CBIT FATCA Conference
March 11, 2014

Registration

1) **Branches and disregarded entities –** While the temporary regulations clarify that disregarded entities ("DEs") should be treated as branches for FATCA purposes, should one or both be registered as branches or as separate FFIs in the portal – under the regs, Model 1 IGA, Model 2 IGA? If DEs should be registered as branches, how will counterparties verify the DE's legal name against the IRS GIIN list since there is no space in the portal to enter a branch name?

2) **Closing/blocking accounts**
   a. The RO of a PFFI must certify under 1.1471-4(c)(7) that the entity had no formal or informal practices or procedures in place from August 6, 2011, through the date of such certification to assist account holders in the avoidance of chapter 4. Since that date, many FIs have closed US accounts on the basis that they did not want to use additional resources to comply with FATCA requirements with respect to US accounts generally or after requests for waivers have been rejected. Can an RO of a PFFI that has done so make the required certification without qualification notwithstanding this practice?
   b. Are PFFIs unlike USFIs and reporting model 1 FFIs in that they are obligated to terminate recalcitrant accounts? If so, does the obligation of a PFFI to close such accounts in a "reasonable period of time" take into account local law restrictions on timing of such actions and practical issues with respect to illiquid assets (e.g., private equity, long-term lease contracts, fixed term mortgages)? Institutions have concerns regarding this requirement in non-IGA jurisdictions because most jurisdictions do not permit a forced sale of client assets without client consent.
   c. Can PFFI block accounts or can only Limited FFIs and Branches block accounts? What activities are prohibited if an FI blocks an account? For example, are making distributions on existing transactions or partial liquidation of an existing investment in a fund prohibited?

3) **Local law restrictions –** As we near the FATCA go live date and IGAs are not being signed at the expected pace, global financial institutions are grappling with when a branch or entity needs to register as limited branch or entity if there are local law restrictions on reporting, withholding and/or terminating accounts. In many jurisdictions, there's an expectation that IGAs will be signed in the near future, but registering with limited status may have significant impacts on new local business given the restriction on onboarding new NPFFIs and will put multinational groups at a disadvantage to purely local FIs. Reg. 1.1471-4(i)(1) provides "An FFI that cannot comply with any of the requirements of this paragraph (i) is not eligible to enter into an FFI agreement with the IRS, but may obtain status as a limited FFI if the FFI meets the requirements and agrees to the conditions of paragraph (e)(3) of this section." Does this reg mean that an FFI is precluded from entering into an agreement only when and if it actually knows that it has an account holder for which it cannot meet the requirement of (i)? Or does it go further than that and preclude entering into an agreement based only on the FFIs inability to meet the requirements of (i) at the time of registration regardless of whether the FFI, at that time, actually has an account to which (i) would be applicable? For example, for an FFI that is in a non-IGA jurisdiction that has local law restrictions on reporting accounts without a waiver and terminating certain accounts, can it register as a PFFI and request waivers?

Definitions

4) **Definition of "Account": Block Trades –** Institutions regularly enter into a large number of block trades on DVP/RVP or "execution only" securities and other transactions that are initiated by a Fund Manager and the securities are subsequently allocated to the various funds that the Fund Manager manages and custodied by another financial institution. The fund manager is subject to AML/KYC requirements by the institutions doing the execution but funds managed by such Fund Manager are not. Are these types of transactions considered accounts subject to FATCA due diligence? If so, this will require a major change in the due diligence practices of financial institutions. PFFIs may also potentially trigger events of default as a result of these transactions if they end up defaulting counterparties to NPFFIs.

5) **Definition of "Account": Derivatives -** There are disparate views as to whether or not trading derivatives with a counterparty should be considered to give rise to a custodial account or merely create a payer/payee relationship. Does the IRS/Treasury have a view on this issue? Will the determination be made based on whether there is collateral associated with the derivatives or will the existence of a bilateral derivative contract itself create an account?

