



The voice of banking  
& financial services

**NOTICE 2011-34, Supplemental Notice to Notice 2010-60 Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code ('the Notice')**

1. The British Bankers' Association ("BBA") is the leading association for banking and financial services in the UK. We represent 230 banking organisations from 60 countries and have 40 professional service firms within our associate membership.
2. The BBA welcomes the opportunity to comment on the Notice and information reporting and withholding under Chapter 4 of the Internal Revenue Code ("FATCA"). We would, of course, be happy to clarify any points raised in these comments, or to discuss further any issues related to our understanding of the Internal Revenue Service's (IRS) intentions. The BBA looks forward to continuing this dialogue and to further meetings at the appropriate stage.
3. The BBA re-affirms its commitment to transparency and openness in its dealings with the U.S. Authorities and the observations and comments that follow are provided in that light.

**General Comments**

4. The early provision of additional information in relation to the proposed operation of FATCA requirements is welcome, and we are pleased that some of the points raised in our earlier submissions, particularly in relation to the review process for pre-existing accounts, have been recognised.
5. The comments and suggestions contained in this paper in respect of the Notice are provided subject to the issues that we have previously identified relating to the legal tensions between FATCA and UK/European law being satisfactorily resolved. We note that the European Commission has recently proposed the exploration of possible synergies between the EU Savings Directive and FATCA. We fully endorse this proposal and again urge the US to work with other governments towards an alternative global multilateral solution, where there would be reciprocal arrangements for all jurisdictions, and where information could be collected and exchanged between governments.
6. While we understand and support the goals of preventing tax evasion, the most problematic proposal in the Notice is Passthru Payments. We understand the US Government's concern with the potential for using non-participating FFIs as a blocker to shield US taxpayers from identification and reporting and the intent of the proposal to encourage FFIs to become compliant with FATCA. However, in its current form the proposals are unfortunately unworkable for a deposit-taking global institution. We explain our concerns in more detail starting in paragraph 44.
7. Furthermore, the BBA is significantly concerned about the wide application of the Passthru Payment principles contained within the Notice, especially in relation to the likely impact to securities settlement systems and central bank clearing systems, on which we propose to revert in due course.

8. The BBA additionally has concerns with the definition in the Notice of “private banking” and “wealth management” and their very broad applicability in many institutions which will capture high volumes of what by any other definition would be retail clients. For this reason, we believe it is simpler and therefore more proportionate to target accounts by a suitable value threshold to better and more proportionally target appropriate accounts. The Notice refers in Step 5 to a \$500,000 threshold which the BBA believes is a sufficient test for the client to be considered in general terms as ‘high net worth’ and subject to the enhanced due diligence tests outlined in Step 3. The BBA also believes that there is merit in aligning this definition to that in the Patriot Act of \$1,000,000 so that there is a single consistent test.
9. The BBA is examining the implications of the Notice for the existing business models of the membership in relation to their wealth management divisions generally. We propose to revert in due course with our analysis and commentary.

