard calendar years 2014 and 2015 as a transition period with respect to the requirements of chapters 3 and 61, and section 3406, that were not modified by the temporary coordination regulations. For example, the IRS will not provide transitional relief with respect to its enforcement regarding a withholding agent's determinations of the character and source of payments for withholding and reporting purposes. The transition period for compliance provided in this notice is similar to other transition periods that the IRS has provided when it has introduced or significantly revised due diligence, reporting, and withholding rules. See, e.g., Notice 98-16 (1998-15 I.R.B 12), Notice 99-25 (1999-20 I.R.B 75), and Notice 2001-4 (2001-2 I.R.B. 267).

IV. TREATMENT OF CERTAIN ENTITY OBLIGATIONS ISSUED, OPENED, OR EXECUTED ON OR AFTER JULY 1, 2014

A. Chapter 4 Regulations

Under the chapter 4 regulations, withholding agents (other than participating FFIs and registered deemed-compliant FFIs) are generally required to implement new account opening procedures beginning on July 1, 2014. A participating FFI is required to implement new account opening procedures on the later of July 1, 2014, or the effective date of its FFI agreement, and a registered deemed-compliant FFI is required to implement new account opening procedures on the later of July 1, 2014, or the date on which the FFI registers as a deemed-compliant FFI and receives a global intermediary identification number (GIIN).

Comments received after the publication of the temporary chapter 4 regulations have indicated that the release dates of the final Forms W-8 and accompanying instructions present practical problems for both withholding agents and FFIs to implement new account opening procedures beginning on July 1, 2014. In consideration of these comments, Treasury and the IRS intend to amend the chapter 4 regulations to allow a withholding agent or FFI to treat an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation for purposes of implementing the applicable due diligence, withholding, and reporting requirements under chapter 4. The proposed amendments to the chapter 4 regulations described in this section IV will be available only to obligations held by entities. The proposed amendments to the chapter 4 regulations will not be available for obligations held by individuals because the procedures for documenting individual accounts are less complex than those for documenting entities for chapter 4 purposes and the Form W-8BEN (for withholding agents to document individuals) and its accompanying instructions were published in final form on March 3, 2014.

More specifically, the proposed amendments will allow withholding agents and FFIs to treat any obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation for purposes of the due diligence and withholding requirements applicable to preexisting obligations described in §§1.1471-2(a)(4)(ii), 1.1472-1(b)(2), and 1.1471-4(c)(3), except that an FFI may not apply the documentation exception under §1.1471-4(c)(3)(iii).

As a result, a withholding agent that treats an obligation described in this section IV as a preexisting obligation will have the additional time provided in §1.1471-2(a)(4)(ii) or §1.1472-1(b)(2) in order to document an entity that is a payee or account holder of the obligation to determine whether the entity is a payee subject to withholding under chapter 4. For example, a withholding agent may document an entity that is a payee of an obligation issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, by December 31, 2014, if the payee is a prima facie FFI, or by June 30, 2016, in all other cases (as provided in §1.1471-2(a)(4)(ii)). A withholding agent would otherwise be required to document the entity by the

earlier of the date a withholdable payment is made or within 90 days of the date the obligation is issued, opened, or executed.

An FFI that is a participating FFI or registered deemed-compliant FFI may also treat an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation to document the obligation for chapter 4 purposes within the period permitted under §1.1471-4(c)(3)(ii) as if the effective date of its FFI agreement or the date on which the FFI registers as a deemed-compliant FFI and receives a GIIN is June 30, 2014, and may not exclude such accounts from review under §1.1471-4(c)(3)(iii).

The proposed amendments to the chapter 4 regulations described in this notice will not otherwise affect the timelines provided in the final and temporary chapter 4 regulations for due diligence, reporting, or withholding and will not modify the starting date for an FFI to implement new account opening procedures with respect to accounts maintained by the FFI that are held by individuals. For example, if a withholding agent treats an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation and receives a Form W-8BEN-E from the entity to document its status as a nonparticipating FFI, the withholding agent must begin withholding and reporting under chapter 4 when otherwise required for a preexisting obligation under the chapter 4 regulations.

