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From: [REDACTED]

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To: [REDACTED]

Cc:

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Subject: FATCA certifications transmitted electronically

You had asked whether the IRS may require that FFIs who agree to reporting obligations submit their compliance certifications electronically, without offering an alternative means for submission. Our answer is yes, as discussed in the attached.

ATTACHMENT 1

ISSUE

To avoid a 30% withholding on payments to Foreign Financial Institutions ("FFIs"), an FFI can, under section 1471(b), voluntarily comply with reporting obligations about its U.S. investors. There is no penalty for not complying, other than a 30% withholding, the refund of which could be sorted out later by claims. Can the IRS require that FFIs who agree to these reporting obligations submit their compliance certifications electronically, without offering an alternative means for submission?

CONCLUSION

Yes.

BACKGROUND AND FACTS

Foreign financial institutions¹ (FFIs) provide a significant proportion of investment opportunities for, and act as intermediaries with respect to investments of, U.S. taxpayers. Like U.S. financial institutions, FFIs are generally in the best position to identify and report U.S. customers and their financial accounts. To ensure reporting of U.S. persons and prevent attempted tax evasion, Chapter 4 of Subtitle A² (Chapter 4), composed of sections 1471 through 1474, was added to the Code in March 2010.³ Chapter 4 generally requires U.S. withholding agents to withhold tax on 30 percent of withholdable payments⁴ being sent to FFIs.⁵ This is true regardless of whether the FFI is the beneficial owner of payments (i.e., payments stemming from the FFI's own investments in the U.S.) or merely an intermediary/flow-through payment to another beneficiary (i.e., payments belonging to an account holder who would be liable for any U.S. tax that might be due on the payments). In the latter case, 30 percent is withheld because the payee is deemed to be the non-compliant FFI, rather than the account holder. Although in these latter cases the account holders could apply for a refund of the withheld amounts if no tax is owed, this takes time, requiring filing of claims. So it behooves FFIs to comply with the reporting obligations not only for themselves but also to keep their customers satisfied.

FFIs can avoid this withholding, however, if they meet either of the two reporting requirements in section 1471(b):

- entering into an agreement with the IRS directly (see section 1471(b)(1));⁶ or
- complying with procedures and requirements prescribed by the Secretary (see section 1471(b)(2)).⁷

¹ A foreign financial institution is any financial institution that is a foreign entity, other than a financial institution organized under the laws of a possession of the United States.

² Chapter 4 is entitled, "Taxes to Enforce Reporting on Certain Foreign Accounts."

³ See Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147.

⁴ Withholdable payments include payments of interest, dividends, rents, salaries, wages, premiums, annuities, and compensations from sources within the United States. See I.R.C. § 1473(1).

⁵ Chapter 4 also requires U.S. withholding agents to withhold tax on certain payments to nonfinancial foreign entities (NFFEs) that do not provide information on their substantial United States owners (substantial U.S. owners) to withholding agents.

⁶ Section 1471(b)

(1) IN GENERAL—The requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary under which such institution agrees—

- (A) to obtain such information regarding each holder of each account maintained by such institution as is necessary to determine which (if any) of such accounts are United States accounts,
- (B) to comply with such verification and due diligence procedures as the Secretary may require with respect to the identification of United States accounts;...

⁷ Section 1471(b)

An FFI meets the requirements under section 1471(b)(1) by completing and submitting a Form 8957, Foreign Account Tax Compliance Act (FATCA) Registration, which is accessible via the FATCA Registration Portal. This binds the FFI to an FFI agreement⁸ between itself and the Secretary. These FFIs then become “participating FFIs.”

Alternatively, FFIs permitted to comply under section 1471(b)(2) register to do so and become “registered deemed-compliant FFIs.” Both participating and registered deemed-compliant FFIs register on the IRS FATCA portal, which requires them to provide some basic information, such as legal name; address with country of jurisdiction for tax purposes; tax ID in country of jurisdiction for tax purposes; branch locations outside the U.S.; FATCA Responsible Officer and contact information; and the identification of other FIs in its expanded affiliate group.

A paper version of the Form 8957 is also available. In the few instances where an FFI submitted an application on paper, the Service transcribed it into its system and then sent the FFI a letter that required the FFI to log onto the portal and submit its own registration. Over 99.9 of the paper registrations received by the Service since this program began were ultimately completed online by FFIs.