### **Specific comments on the Notice**

#### **Section I. Preexisting Individual Accounts**

##### **A Revised Procedures for Identification of Preexisting Individual Accounts**

###### **1. Definitions**

10. We note that the definition of a “private banking account” includes “any account maintained or serviced as part of a private banking relationship, including any account held by any entity, nominee, or other person to the extent the account is associated with the private banking relationship with an individual client”. We note further that “private banking relationship” is defined as existing “when one or more officers or other employees of the FFI are assigned by the FFI to provide services such as those described in clause (D)(i) of the definition of a private banking department or to gather information about a client (or the client’s family) of the type described in clause (D)(ii) of the definition of a private banking department, regardless of whether the assigned individual is employed within the FFI’s private banking department.” We would welcome clarification in further Notices or in the draft regulations as to the intention of the Notice regarding what factors would be sufficient to cause an account that would not otherwise fall within the definition of a private banking account to be “associated with” a private banking relationship.
11. In addition, the BBA would point out that under business models operated by certain of our Members it is possible for an enhanced level of service to be provided to some customers who may, nominally, be “relationship managed”, but who in practice are not considered by the FFI to be high net worth. Such customers do not enjoy the close relationship that would exist between a private banking customer and his relationship manager, and are customarily portfolio managed. The BBA considers that such customer relationships do not fall within the intended scope of the private banking account proposals contained in the Notice.
12. The BBA notes in particular that the term “associated” is also used at Section 1.A.2 of the Notice, which refers to “accounts maintained by the FFI or its affiliates that are associated with one another due to partial or complete common ownership of the accounts under the FFI’s existing computerized information management, accounting, tax reporting, or other recordkeeping systems”. We would welcome clarification in further Notices or in the draft regulations as to whether the intention of the Notice is that the word “associated” when used in connection with the definition of

a “private banking account” should have the same meaning as the word when used at Section 1.A.2 of the Notice (i.e. that partial or common ownership of the accounts under the FFI’s existing systems would be required for an association to exist).

13. In addition, we note that the above definitions would appear to bring certain entity accounts, where an “association” with a private banking relationship is found to exist, within the scope of the Revised Procedures for Identification of Preexisting Individual Accounts as set out at Section 1.A.2 of the Notice. However, the current content of Section I of the Notice appears to be exclusively predicated on the basis that the account to be reviewed is an individual account. We note that Notice 2010-60 proposes separate procedures for individual and entity accounts and would welcome confirmation as to whether this is the intention of the Notice. In particular, we would welcome clarification in further Notices or in the draft regulations as to the following:
- whether an entity that has been identified as an excepted NFFE under the procedures relating to entity accounts, but that would fall within the definition of a private banking account by reason of its association with a private banking relationship with an individual client would need to be subjected to the Private Banking Accounts review process as set out in Step 3 of the Procedures for Identification by Participating FFIs of Preexisting Individual Accounts in the Notice or whether it would fall to be treated as an excepted NFFE; and
  - whether an entity that has been identified as an FFI under the procedures relating to entity accounts, but that would fall within the definition of a private banking account by reason of its association with a private banking relationship with an individual client would need to be subjected to the Private Banking Accounts review process as set out in Step 3 of the Procedures for Identification by Participating FFIs of Preexisting Individual Accounts in the Notice or whether it would fall to be treated as an FFI.
14. The BBA does not believe that condition at Section I A 1 (3) C can be conclusively applied as a primary test to define a private banking department. Whilst AML/KYC policies do make reference to private banking it would not be a reliable single test criterion for identifying such a department but might be a useful indicative supplement to more definitive criteria.
15. The BBA’s analysis of the documentary evidence required at Section I A 1 (6) (i) to establish the status of a person as a non-US person suggests that this particular test would be satisfied by any documentation that includes the person’s name, address and photograph, and is an official document issued by an authorized governmental body and has been issued in the last three years or is supplemented by additional evidence of the person’s residence such as a bank statement or utility/medical bill. The BBA believes that the documentary requirements should be explored in more detail to take account of the existing AML standards applicable in various jurisdictions.

## **2. Procedures for Identification by Participating FFIs of Preexisting Individual Accounts**

### **Step 1: Documented U.S. Accounts**

16. The BBA welcomes the election that is provided at Step 1.

### **Step 2: Accounts of \$50,000 or Less**

17. The BBA welcomes the election that is provided at Step 2.

18. The BBA notes that the threshold is now at an account level, subject to the association requirements at Section 1.A.2. of the Notice, which we regard as both a pragmatic and positive development.