6) **SPVs/LLDIE –** The new regulations (p. 185) modify the existing LLDIE in response to concerns that it did not cover the vehicles it intended to. Questions remain regarding some of the requirements:
   a. Will there be guidance as to what substantially all means, e.g., 80%?
   b. Will an entity that holds equity in an entity that holds substantially all debt or that enters into CDSs over a pool of debt meet the asset test?
   c. In subsection (F), are the requirements met if the board has the authority to register the entity, but may not be able to meet the FATCA requirements, e.g., because the documentation for the vehicle does not enable them to get information from its investors.
   d. More generally, why was the relief for SPVs limited to CLOs and CDOs? There are concerns in the market regarding other SPVs, including repack vehicles (see below).

7) **EAG/ SPVs** - Has any thought been given to providing additional EAG relief outside of the LLDIE context? An investment in a non-LLDIE SPV that is denominated as a debt investment but treated as equity for US tax purposes could potentially pose a risk to an entire expanded affiliated group. There is a different EAG test depending on whether the entity is treated as a corporation or partnership for US tax purposes. The ownership trigger for a partnership to be part of an EAG is a 50% capital or profits interest so that an investor that may not be aware of the US tax treatment of a vehicle with no voting rights in the vehicle and no ability to register the entity could be at risk of compromising its EAG.

8) **Repackaging vehicles** - typically set up in IGA countries, such as the Netherlands, Jersey, Cayman Islands, Ireland and Luxembourg - are organized as contractual cell companies, statutory cell companies or stand-alone vehicles organized for individual transactions. Notes issued by repackaging vehicles are typically held through a clearing system such as Euroclear. Repackaging vehicles have a static investment strategy with no anticipated reinvestment.
   a. **Are these vehicles FFIs or NFFEs?** 1.1471-5(e)(4)(i) generally defines an investment entity to be one that (i) conducts trading or investing activity on behalf of a customer; (ii) has income from trading or investing and is managed by another investment entity; or (iii) is similar to a mutual fund, hedge fund, etc. These vehicles are passive vehicles that have a set of investments at the outset which don't change over time.
   b. If the vehicle is an FFI, should it indicate it is **a "single FI" or "member FI of an EAG"** when registering? 1.1471-4(e)(1) requires each member of an EAG be a PFFI/RDCFFI, but allows a PFFI/RDCFFI in an IGA country to maintain its status as such pursuant to the IGA. But, IGAs provide that a FFI will still be in compliance if a related entity is prohibited under local law from its FATCA obligations. Does that mean a repackaging vehicle might not be considered compliant under an IGA simply because an affiliate of a noteholder fails to register or otherwise does not comply with FATCA?
   c. If an FFI or NFFE, **how is a repackaging vehicle to know who its noteholders are**, let alone their affiliates/whether it is part of an EAG, if the vehicle's notes are cleared? Because notes are cleared, a vehicle cannot determine its EAG status or its substantial U.S. owners.
   d. For cell companies, should they be **considered as a whole or cell by cell**? Issues regarding inability to know owners and affiliates may be alleviated if considered as a whole.

9) **Sponsored, closely held investment vehicles** – The Jan. 2013 definition under 1.1471-5(f)(2)(iii)(B) required the sponsor to be "<u>authorized to manage the FFI and enter into contracts on behalf of"</u> the sponsored FFI". While the Sep. 2013 technical requirements eliminated this requirement in favor of a requirement that the sponsor agree to fulfill PFFI FATCA responsibilities on behalf of the sponsored FFI, the new regulations revert back to the original definition. See page 183 of the new regulations. Was that intended?

<u>Withholding</u>

Questions #10-14 relate to the transitional exception to the definition of "withholdable payment" for **payments on collateral** in 1.1473-1T(a)(4)(vii) (p.211). The new regulations provide transitional relief for payments made prior to January 1, 2017 by a secured party with respect to collateral securing one or more transactions under a “collateral arrangement”. The regulations do not define, however, what "collateral arrangement" means. Please advise on the following:

10) Is the interest on cash paid in the 3 cases described below paid under a “collateral arrangement”?