B. Intergovernmental Agreements

The Model 1 and Model 2 IGAs contain a provision that allows a partner jurisdiction that has entered into an IGA to receive the benefit of certain more favorable terms that are set forth in a later signed IGA, including revisions to the procedures under Annex I of an applicable IGA, unless the partner jurisdiction declines in writing to adopt the update (the "most-favored nation" provision). With respect to FFIs covered by an IGA, Treasury intends to update the due diligence procedures described in Annex I of the Model 1 and Model 2 IGAs to incorporate due diligence procedures consistent with this notice.

Thus, it is expected that Annex I of future Model 1 and Model 2 IGAs will include a new due diligence procedures for an entity account opened on or after July 1, 2014, and before January 1, 2015, to allow an FFI covered by a Model 1 IGA or Model 2 IGA to treat such an account as a preexisting entity account, but without permitting application to such accounts of the $250,000 exception for preexisting entity accounts that are not required to be reviewed, identified, or reported. A partner jurisdiction with an IGA that has been signed or that has reached an agreement in substance will be permitted to adopt the revised due diligence procedures

described above pursuant to the most-favored nation provision contained within its IGA, once an IGA with the revised procedures has been signed with another partner jurisdiction.

Annex I of the Model 1 IGA contains a provision that allows a partner jurisdiction to permit a reporting Model 1 FFI to rely on the procedures described in relevant U.S. Treasury regulations to establish whether an account is a U.S. reportable account or an account held by a nonparticipating financial institution. Annex I of the Model 2 IGA contains a provision that allows a reporting Model 2 FFI to rely on the procedures described in relevant U.S. Treasury regulations to establish whether an account is a U.S. reportable account or an account held by a nonparticipating financial institution. Prior to the publication of the proposed amendments to the chapter 4 regulations, a partner jurisdiction may rely on the provisions of this notice to permit a reporting Model 1 FFI to apply the due diligence procedures for documenting entity accounts described in this section IV. Similarly, prior to the publication of the proposed amendments to the chapter 4 regulations, a reporting Model 2 FFI may rely on the provisions of this notice to apply the due diligence procedures for documenting entity accounts described in this section IV.

V. MODIFICATION OF THE STANDARDS OF KNOWLEDGE RULES UNDER CHAPTER 3

A. Background on Reason to Know

The temporary coordination regulations, among other things, revised the reason to know standard under §1.1441-7(b) to provide that a withholding agent will have reason to know that documentation establishing the foreign status of a direct account holder is unreliable or incorrect if the withholding agent has a current telephone number for the account holder in the United States and no telephone number for the account holder outside the United States, or has a U.S. place of birth for the account holder. See §1.1441-7(b)(5) and (8). The addition of rules concerning a U.S. telephone number and a U.S. place of birth as U.S. indicia to the standards of knowledge for withholding agents was made in the temporary coordination regulations to coordinate with the standards of knowledge applicable to a withholding agent's reliance on a payee's claim of foreign status for chapter 4 purposes. The temporary coordination regulations also provide a transitional rule to allow a withholding agent that has previously documented the foreign status of a direct account holder for chapters 3 and 61 purposes prior to July 1, 2014, to continue to rely on such documentation without regard to whether the withholding agent has a U.S. telephone number or U.S. place of birth for the account holder. The withholding agent would, however, have reason to know that the documentation is unreliable or incorrect if the withholding agent is notified of a change in circumstances with respect to the account holder's foreign status or the withholding agent reviews documentation for the account holder that contains a U.S. place of birth. See §1.1441-7(b)(3)(ii).

B. Modification of the Standards of Knowledge

Commentators have noted that the transitional rule for preexisting obligations described in §1.1441-7(b)(3)(ii) has limited use for withholding agents because it is tied to a withholding agent's reliance on documentation obtained from an account holder prior to July 1, 2014, and may therefore not include cases in which a withholding agent renews a withholding certificate or documentary evidence on or after July 1, 2014, under the requirements of §1.1441-1(e)(4)(ii)(A) (referring to the time period for renewal of certain withholding certificates or documentary evidence). Commentators further note that because of the extension until December 31, 2014, provided in the temporary coordination regulations for withholding agents to renew withholding certificates and documentary evidence that would have otherwise expired on December 31, 2013, withholding agents will have a significant number of accounts that were documented prior to July 1, 2014, but that will need to be re-documented by December 31, 2014, at which time they will no longer be able to rely on the transitional rule in §1.1441-7(b)(3)(ii) even if the renewal documentation does not include any information indicating a change in circumstances. See §1.1441-1(e)(4)(ii)(A) for the extended renewal allowance for withholding certifications and documentary evidence otherwise expiring on December 31, 2013.