### **Step 3: Private Banking Accounts**

19. The BBA assumes there will be a general rule in the Regulations that where a Form W-9 is obtained it is only valid and acceptable if the client provides a waiver of applicable restrictions, if any, on reporting of the client's information to the IRS. We mention this as strict interpretation and reading of the Notice infers there may be cases where the waiver is not required to be obtained which would create a conflict with local law in many cases.
20. As a follow up to the above comment, we believe that there is value in the Form W-9 being amended so as to include an authority to waive any reporting restrictions that may otherwise apply.
21. The BBA has some reservations with regard to the number of accounts that could be impacted by the checks required at Section I A.2.Step 3 (A)(ii)(d) to (f) but overall we believe that these requirements are far more manageable than those envisaged under Notice 2010-60.
22. The BBA would note that AML checks in relation to a "family member" may be limited to certain prescribed circumstances; in particular where there is a transaction between a politically exposed person and the family member.
23. The BBA notes that at Step 3 (A) (iii) (a) a Form W-9 must be requested from each client identified as a US citizen or lawful permanent resident as a result of the identification of US indicia during a diligent review (Step 3(ii)). We believe that such clients should have an alternative to form W-9. We propose that W-8BEN be modified so as to accommodate the need for any confirmation/explanation regarding the revocation of US citizenship or lawful permanent residence. This might be regarded as less intrusive than relationship manager requests for written explanations regarding renunciation of US citizenship or acquisition of US citizenship at birth.
24. The BBA notes the requirement at Section I A 2 Step 3 (A) (iv) to treat all accounts associated with a client as US accounts (or as Documented FFIs under Section II.B.3 of Notice 2010-60) if the client is identified as a US person. We would welcome clarification in further Notices or in the draft regulations of the definition of "associated" for the purposes of this requirement and whether this should be interpreted in accordance with the introduction to Section I A 2.
25. The requirement at Section I 3 (D) for an FFI to retain all the written requests and responses related to the search for US indicia for ten years is very onerous and is, generally, longer than the statute of limitation applicable in countries in which our members operate. A ten year period of retention for these written requests and responses will lead to substantial additional costs for FFIs. The BBA understands that the US retention period for 'substantial understatement' is six years and it is our view that a six year retention period should be the absolute maximum required by FATCA. This will provide a level of consistency between the requirements for participating FFIs and US financial institutions.

#### **Step 4: Accounts with U.S. Indicia**

26. The BBA notes that the term "electronically searchable information" is now defined and believes that the definition that has been arrived at is reasonable and workable.
27. The BBA considers that the client should have the opportunity to rebut US resident or citizen status as a result of identification at (A) (i) or having a US birthplace at (A) (ii). Please also refer to our previous comments at paragraph 23 above regarding the possible use of a modified Form W-8BEN to secure any confirmation/explanation regarding the revocation of US citizenship or lawful permanent residence. From BBA Members' experience of QI, 'instructions from the US' would not be effective as a potential indication of US status and propose that this should be removed from FATCA.

#### **Step 5: Accounts of \$500,000 or More**

28. The BBA notes that the threshold is now at an account level, subject to the association requirements on Page 8 of the Notice, which we regard as a positive development.
29. Please also refer to our previous comments at paragraph 27 above in relation to Step 4.

#### **Step 6: Annual Retesting**

30. The BBA believes that where a participating FFI enters into an Agreement during 2013, this requirement will apply from 2016. The BBA would be grateful if you would advise if you have reason to disagree with our conclusion.

### **3. Certifying Completion of Customer Identification Procedures**

31. The BBA is supportive of the principle of compliance verification by means of Chief Compliance Officer (CCO) certification. However, we would highlight a number of issues attached to the arrangements envisaged at Section I 3, as set out in paragraphs 32 - 35 below.
32. Full and immediate compliance with FATCA requirements is unlikely to be possible, given the breadth of requirements and the tight implementation timeframe. The BBA believes that the compliance verification arrangements should recognize these practical limitations so that participating FFIs are provided with a reasonable transitional period of a minimum of two years in which to implement necessary systems and controls, which period should start no earlier than the laying of final regulation/guidance.
33. The level of coordination that would be required within large groups to enable a single person to provide a group level certification would be extremely challenging. The BBA believes that it is essential that the required certification recognize this. In particular, the BBA considers that the emphasis should be on certifying, to the best of the CCO's knowledge and belief, that there are no formal or informal policies or procedures in place to assist account holders to evade tax. It should be borne in mind that such activity would already be a criminal offence in many countries, including the UK.
34. The BBA believes that there is a logistical issue associated with the requirement for written policies and procedures to be in place as of the effective date of the FFI