  (i) interest paid by a secured party on cash collateral posted to the secured party to secure a derivative transaction (e.g., pursuant to a “Credit Support Annex” of an ISDA master agreement)
  (ii) interest on cash collateral posted by a security borrower to a security lender to secure a securities loan made by a security lender to the security borrower (e.g., pursuant to a Master Securities Lending Agreement)
  (iii) interest on cash paid by a repo seller to a repo buyer for the sale of a security pursuant to a repurchase agreement

11) Is interest/substitute interest paid in the 3 cases described below paid under a “collateral arrangement”?

  (i) interest/substitute interest paid on US debt securities pledged to a secured party to secure a derivative transaction (e.g., pursuant to a “Credit Support Annex” of an ISDA master agreement)
  (ii) interest/substitute interest paid by a repo buyer to a repo seller on US debt securities purchased by the repo buyer from the repo seller pursuant to a repurchase
  (iii) interest/substitute interest paid on US debt securities borrowed by a security borrower from a security lender (e.g., pursuant to a securities lending agreement)

12) The regulations provide that the temporary withholding tax relief for collateral described above applies with respect to collateral securing one or more “transactions” under a collateral arrangement. “Transaction” is defined, among other things, as a “margin loan”. In that regard, when (for example) US debt securities are purchased in a “margin account”, how is it determined whether interest paid on the US debt securities in the margin account is paid under a commercially reasonable collateral arrangement? Does is matter in that regard how much debt is in the margin account?

13) An FFI generally custodies US securities posted by a counterparty as collateral with a US withholding agent so that there are two relevant payments on the collateral that could be subject to FATCA withholding – the first payment from the US custodian to the FFI-secured party, then a payment from the FFI secured party to the counterparty posting the securities as collateral; however the transitional relief only applies to payments made “<u>by a secured party</u> with respect to collateral.” Was the intention of the transitional exception to apply to payments made by the US custodian to the FFI in addition to payments made by the FFI (secured party) to the counterparty posting securities? Should we expect to see a technical correction to address this point?

14) To the extent that the new collateral rule does not apply, FIs are still concerned with the application of the grandfathering rules to collateral due to the same concerns regarding the fungibility of pooled collateral. Is there any intention of providing guidance on these issues? ISDA had made the following recommendations to address these concerns:
  a. Payments on U.S. securities that are posted as collateral are treated as either grandfathered or non-grandfathered by reference to the “grandfather” status of the posted security (i.e., whether or not the security posted as collateral by the pledgor is an obligation issued before after June, 30, 2014).
  b. For payments of withholdable amounts on non-grandfathered collateral (including cash after June 30, 2014) to be eligible for the grandfathering rule by reason of securing a grandfathered transaction, that collateral must be clearly identified in segregated accounts as securing solely grandfathered transactions.

15) **Transitional relief for offshore obligations** 1.1473-1T(a)(2)(vi) – Under Chapter 4, the rule sourcing interest paid by foreign branches of US institutions as foreign is turned off. Foreign branches were relying on the transitional rule for offshore obligation to provide additional time to build systems to accommodate this substantial change. The new regulations state that transitional relief no longer applies to payments made with respect to debt or equity issued by a U.S. person with a limited exception for branch deposits of retail customers. According to the preamble Treasury and IRS intended to provide that the exclusion does not apply to debt or equity issued by a U.S. person. What exactly do the Treasury and the IRS intend the transition relief to apply to? Foreign branches of US banks had not been planning on updating requisite systems to implement withholding on offshore deposits and other US source FDAP income payments and seemingly under the new regs now must do so within the next four months. Will any form of relief be provided?

Due Diligence

16) **Reason to know/Industry codes** - On the reason to know changes, the preamble suggests that industry classifications may be used as a safe harbor, but the regs basically add it as another thing to do. What was the intention here? See 1.1471-3(e)(4)(i) (p. 119).