Once the IRS receives an FFI’s registration via the Portal, the IRS assigns a Global Intermediary Identification Number (GIIN) to the FFI. All GIINs are listed on an IRS website, which is updated monthly (“the IRS FFI monthly list”). Before making any U.S.-source payments to an FFI, withholding agents are required to confirm, by reviewing the IRS FFI monthly list, that the FFI receiving the payment has a GIIN. Having a GIIN immediately entitles the FFI to not be withheld upon (for both their own and their account holders’ payments).⁹ To keep their GIIN on the IRS’s monthly list, both participating and registered deemed-compliant FFIs have periodic reporting obligations and must, as described below, make certifications attesting to their compliance. It is these FATCA certifications that are the subject of this memorandum.

For example, one of the agreed-upon terms in the FFI agreement requires the participating FFI, within 60 days after the two-year anniversary of entering into the

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- (1) FINANCIAL INSTITUTIONS DEEMED TO MEET REQUIREMENT IN CERTAIN CASES—A foreign financial institution may be treated by the Secretary as meeting the requirements of this subsection if
- (A) such institution
 - i. complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain United States accounts, and
 - ii. meets such other requirements as the Secretary may prescribe with respect to accounts of other foreign financial institutions maintained by such institution...

⁸ A sample FFI agreement is in Rev. Proc. 2014-38, 2014-29 I.R.B. 131.

⁹ Although account holders could apply for a refund of the withheld amounts if no tax is owed, this takes time, requiring filing of claims. So it behooves FFIs to comply with the reporting obligations not only for themselves but also to keep their customers satisfied.

agreement, to “make the certification described in Treasury Regulation 1.1471-4(c)(7).”¹⁰ FFI Agreement, Section 8.03(A), Certifications Regarding the Due Diligence Procedures. Another agreed-upon term requires the participating FFI, “on or before July 1 of the calendar year following the certification period” to make additional certifications, such as a certification regarding internal controls described in Treasury Regulation 1.1471-4(f)(3)(ii). FFI Agreement, Section 8.03(B), Periodic Certification of Compliance.

With respect to registered deemed-compliant FFIs, they must make the periodic certification described in Treasury Regulation 1.1471-5(f)(1)(ii)(B).¹¹ Local FFIs and restricted funds (types of registered deemed-compliant FFIs) are required to make preexisting-account certifications under, respectively, Treasury Regulations 1.1471-5(f)(1)(i)(A)(7) and 1.1471-5(f)(1)(i)(D)(6).

Both participating and registered deemed-compliant FFIs agree to submit certificates in the manner prescribed by the IRS. Participating FFIs enter into an agreement that provides, “The participating FFI (or the compliance FI with respect to such FFI) must make the certifications of compliance in such manner as the IRS may prescribe in future guidance or other instructions.” FFI Agreement, Section 8.03(C), Method of Making Certifications. Registered deemed-compliant FFIs do not enter into agreements, but they must, if they do not want to be withheld upon, comply “with such procedures as the Secretary may prescribe to ensure that such institution does not maintain United States accounts...” I.R.C. § 1471(b)(2).

Participating and registered deemed-compliant FFIs all have online accounts, which they use and access for various purposes. For instance, they receive notifications from the IRS through their online accounts; they add and remove branches,¹² designate a new responsible officer,¹³ and identify new members in their Expanded Affiliated Group (EAG).¹⁴ The Service is unaware of any participating or registered deemed-compliant FFI that does not have and use an online account. Submitting a FATCA certification electronically is essentially no different from how the FFIs registered for the program. No data is required to be formatted or submitted in a particular manner, as it would, for example, if a Form 1042-S would be filed electronically.

As a final point, the withholding tax under Chapter 4 is not a substantive tax liability for the FFI: if the withholding agent doesn’t withhold, the FFI is not liable. This is

¹⁰ Certifying essentially that it completed the due-diligence procedures for preexisting accounts.

¹¹ Certifying that all requirements in the deemed-compliant category have been satisfied.

¹² An FFI can enter into an FFI agreement on behalf of one or more of its branches so that each of its branches may be treated as a participating FFI. Rev. Proc. 2014-38.

¹³ A participating FFI is required to adopt a compliance program under the authority of the responsible officer of the participating FFI. Rev. Proc. 2014-38, Sec. 8.01.