Agreement, as these would require final regulation/guidance. The BBA questions whether all relevant regulation and guidance is likely to be in place by 1 January 2013. This may have the undesired effect of potential participating FFIs delaying their entry into an Agreement.

35. Initial indications are that external advisor sign off will be required in many cases, particularly for larger participating FFIs. This is likely to have a material impact in terms of associated cost and a potentially adverse effect in terms of the cost/benefit analysis attached to potential participating FFI status.

#### **B. Future Guidance and Request for Public Comment**

*Treasury and the IRS solicit comments on appropriate ways to modify the application of the private banking test described in Step 3 in order to ensure that the test will apply, whenever practical, to the accounts of high-net-worth individuals and individuals who receive from FFIs services of the type described in Section I.A.1(3)(D)(i) in the definition of a private banking department and thereby reduce the number of accounts that will be subject to Step 5.*

36. The BBA considers that there may be exceptional circumstances, such as a property sale, where customers that would not generally be regarded as 'high net worth' could find themselves subject to Step 5. Additionally we are concerned that it would not be cost-effective to modify systems and procedures to effectively identify and screen out such transactions.

*Treasury and the IRS recognize that the procedures described in Step 3 are most relevant to those FFIs that engage in banking, brokerage, and similar businesses. Treasury and the IRS are considering whether other FFIs should apply analogous procedures to certain classes of accounts they maintain. Accordingly, Treasury and the IRS seek comments concerning whether other FFIs, and in particular insurance companies, should perform procedures similar to those described above with respect to holders of preexisting individual accounts, including private placement life insurance.*

37. The BBA believes that this question is best answered by the insurance industry.

#### **C. Long Term Recalcitrant Account Holders**

38. The BBA is concerned that the Notice continues to raise the possibility of FFI Agreements being terminated due to the level of "recalcitrant" account holders over a period of time. In practice, the vast majority of "recalcitrant" account holders will be non-U.S. investors invested in non-U.S. accounts with no nexus with the United States (and therefore have no understanding of the FATCA requirements) and with no local law obligation to cooperate with a participating FFI seeking the relevant information.
39. Furthermore, the possibility of the IRS subsequently making an arbitrary decision to terminate participating FFI status on this basis, could discourage prospective participating FFIs from making the extensive financial commitment that would be required to enter into an FFI Agreement.
40. As previously noted by the BBA, the current FATCA requirements create tensions with UK and European Union law, including the ability of a participating FFI to deny account facilities to customers that have otherwise satisfied local regulatory

requirements. Consistent with our general comments at the head of this letter, we are strongly of the view that the U.S. Treasury should work towards a multilateral solution, so that there is then a domestic legal requirement for account holders to comply. We fear that without such a solution, the BBA's Members will be placed in the invidious position of being able to comply with either their home state law or that of FATCA, but not both.

41. The BBA believes that consequential changes will be required in relation to the proposed procedures for new individual accounts set out in Notice 2010-60. In particular, the same conventions should be applied to new accounts as for pre-existing accounts in relation to:
  - (a) when accounts are "associated" with one another;
  - (b) the \$50,000 threshold for accounts not identified as US accounts being extended to both depository and non-depository accounts;
  - (c) separate rules for private banking accounts and non-private banking accounts (with electronic searches being allowed in the latter case);
  - (d) a common re-testing threshold (ideally set at a level of \$1,000,000); and
  - (e) the re-testing of certain accounts taking place at year end.
  