17) **eW-8s** – Can an electronically signed Form W-8 be provided to upstream or third-party withholding agents in either of the following situations:
    a. As an attachment to Form W-8IMY
    b. As documentation for a direct account when provided by an authorized agent of the payee, when that agent is the one that has the e-W-8 system and an MOU. Examples of this would be
        i. Investment Adviser obtains eW-8s from clients, opens custody or brokerage account, sends pdf of e-W-8.
        ii. fund manager obtains electronic W-8s from his funds and wants to send them to a custodian or broker to document a direct custody account).

    - Allowing submission as attachments to Form IMY should be allowed.
    - With respect to b, 1.1441-1T(e)(4)(iv)(C) allows us to accept a fax or pdf of "an otherwise valid" withholding certificate so long as the sender is authorized to send it on behalf of the signatory.
    - The output of data from a compliant eW-8 system should be considered "an otherwise valid" withholding certificate that can be transmitted to other withholding agents for direct accounts
    - Assuming that the answer to either question is "yes," is there a particular form for the electronically signed form. I think the argument is strong with respect to a physical printout the system with "electronically signed by ________" on the signature line.
    - But can we go to the next level, which is direct transmittal of the data fields (although I would assume we would need to be able to generate a paper form at the request of the IRS).
    - Interestingly, there is a 2001 IRS ruling (Announcement 2001-91, 2001-2 CB 221) that does go that far. It authorizes the direct data transfer for e-W-9s provided by introducing brokers to a clearing broker by way of a third party vendor.

18) Under the new regulations p. 102, it looks like all PFFIs and registered deemed-compliant FFIs are required to provide a W-8 or a written statement re their Chap 4 status and documentary evidence. In case of a pre-FATCA W-8, this can be used until Jan 2017. Has the transitional rule for offshore obligations of reporting model 1 FFIs under 1471-3(d)(4)(iv)(C) been effectively eliminated?

19) **Offshore obligations** – The preamble to the FATCA regulations released on February 20, 2014 address the definition of Offshore obligation as follows: "In response to comments stating that the definition of offshore obligation in the final regulations is unclear, and in order to harmonize chapters 4 and 61, these temporary regulations define offshore obligation by cross-reference to §1.6049-5(c)(1) (which now uses the term offshore obligation instead of offshore account). These temporary regulations also remove the definition of offshore account because it is included in the definition of offshore obligation under §1.6049-5(c)(1)."
    a. How should the US branch of a PFFI apply onshore/offshore analysis where KYC and client relationship/support is carried out in the US branch but the obligation is booked offshore in head office either to realize cost efficiencies or as the result of a global dealing activity (where there are participants in multiple jurisdictions with allocation of P & L to participants pursuant to the Proposed Treas. Reg. Section 1.482-8 but where booking is centralized in head office). In these cases, the income is effectively connected to the US branch even though the "obligation" is booked off-shore. Should such activity be considered onshore or off-shore obligations?
    b. More generally, do the global dealing regulations impact the determination of what is an offshore obligations where an obligation is on the books of a PFFI but some of the related P&L is allocated to the US?

20) **90 day "grace period"** – When a client has a change in circumstances, do FIs have any period of time to input information into their systems after they become aware of such change and when neither chapter 3 nor 4 withholding will apply? The regulations seem to say that a default rate of 30% Chapter 3 withholding applies upon a change in circumstances.

a. The issue previously raised with the change in circumstances rule was resolved by the tech correction regs issued in Sept. 2013 by eliminating the "earlier of" rule and leaving a simple 90 day rule. 1.1471-4(c)(2)(iii)(C) and 1.1471-5(g)(3)(iii). However, the regs retain an "earlier of" rule for new accounts. 1.1471-5(g)(3)(ii). Was that intended?
b. Both 1.1471-4(c)(2)(iii)(C) and 1.1471-5(g)(3)(iii) should be clarified to indicate when the 90 day period begins to run by changing the phrase "90 days after the change in circumstances" to "90 days after <u>the date the participating FFI knows or has reason to know of</u> the change in circumstances". This would be modeled on 1.1471-3(c)(6)(ii)(E)(3) which provides a 90 day rule for determining when there has been a change in circumstances making documentation invalid.