Accordingly, Treasury and the IRS intend to amend the temporary coordination regulations to provide that a direct account holder will be considered documented prior to July 1, 2014, without regard to whether the withholding agent obtains renewal documentation for the account holder on or after July 1, 2014 pursuant to the requirements of §1.1441-1(e)(4)(ii)(A). Therefore, a withholding agent that has documented a direct account holder prior to July 1, 2014, is not required to apply the new reason to know standards relating to a U.S. telephone number or U.S. place of birth until the withholding agent is notified of a change in circumstances with respect to the account holder's foreign status (other than renewal documentation that is required under §1.1441-1(e)(4)(ii)(A)) or reviews documentation for the account holder that contains a U.S. place of birth. See §1.1441-7(b)(3)(ii).

VI. REVISION OF THE DEFINTION OF REASONABLE STATEMENT UNDER CHAPTER 4

A. Background on Reasonable Explanation Supporting a Claim of Foreign Status

The final chapter 4 regulations in §1.1471-3(e)(4)(viii) and the temporary coordination regulations in §1.1441-7(b)(12) each provide that a withholding agent may rely on the foreign status of an individual account holder irrespective of certain U.S. indicia if, in certain cases, the account holder provides a reasonable explanation supporting the account holder's claim of foreign status. Section 1.1441-7(b)(12) describes a reasonable explanation supporting a claim of foreign status for chapter 3 purposes as either a written statement prepared by an individual

or a checklist provided by a withholding agent stating that the individual meets the requirements described in §1.1441-7(b)(12)(i) through (iv). Section 1.1471-3(e)(4)(viii) also describes a reasonable explanation supporting a claim of foreign status by an individual account holder for chapter 4 purposes, and it is substantially similar to the description under §1.1441-7(b)(12), except that it limits the contents of a reasonable statement provided by an individual account holder to the explanations permitted on the checklist. Thus, unlike the description provided in the temporary coordination regulations, the description provided in the final chapter 4 regulations does not permit an individual to provide a written explanation other than an explanation that the individual meets the requirements described in §1.1471-3(e)(4)(viii)(A) through (D).

B. Revision of Reasonable Explanation Prepared by an Individual

Commentators have noted that the description of a reasonable explanation of foreign status in the final chapter 4 regulations differs from the description provided in the temporary coordination regulations. Treasury and the IRS intend to amend the final chapter 4 regulations to adopt the description of a reasonable explanation of foreign status provided in the temporary coordination regulations, which permit an individual to provide a reasonable explanation that is not limited to an explanation meeting the requirements of §1.1471-3(e)(4)(viii)(A) through (D).

VII. LIMITED FFIS AND LIMITED BRANCHES

A. Background

The final and temporary chapter 4 regulations require that for any member of an expanded affiliated group (as defined in §1.1471-5(i)(2)) to obtain status as a participating FFI or registered deemed-compliant FFI, each FFI member of the expanded affiliated group must have a chapter 4 status of a participating FFI, deemed-compliant FFI, exempt beneficial owner, or limited FFI. The final chapter 4 regulations also provide in §1.1471-4(e)(2)(iv) and (3)(iii) that an FFI or branch of a participating FFI must be registered with the IRS and agree to certain conditions in order to be treated as a limited FFI or limited branch. The conditions for limited FFI or limited branch status include, among other things, that the FFI or branch not open accounts that it is required to treat as U.S. accounts or accounts held by nonparticipating FFIs, including accounts transferred from any member of its expanded affiliate group.

The IRS's FATCA registration website, available at www.irs.gov/FATCA, serves as the primary way for FFIs to register for status as a participating FFI, registered deemed-compliant FFI, or limited FFI. The FATCA registration website allows FFIs that are members of an expanded affiliated group to designate a lead financial institution (Lead FI) to identify member FFIs that will register as participating FFIs, registered deemed-compliant FFIs, or limited FFIs and to

perform certain functions with respect to member FFIs. A Lead FI is not, however, required to act as a Lead FI for all FFIs within an expanded affiliated group.