42. In addition, the BBA would refer to its comments in respect of Notice 2010-60 concerning new account relationships, in which it was noted that where an existing customer establishes a new account relationship, the FFI must treat them as a new customer. However, it is not clear whether this impacts new accounts of a similar type to existing accounts. For example, if an existing pound sterling cash account holder opens a pound sterling fixed cash deposit, would this constitute a new account relationship? What if that customer opened a euro cash account? The BBA had noted that further guidance was required in terms of what is meant by new account relationship and had suggested that a new account relationship should be regarded as being formed when the customer is obliged to enter into a new contractual agreement with the FFI in relation to a particular product offering that has not previously been provided to that customer.
  
43. The BBA would also like to remind IRS/Treasury of the comments previously made in respect of Notice 2010-60 in relation to entity accounts, and in particular:
  - (a) the importance of being able to verify participating FFI status;
  - (b) our proposal that FFIs should have the option not to apply the "active trade or business" check, so that entity account holders are deemed not to be involved in such trade or business; and
  - (c) our contention that the requirement for an FFI to identify each individual, and each other specified U.S. person that has a direct or indirect interest in an NFFE runs contrary to statutory intent at 1472(b) to identify substantial US owners and should be amended accordingly. We had further suggested that substantial U.S. ownerships levels should be revised to 25% or any alternative percentage required under relevant AML/KYC requirements.

## **Section II. Passthru Payments**

### **A. General Rule**

44. The BBA is far from clear as to what is meant by "Passthru Payment Concept". The Notice provides an illustration which is confined to a fund context. On reading the Notice on Passthru Payments, it would appear that the concept applies very broadly,

extending, inter alia, to ordinary interest and dividend payments from UK banks and other financial institutions. The BBA considers that any such requirement would be hugely disproportionate at best and potentially unworkable. It would also result in significant legal and practical ramifications as set out in further detail below.

45. The requirement would adversely impact, in particular, large multi-national groups that are FFIs and engaged in varied international businesses with very significant transactional volumes. The BBA is of the strong opinion that it is unrealistic to regard an investment in such an FFI as an indirect investment in US securities.
46. There would also be a considerable commercial risk associated with the publication of the U.S. asset ratio for each financial institution, with consequential implications in terms of the institution's relative attractiveness to investors and its credit rating and share price.
47. There would be a dramatic increase in the number of payments subject to withholding and retrospective reclaim, creating huge administrative burdens for investors (and potentially their taxing authorities), intermediaries and the IRS.
48. In the absence of enabling domestic legislation, banks operating in the UK are unable to legally apply a foreign (US) withholding tax, as evidenced in the DLA Piper legal opinion of 9 July 2010 that you have already received.
49. Those that would remain invested in the U.S. would face formidable operational and systemic challenges to compute and apply the Passthru Payment Percentage (PPP). These challenges are further accentuated by the requirement at Section II B 1 to deem any uncalculated/unpublished PPP as being 100%, at Section II B 4 to identify and apply the PPP of each lower tier participating FFI and at Section II B 5 to render associated compliance undertakings.
50. The complexities noted above would almost certainly require an extended transitional period for implementation, far beyond 2013.
51. These complexities and their associated costs would create a powerful incentive not to enter into an FFI agreement.
52. The BBA believes that the Passthru Payment requirement would also create unintended detrimental effects in relation to the stability of the wider market in so far as the potential impact on net settlement systems is concerned. Given the inherent risk management implications, we believe that such a development would be of considerable concern to market regulators, market participants and investors alike. The BBA will revert with further information in due course.
53. The BBA understands the concerns expressed in relation to "blockers", however we believe that such concerns could be better addressed through the CCO certification route.