21) **US Indicia: Standing Instructions for preexisting accounts for individuals** – US indicia listed under 1.1471- 4(c)(5)(iv)(B)(1) includes "standing instructions to pay amounts from the account to an account maintained in the United States". 1.1471- 4(c)(5)(iv)(B)(2) sets out the requirements to cure and reads as follows: "If information required to be reviewed with respect to the account contains standing instructions to pay amounts from the account to an account maintained in the United States **<u>for an account holder</u>**, the participating FFI must retain a record of a withholding certificate and either a form of documentary evidence described in 1.1471-3(c)(5)(i)(A) through (C) or a written reasonable explanation (as defined in 1.1441-7(b)(12)) establishing the account holder's status as a foreign person." (Underlining and bolding added)
a. Was the omission of the reference to "for an account holder" in 1.1471- 4(c)(5)(iv)(B)(1)(v) intentional? If so, does this mean that all standing instructions to pay amounts to accounts maintained in the US are US indicia but that only those that are to an account for an account holder can be cured? Alternatively, was the intention that standing instructions to payment amounts to an account maintained in the United States are only in scope if the account maintained in the US is for an account holder.
b. In either case, can you provide any clarity regarding "an account holder" in this context? Is the intended to include all account holders of the PFFI or only those that the PFFI knows are linked to the account holder of the account from which the funds are transferred?

22) The new temporary regulations issued in February 2014 allow a WH Agent to rely on a signed tax form or document received by fax or scanned and sent by e-mail unless WH Agent knows that the person transmitting form or documentary evidence is not authorized to do so. The regulation cited in the preamble as legal authority for this rule is 1.1441-1(e)(4)(iv)(B). Shouldn't the cite be to 1.1441-1(e)(4)(iv)(C)?

<u>Chapter 3/61 vs. Chapter 4</u>

23) Under current law (for Ch. 3/61), where you cannot presume that a person is an individual, a corporation or a trust, you must treat it as a partnership. Then, 1.1441-5(d)(2), provides that in the absence of documentation, a withholding agent must apply the rule in 1.1441-1(b)(3)(ii) and presume the partnership to be a US partnership unless there are indicia of foreign status. Indicia only exists if the entity has an EIN beginning with a "98," the entity has a foreign mailing address or the payment is made outside the US.
a. Under the conforming regulations, in the absence of documentation (which would be a W-8, W-9 or documentary evidence), 1.1441-5T(d)(2) now refers you to 1.1441-1T(b)(3)(iii), which provides that where a withholding agent cannot reliably associate a payment with documentation, it is presumed to be made to a US person except as otherwise provided in the paragraph, and the exceptions apply to (A) exempt recipients, (B) scholarships and grants (C) pensions, and annuities (D) offshore obligations and (E) payments for services. In other words, there is no special treatment for an entity (that is not an exempt recipient) with foreign indicia.
b. Furthermore, in the absence of documentation, the new presumption rule does not get the benefit of the "limits on reason to know" for preexisting obligations in 1.1441-7(b)(3)(ii), so there does not appear to be any transition period for the change.
c. Therefore, an undocumented entity that was previously identified as foreign due to its foreign indicia, would now be an undocumented US person and, as a result, would be subject beginning on July 1, 2014 to, among other things, 28% withholding on broker proceeds. The effective date for this withholding is July 1 since the limit on reason to know mentioned above does not apparently apply.
d. Was this intended?

Questions #11-13 arose initially as a result of Section 4.04(A) in the FFIA which provides that a PFFI is a withholding agent not just for Ch. 4 but also for Ch. 3 and 61. What is the significance of this provision for a PFFI which is not otherwise a US payor, QI, WT or WP and therefore, was not aware of and did not as a practical matter need to be aware of these rules till now? It is signing the FFIA (or, in the case of a Model 2 FI, agreeing to its terms) with a view to compliance with FATCA, not the entire US tax withholding and reporting regime. Further, the PFFI does not elect to apply these other Chapters where permitted for FATCA purposes. The following questions are an attempt to determine the scope of the additional obligations, if any.