¹⁴ The online registration system allows FFIs to add members of their EAG to the account.

different from the Chapter 3¹⁵ withholding, which is withheld for substantive tax related to foreign persons' tax liability and which would be due whether or not it is withheld.

In light of the above, you have asked our advice on whether the IRS can require in instructions or otherwise that participating and deemed-compliant FFIs submit their certifications only electronically. In other words, because of limited and shrinking resources, the IRS does not want to offer an option to submit these certifications by facsimile or mail.

LAW AND ANALYSIS

Section 6011(e), entitled "Regulations Requiring Returns on Magnetic Media, Etc.," provides rules for when the IRS may require returns to be filed electronically. If the required certification is deemed to be a "return" subject to the requirements of section 6011(e), the Service:

1. must impose the e-file mandate by regulation. I.R.C. § 6011(e)(1);
2. cannot require e-filing of returns if the filer files fewer than 250 returns a year unless the returns are with respect to tax for which financial institutions are made liable under section 1461 or 1474(a).¹⁶ I.R.C. § 6011(e)(2)(A) and (e)(4); and
3. must take into account (among other relevant factors) the taxpayer's ability to comply at reasonable cost with the requirements of such regulations. I.R.C. § 6011(e)(2)(B).

It is not at all clear, however, that these certifications are returns or information returns. Although the term "return" is used throughout the Code, including section 6011(e), it is not defined. A tax return has been characterized as "a report by a taxpayer setting forth facts necessary to establish the amount of tax, if any, that is due from him as a person liable for the tax." S-1 Federal Tax Coordinator 2d § 1001. An information return is defined as "a return, such as a W-2, filed by an entity to report some economic information other than tax liability." Black's Law Dictionary (9th ed. 2004). Thus, returns contain information used to calculate or report a tax liability.

From the facts you have given us, these certificates do not report any tax liability. Although participating and registered deemed-compliant FFIs agree to identify their U.S. account holders and to annually report information about their accounts—which could

¹⁵ Chapter 3 is entitled, "Withholding of Tax on Nonresident Aliens and Foreign Corporations."

¹⁶ The legislative history of subsection 6011(e)(4) does not refer to FATCA certification forms, referring only to the Form 1042, *Annual Withholding Tax Return for U.S. Source Income*, and the Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*. See Staff of the Joint Committee on Taxation, 111th Cong., Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate 68 (Comm. Print 2010).

arguably be construed as reporting economic information useful in calculating tax liability, the certificates themselves do not report any such information. The certificates attest, for example, that the FFI has internal controls, that it conducted a reasonable inquiry and has no formal or informal practices or procedures in place to assist account holders in avoiding FATCA's provisions, and other such certifications. If an FFI does not submit a certificate, the consequence is that 30% of payments to that FFI are withheld. There is no penalty to the FFI itself for not complying—other than the 30% withholding. And, as we understand the facts, the withheld amounts would more than likely be refundable if a claim is timely filed by the ultimate recipient of the payments. This is because the payment is not withheld for any specific substantive tax obligation, as it is when it is withheld under section 1442 (Chapter 4), for example, for income subject to tax under section 881, Tax on Income of Foreign Corporations Not Connected With United States Business.¹⁷ For all of these reasons, we do not view these certificates as returns.

Because there is logical support for the position that these certifications are not returns and thus not subject to the requirements of I.R.C. § 6011(e), we do not see a legal necessity that the IRS impose the e-file mandate in this instance by regulation and provide an option for submitting these certifications on paper. Moreover, the FFIs get the benefit of not being withheld upon only if they agree to comply with procedures that the IRS may prescribe. And they have all agreed, as part of this voluntary program, to the IRS's requirement to submit the certificates electronically. In any event, it seems unlikely that an FFI would challenge the requirement to submit the certifications electronically as all have online accounts and use them routinely. In fact, it would probably be more costly for an FFI, especially an FFI in a country like _____, for example, to submit a FATCA certificate by paper because not only would the certificate need to be printed but it would then need to be mailed by a private delivery service, which can be costly. We do recommend, however, as good administrative practice, to offer an alternative in cases of technological mishaps: perhaps a telephone number or other option.

¹⁷ "There is hereby imposed for each taxable year a tax of 30 percent of the amount received from sources within the United States by a foreign corporation as —(1) interest"