## **B. Calculation of Passthru Payment Percentage**

### **1. In General**

*Treasury and the IRS request comments as to whether alternative methods for determining passthru payment percentages (such as permitting reliance upon representations in investor solicitation or proxy materials regarding target percentage*



*holdings of U.S. assets) may be appropriate and administrable under certain circumstances.*

54. The BBA believes that such alternative methods may be appropriate in a fund context and note that similar arrangements already apply in relation to the operation of the EU Savings Directive. However, the BBA defers to the fund industry representative bodies on this point.

## **2. Alternative Transition Method for Computing Passthru Payment Percentage**

55. The BBA is still considering the alternative transition method for computing Passthru Payment Percentage.

## **3. Determination of Assets**

56. The BBA is very concerned about the potential for relevant assets to be extended to off-balance sheet transactions or positions unless it is possible for such transactions or positions to be readily identified and calculated.
57. It is noted that assets held in a custodial account will not be considered assets of a participating FFI for the purpose of calculating its PPP, although such assets might be subject to the Passthru Payment requirements to the extent that they are issued by a participating FFI or owned by a recalcitrant accountholder.

## **4. Definition of "U.S. Asset"**

58. The BBA notes that the IRS intends to maintain a database which will enable participating FFIs and deemed compliant FFIs to be identified. The BBA seeks confirmation that if an FFI does NOT appear on the list it can be presumed not to be a participating FFI or deemed compliant FFI for the purpose of the calculation.
59. The BBA considers that an alternative facility should be available to allow real-time verification of FFI status, to ensure that there are no delays to commercial transactions when the database is unavailable or has not been recently updated.

*Comments are requested regarding any further anti-abuse rules which may be necessary to prevent the manipulation of an FFI's passthru payment percentage.*

60. The BBA believes that such concerns could be better addressed through the CCO certification route.

*Comments are also requested regarding the above approach to defining a U.S. asset.*

61. Consistent with our previous comments, and subject to the provisions related to grandfathered obligations, the BBA believes that a US asset should be defined as a debt or equity interest in a US issuer.

*Additionally, Treasury and the IRS are seeking comments regarding the use of the passthru payment percentage with respect to domestic and foreign partnerships and other flow-through entities, as well as how a partnership or other flow-through entity may determine whether a payment it makes to an interest holder is a withholdable payment or a passthru payment.*

62. The BBA is not clear as to what the issue is here. The BBA will supply further comments upon further clarification from IRS/Treasury.

*Comments are also requested regarding whether it is appropriate to permit a U.S. financial institution that is a partnership or other flowthrough entity under U.S. tax principles to calculate and make available a passthru payment percentage that may be used by participating FFIs in determining their own passthru payment percentages with respect to non-custodial accounts held with such U.S. institutions.*

63. The BBA believes that it may be appropriate to do so, subject to our previous comments in relation to the definition of US Asset and the practical implementation of the passthru payment requirements.

#### **5. Timing and Publishing of Passthru Payment Percentages**

*Treasury and the IRS request comments on the most efficient mechanism for ensuring that accurate passthru payment percentage information is readily available to FFIs for purposes of administering their obligations under chapter 4.*

64. The following observations are made subject to our previous comments at paragraphs 44 to 53 and our further comment at paragraph 69 below.
65. The sheer magnitude of information gathering will require a wholesale solution across the entire financial services industry to enable all FFIs comply with this requirement. It will be practically impossible to achieve unless such information is published in a central data system. Such system would need to be universally recognised and wholly relied upon by any intermediary in the global income collection and securities settlement systems.
66. The BBA believes that the final regulations should make clear that participating FFIs may rely on information from recognised industry sources (for example, feeds from established information vendors) to determine any FATCA withholding or reporting. It would be preferable that this is restricted to a single source and that participating FFIs are not expected to demonstrate that they have systems in place to transpose information correctly or that they cross validate the information, for example by using more than one recognised source, or by performing random checks. The final regulations should further confirm that the information can be assumed to remain current at the time of its use for the purposes of any upstream PPP calculation.