24) 1.1471-4T(d)(2)(i): Assuming that an FFI (that is not a US payor) is fully compliant with its FATCA obligations to report on US accounts, what is the extent of its obligation to report on Form 1099 payments to its US accountholders that are non-exempt recipients? For example, if there is a payment that is a reportable amount under section 6045 (that is not a withholdable payment and not a Ch. 4 reportable amount under FATCA) that is made to a US account reported by the FFI, must the FFI report that payment under Ch. 61 (or otherwise)?
25) 1.1474-1(d)(2)(iii) and 1.1474-1T((d)(2)(i). It is understood that under the final/temporary regs which were just issued, the definition of Chapter 4 reportable amount ties into the definition of withholdable payments. However, 1.1474-1(d)(2)(iii) states that payments not subject to reporting under that section may still be reportable under Ch. 3. Assuming the above FFI is also not an intermediary, what additional payments is it required to report on Form 1042-S pursuant to Chapter 3, if any? If the FFI is an intermediary, have its Ch. 3 responsibilities grown beyond of those of a QI or NQI pre FATCA? Must payments for services performed in the US (other than those financial services payments which are withholdable payments) be reported and withheld upon if the vender is not documented as required? Are there other payments that it must capture, report?
26) Following up on both #1 and #2, how much of the new Ch. 3/61 conforming regulations (or the unchanged sections of those chapters) do the FFIs discussed above need to know about? Is it just the sections referenced within the Ch. 4 regs?

27) Will a failure to comply with a Ch. 3/61 provision with regard to payments that are not withholdable payments and therefore, outside the scope of FATCA be considered failures, material failures or potentially events of default under the FFIA? Must the PFFI apply the requirements for withholding certificates to support a treaty claim or is its obligation limited to being sure that the foreign status and FATCA classifications of its accountholders and payees are documented as required? 1.1441-7T(b)(iii)(6).

28) What if that FFI (that is not a US payor or QI, WT or WP) is an FFI in Model 1 jurisdiction? What if anything must an FFI in a Model 1 jurisdiction do with respect to Ch. 61 and Ch. 3? How is the answer different from the answer for a PFFI?

29) In 1.1474-1T(i)(1) and (2) with regard to reporting on owners of ODFFIs and passive NFFEs, are the triggering payments and payments to be reported for both types of entities of for both 2014 and 2015, withholdable payments, Ch. 4 reportable amounts or all payments? These terms are not used consistently. In addition, the automatic extension provision is included at the end of the section regarding reporting on passive NFFEs. Are there no extensions possible for the ODFFI filings?

30) **QI -** QIs may be required to provide the IRS the name/address of foreign customers claiming treaty benefits, so the IRS can verify entitlement to such benefits (esp LOB provisions). This represents a complete reversal of QI policy. (p. 179) Can you confirm this reading and elaborate on it? If this is the appropriate reading, institutions have serious reservations regarding whether they can implement such significant changes by July 1. Does this indicate that QIs will be subject to IRS audit in the future? If so, will the IRS still have the ability to contact the QI's auditors as well?

31) Are the standards of knowledge rules in Chapter 4 (specifically, in 1.1471-3(e)) meant to be applied for purposes of Chapter 3 as well, or are they only applicable to Chapter 4 withholding?
    a. The US indicia were unexpectedly moved from 1.1471-3 (in the Final Regs.) to 1.1441-7(b) in the Temp. Regs. Under the current regs, the presence of uncured US indicia will invalidate a Form W-8 for both Chapter 3 and Chapter 4 purposes. Therefore, it is important to know whether the favorable limitations on reason to know in the Chapter 4 rules are meant to apply for Chapter 3 as well. For example: a US withholding agent that receives a valid GIIN from an FFI payee does not need to search for US indicia for Chapter 4 purposes. Does this exemption apply for Chapter 3 withholding also?

b. We think that, technically, the reg section that presents this question is Section 1.1441-7T (b)(1), which states (last sentence): "In the case of a withholding agent making a withholdable payment to a payee that the withholding agent is required to treat as a foreign entity, see §1.1471-3(e) for standards of knowledge and §§1.1471-2 and 1.1472-1(b) for withholding that may apply under chapter 4."
c. Does the final clause in this sentence ("that may apply under chapter 4") modify the earlier cross-reference to 1.1471-3(e) (meaning that one can apply the 1.1471-3(e) rules for chapter 4 only)? Or does the final clause only relate to the cross-reference to 1.1471-2 and 1.1472-1(b), but the 1.1471-3(e) rules are meant to be imported into chapter 3?