B. Relief from Limited FFI and Limited Branch Restrictions on Account Opening.

FFIs and other stakeholders continue to express strong support for IGAs as a way to facilitate effective and efficient FATCA implementation while avoiding conflicts with local law. While Treasury stands ready and willing to negotiate IGAs based on the published models, commentators have expressed practical concerns about the status of FFIs and branches of FFIs in jurisdictions that are slow to engage in IGA negotiations and that have legal restrictions impeding their ability to comply with FATCA, including the conditions for limited FFI or limited branch status under the chapter 4 regulations. Specifically, comments have noted that the restrictions imposed by the final chapter 4 regulations on a limited branch or limited FFI on opening any account that it is required to treat as a U.S. account or as held by a nonparticipating FFI hinders the ability of an FFI to agree to the conditions of limited status due, for example, to requirements under local law to provide individual residents with access to banking services or to the business needs of the FFI to secure funding from another FFI in the same jurisdiction with similar impediments to complying with the requirements of FATCA.

In response to these comments, Treasury and the IRS intend to amend the final chapter 4 regulations to permit a limited FFI or limited branch to open U.S. accounts for persons resident in the jurisdiction where the limited branch or limited FFI is located, and accounts for nonparticipating FFIs that are resident in that jurisdiction, provided that the limited FFI or limited branch does not solicit U.S. accounts from persons not resident in, or accounts held by nonparticipating FFIs that are not established in, the jurisdiction where the FFI (or branch) is located and the FFI (or branch) is not used by another FFI in its expanded affiliated group to circumvent the obligations of such other FFI under section 1471. This modification is consistent with the treatment of related entities and branches provided in the model IGAs.

C. Registration of Limited FFIs.

Commentators have also stated that certain jurisdictions are explicitly prohibiting an FFI resident in, or organized under the laws of, the jurisdiction from registering with the IRS and agreeing to any status, including status as a limited FFI, regardless of whether the FFI would otherwise be able to comply with the requirements of limited FFI status. Treasury and the IRS intend to amend the final chapter 4 regulations to provide that, if an FFI is prohibited under local law from registering as a limited FFI, the prohibition will not prevent the members of its expanded affiliated group from obtaining statuses as participating FFIs or registered deemed-compliant FFIs if the first-mentioned FFI is identified as a limited FFI on the FATCA registration website by a member of the expanded affiliated group that is a U.S. financial institution or an

FFI seeking status as a participating FFI (including a reporting Model 2 FFI) or reporting Model 1 FFI. In order to identify the limited FFI, the member of the expanded affiliated group will be required to register as a Lead FI with respect to the limited FFI and provide the limited FFI's information in Part II of the FATCA registration website. If the Lead FI is prohibited from identifying the limited FFI by its legal name, it will be sufficient if the Lead FI uses the term "Limited FFI" in place of its name and indicates the FFI's jurisdiction of residence or organization.

By identifying a limited FFI in the FATCA registration website pursuant to this subsection VII.C, the Lead FI is confirming that: (1) the FFI made a representation to the Lead FI that it will meet the conditions for limited FFI status, (2) the FFI will notify the Lead FI within 30 days of the date that such FFI ceases to be a limited FFI because it either can no longer comply with the requirements for limited status or failed to comply with these requirements, or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI and will separately register, to the extent required, to obtain its applicable chapter 4 status, and (3) the Lead FI, if it receives such notification or knows that the limited FFI has not complied with the conditions for limited FFI status or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI, will, within 90 days of such notification or acquiring such knowledge, update the information on the FATCA registration website accordingly and will no longer be required to act as a Lead FI for the FFI. In the case in which the FFI can no longer comply or failed to comply with the requirements of limited FFI status, the Lead FI must delete the FFI from Part II of the FATCA registration website and must maintain a record of the date on which the FFI ceased to be a limited FFI and the circumstances of the limited FFI's non-compliance that will be available to the IRS upon request.

VIII. DRAFTING INFORMATION

The principal author of this notice is Tara N. Ferris of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Ms. Ferris at (202) 317-6942 (not a toll-free call).