#### **C. Custodial Payments**

67. With regard to the example set out at Section II C concerning a FFI holding stock of a domestic corporation in custody for a recalcitrant account holder; the BBA would expect the final regulations to confirm that a payment of a US dividend in such circumstances would fall to be a withholdable payment (as well as a Passthru Payment).

#### **D. Grandfathered Obligations**

68. The BBA is still considering the general application of the proposed grandfathered obligations.

## **E. Request for Comments Regarding Potential Exceptions to Passthru Payments**

*Treasury and the IRS request comments regarding possible exemptions from the definition of passthru payments that would, to the extent possible, be consistent with the policy goals of the passthru payment rule and reasonable in light of the potential burden on participating FFIs.*

69. For the reasons set out above, the BBA believes that the only practical way to apply the Passthru Payment Percentage calculation is to limit this obligation to collective investment vehicles. The BBA defers to the fund industry representative bodies on this, and other related points.

## **Section III. Deemed-Compliant Status for Certain FFIs**

### **A. Certain Local Banks**

70. While the BBA welcomes the intent of the exception defined in Section III A, EU law stipulates the free movement of people and capital within the EU, which would prevent banks from refusing to open accounts for residents of other EU Member States. It is also likely that domestic anti-discrimination laws would also prevent banks from refusing to open accounts for residents of other EU Member States. Therefore this exception could not be taken up by any of the FFIs in the EU that it is aimed at. The BBA considers that this potential exception would be largely incapable of being exercised due to the limitations at 4 – 5. In a UK (and EU) context, there would be particular legal issues around the requirement at 5 not to open or maintain accounts for non-residents.
71. The definition of FFI is extremely broad and captures a large number and diverse range of businesses within the financial services sector. Certification costs are a significant barrier to participation and Treasury should accept in principle, and define, additional categories which allow businesses to be compliant or exempted. This could include businesses which do not service or at best have very low numbers of US clients, where the business is too small or it is inappropriate to introduce burdensome and costly changes, or where there is a low risk of tax evasion by US tax payers. These FFIs should be able to certify themselves as deemed compliant and this self certification should be acceptable to and be able to be relied on by larger FFIs. These FFIs are subject to strict regulations in the UK so any self certification that is incorrect would lead to regulatory censure or even criminal proceedings under anti-fraud laws.

*Treasury and the IRS solicit comments on how an expanded affiliated group would demonstrate to the IRS that it meets the requirements described above.*

72. Given our previous comments, the BBA does not offer any suggestions.

### **B. Local FFI Members of Participating FFI Groups**

73. The BBA considers that this potential exception would be largely incapable of being exercised for similar reasons to those set out at in relation to local banks above. The BBA's Members are further researching this point and will revert in due course.

*Treasury and the IRS solicit comments on how an FFI would demonstrate to the IRS that it meets the requirements described above. In addition, Treasury and the IRS request comments as to whether there are policies and procedures other than the customer identification procedures required of participating FFIs that an FFI member*

*of a Participating FFI Group could apply to effectively ensure that it identifies any U.S. accounts that it opens or maintains.*

74. Given our previous comments, the BBA does not offer any suggestions.

### **C. Certain Investment Vehicles**

75. The BBA defers to the fund industry representatives with regard to the content of this section.

### **D. Other Categories of Deemed-Compliant FFIs**

*Treasury and the IRS request comments regarding other categories of entities that should be treated as deemed-compliant FFIs under section 1471(b)(2)(A) because they possess certain characteristics, or have implemented appropriate policies and procedures, that are consistent with the purpose of the passthru payment rule of section 1471 to prevent these entities from being used by non-participating FFIs to avoid compliance with chapter 4.*