32) **Transitional 2014 Form 1042-S Reporting -** Our understanding is that for year 2014, we will file a single Form 1042-S reporting all different income types on the one form. This is a departure from normal filing practice where we typically file a single Form 1042-S per income type. Then, in year 2015, we will revert to standard practice and file a single Form 1042-s per discrete income type.
    a. Institutions are concerned about the substantial programming efforts that will be required to change our reporting output for one year and then switching back to "standard" reporting the following year. What is IRS rationale for the transitional 2014 Form 1042-S reporting requirement?
33) **Exception From 1099 Reporting** - 1.6049-4(b)(4) contains two provisions that would relieve a payor from having to perform Form 1099 reporting if it is applying appropriate reporting under FATCA. The provision in 1.6049-4(b)(4)(ii) offers relief where the payment is not an amount subject to chapter 3 withholding or subject to backup withholding and made to a recalcitrant account holder of a PFFI or non-consenting US account of a model 2 FFI if the FFI reports as required under FATCA. A similar rule applies to Model 1 FFIs with respect to US reportable accounts. The other rule - which is limited to non-US payors - applies to payments made by PFFIs, and RDCFFIs when "the payment is not subject to withholding under chapter 3 or 4, or to backup withholding..." It looks as though this language doesn't intend to apply the technical definition of an amount subject to withholding under chapter 3 or of a withholdable payment in chapter 4, but rather implies the more common notion that although the payment may meet the definitional language, it isn't actually subject to any withholding because the payee is documented as a US person. This seems to be the result in example 15 in 1.6049-5(d)(3)(iv)(4) - at least to amounts subject to chapter 3 withholding since the payment was US source interest. But not as clear in regard to withholdable payments since the interest was grandfathered in the example. Can we confirm this understanding, and confirm that if the payment in example 15 was not grandfathered the result would have been the same?

<u>Forms</u>

34) **Completion of W-8BEN-E**: **Excepted NFEs under the US regulations / Active NFEs under IGA** - The definition of Active NFFE Section VI of Annex I of the IGAs includes excepted nonfinancial entities and other entities that are defined separately under the regulations. How should an entity in an IGA jurisdiction complete a W-8BEN-E if it is defined as an Active NFE under any provision of Annex 1, Section VI.B.4 other than (a) (i.e., apply the definitions under the IGA or the regulations)?
35) **Foreign TINs -** Now that foreign TINs are required in certain instances, is a withholding agent required to perform any due diligence with regard to the foreign TINs such that it may be charged with knowing: 1) which countries have TINs and which do not; 2) for countries that have TINs whether there are classes of persons that get then and classes that do not; 3) the number of characters and whether they can be alpha and/or numeric? If this is required will the IRS be publishing guidelines on countries that issue TINs, acceptable formats, etc.?

<u>Reporting</u>

36) **Account Balance or Value as at the effective date of the FFI Agreement / Equity interest in a discretionary trust** - The due diligence procedures to be applied to preexisting individual accounts depend on the account balance or value of the account as at the effective date of the FFI agreement (i.e, June 30, 2014). Based on the provisions in 1.1473-1(b)(3), it is our understanding that the account balance or value of a discretionary interest in a trust is equal to the distributions received by the beneficiary in the calendar year. For purposes of determining the due diligence procedures to be applied to individuals who are entitled to a discretionary interest in a trust, how should the value of that interest be determined as at June 30, 2014 (e.g., distributions received in the preceding calendar year or in the 12 months ending June 30, 2014)?