76. The BBA has previously commented on the proposed treatment of Foreign Retirement Plans, see paragraphs 37-41 of our letter of 29 October 2010, and more recently in our letter of 10 March 2011. The BBA acknowledges that IRS and Treasury are still considering submissions made on this matter. The BBA considers that applying a potential Deemed Compliant status to Foreign Retirement Plans and other Retirement Arrangements, because they pose a low risk of tax evasion, is inappropriate and would reiterate our recommendation that such plans are exempted from FATCA. In our teleconference of 24 February the BBA articulated some of the specific characteristics of Retirement Plans and how these could form the criteria for applying a low risk status. Specifically, the BBA believes these characteristics embrace the purpose of the exemption and would strongly support this treatment.

77. The BBA is further considering the deemed compliant status of categories of entities and will revert in due course.

## **Section IV. Reporting on U.S. Accounts**

### **A. Account Balance or Value**

78. The BBA welcomes the proposal to limit FFI account balance reporting obligations to year end account balances or values.

79. The BBA would appreciate further clarification as regards what is meant by "the purpose that requires the most frequent determination of value".

### **B. Gross Receipts and Withdrawals**

80. The BBA welcomes the increased flexibility attached to the determination of amount and character of dividends interest, other income and gross proceeds (i.e. not necessarily based on US federal income tax principles).

81. The BBA believes that this would enable a participating FFI to report in local currency where appropriate and would welcome IRS/Treasury confirmation of this.

### **C. Basis Reporting**

82. The BBA welcomes the confirmation provided in this section.

### **D. Branch and Affiliate Reporting**

#### **2. Branch Reporting Election and Reporting by Affiliates**

83. The BBA welcomes the proposal that would allow FFIs to elect to have each branch report information regarding US accounts and to make an election under Section 1471 C2. The BBA considers that it would also be very beneficial if such elections could be made at the level of each business unit. This is because automated systems producing reporting for each business unit are generally not linked.

### **Section V. Chapter 4 Requirements for Qualified Intermediaries (all)**

*Treasury and the IRS intend to coordinate the section 1471 reporting and withholding requirements for QIs, FWPs, and FWTs with the requirements that presently apply to QIs, FWPs, and FWTs under chapter 3 and guidance thereunder, and request comments on how the chapter 3 rules and agreements for these entities may be appropriately modified for that purpose.*

84. The BBA again emphasizes the importance of resolving the legal conflicts between FATCA and UK/EU law. UK banks acting as QIs would not be able to enter into an expanded (QI/FATCA) agreement due to the conflicts between what FATCA requires them to do and what UK law allows them to do. In these circumstances, their only recourse would be to revoke QI status for any QI agreement that extends beyond the end of 2012. The BBA is considering the impact of FATCA on existing QI agreements and will revert with analysis and commentary in due course.

### **Section VI. Application of Section 1471(e) Regarding Expanded Affiliated Groups of FFIs**

85. The BBA is broadly supportive of the arrangements set out in Section VI A and B. However, see further comments below.

86. The BBA would highlight the fact that it may be necessary to distinguish between different business units within the FFI affiliate, so far as the information sought at paragraphs 2, 4, 5 and 6 are concerned.

87. In addition, the requirement for the lead FFI to provide details of each group member that is not an FFI seems unduly burdensome and the BBA believes that this requirement should be removed subject to the lead FFI potentially being required to provide additional information as part of the application process.

### **C. Centralized Compliance Option for FFI Groups**

*Treasury and the IRS also intend to provide FFI Groups with an option under which a designated FFI could be appointed by some or all of the FFI affiliates in the FFI Group to assume an oversight role with respect to the compliance by the FFI Group with the section 1471 requirements (Compliance FFIs). For example, a Compliance FFI could assume the responsibility to: (1) establish applicable policies and procedures with respect to the section 1471 requirements for all or a subset of the FFI affiliates in the FFI Group; (2) ensure that all such FFI affiliates have adopted and implemented these policies and procedures; and (3) account to the IRS with*

