Section of Taxation

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January 24, 2014

Hon. John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments Concerning FATCA Regulations Relating to Insurance Issues

Dear Commissioner Koskinen:

Enclosed are comments concerning the final treasury regulations Under the Foreign Account Tax Compliance Provisions of the Hire Act, P.L. 111-147, Relating to Insurance Issues. These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Michael Hirschfeld

Michael Hirschfeld
Chair, Section of Taxation

Enclosure

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
William J. Wilkins, Chief Counsel, Internal Revenue Service
Emily S. McMahon, Deputy Assistant Secretary (Tax Policy), Department of Treasury

ABA SECTION OF TAXATION
COMMENTS CONCERNING FINAL TREASURY REGULATIONS
UNDER THE FOREIGN ACCOUNT TAX COMPLIANCE PROVISIONS OF THE HIRE ACT, P.L. 111-147, RELATING TO INSURANCE ISSUES

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Mark Smith, Jean Baxley, Susan Seabrook, Craig Springfield, and Brenda Viehe-Naess, of the Insurance Companies Committee of the Section of Taxation (the "Committee"). The Comments were reviewed by Kirk Van Brunt of the Section's Committee on Government Submissions, and Stewart Weintraub, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the principles addressed by the Comments or have advised clients on the application of such rules, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: January 24, 2014

INTRODUCTION

On January 28, 2013, the Internal Revenue Service (the "Service") and the U.S. Department of Treasury (the "Treasury") published Final Regulations[1] to implement Internal Revenue Code (the "Code") sections 1471-1474.[2] A number of provisions in the Final Regulations are directed specifically at insurance companies, insurance products, and insurance-related definitions, and take into account comments the American Bar Association Tax Section ("Section") made in response to a request for comments when the regulations were proposed.[3] The Section appreciates the consideration that the Service and Treasury gave to those comments when drafting the Final Regulations.

The Section understands that further guidance is anticipated in this area, and that the Service and Treasury are actively considering written comments, including comments on provisions in the Final Regulations. Accordingly, the Section provides the following comments relevant to insurance companies and insurance-related definitions.

EXECUTIVE SUMMARY

Specifically, the comments recommend:

- Providing that foreign insurance companies electing under Code section 953(d) to be taxed as U.S. insurance companies ("953(d) companies") are treated as U.S. insurance companies for purposes of Chapter 4, regardless of whether they are licensed to do business in any State;

- Clarifying that a Form W-9 is the type of withholding certificate that is required to establish a payee's Chapter 4 status where the payee has elected under Code section 953(d) to be taxed as a U.S. insurance company;

- Clarifying the Foreign Account Tax Compliance Act ("FATCA") entity status of a holding company of an expanded affiliated group that includes an insurance company, but that does not include a specified insurance company, is a nonfinancial foreign entity ("NFFE").

COMMENTS

The Section welcomes the opportunity to comment on the Final Regulations implementing the foreign account tax compliance provisions of the HIRE Act as they relate to insurance companies. We share the Service's goal of balancing the government's need to prevent tax avoidance by U.S. persons by obtaining information regarding U.S. accounts at foreign financial institutions ("FFIs") and substantial U.S. owners of NFFEs, on the one hand, and the administrative burdens that these provisions place on business entities, including U.S.

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[1] Treas. Reg. sections 1.1471-0 - 1.1474-7, Treas. Reg. section 301.1474-1, 78 Fed. Reg. 5874 (Jan. 28, 2013).
[2] References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.
[3] See Prop. Reg. sections 1.1471-0 – 1.1474-7, Prop. Reg. section 301.1474-1, 77 Fed. Reg. 9022 (Feb. 15, 2012).

and foreign entities that engage in the business of insurance, on the other. Our comments focus upon the two provisions in the Final Regulations that appear to be creating the most significant confusion for insurance entities and their affiliated companies, and the application of which will not yield corresponding benefits to the government. Our comments also address a related withholding certificate issue.

Our comments are as follows:

1. **Foreign insurance companies electing under Code section 953(d) to be taxed as U.S. insurance companies should be treated as U.S. insurance companies for purposes of Chapter 4 (Regulation section 1.1471-1(b)(132)), regardless of whether they are licensed to do business in any State.**

The proposed FATCA regulations did not address the status of 953(d) companies. Rather than confirm, as requested by commentators, that 953(d) companies are U.S. companies for all purposes of Title 26, including FATCA, the Final Regulations provide that for purposes of Code sections 1471 through 1474 and the regulations thereunder, the term ''U.S. person'' includes an insurance company that has made an election under Code section 953(d) only if that company has also obtained a license to do business in at least one state. The basis and rationale for this limitation are unclear, and such treatment imposes a significant burden on 953(d) companies.

A U.S. person is defined, by section Code section 7701(a)(30), as including a domestic corporation. If a controlled foreign corporation ("CFC") that is an insurance company makes an election under Code section 953(d)(1) to be taxed as a U.S. company, "for purposes of [Title 26], such corporation shall be treated as a domestic corporation." If a foreign insurance company has made a Code section 953(d) election, it is treated as a U.S. person for all purposes of the Code.

Regulation section 1.1471-1(b)(132) defines the term "U.S. person" or "United States person" to include a person described in Code section 7701(a)(30). The regulation further provides, however, that the determination of whether an insurance company is a U.S. person is made "without regard to an election by a company not licensed to do business in any State to be subject to U.S. income tax as if it were a domestic insurance company." Stated differently, the Final Regulations provide that for purposes of Code sections 1471 through 1474, the term "U.S. person" includes a 953(d) company only if that company has obtained a license to do business in at least one state.

The Final Regulations, at § 1.1471-4(d)(5)(i)(B), also set forth an elective reporting procedure that permits a 953(d) company that is an FFI to satisfy its FATCA reporting obligations by electing to report its Chapter 4 account information using a regime similar to that required under Code section 6047(d). A significant difference, however, is that this elective reporting procedure also requires account balances to be reported, whereas no such requirement applies under Code section 6047(d). While the Final Regulations' elective reporting procedure provides flexibility, it is based on the premise that a 953(d) company can be an FFI in the first instance.[4] In this regard, the Code's treatment of a 953(d) company as a U.S. person for all

[4] This is only an issue for 953(d) companies that are specified insurance companies not licensed to do business in any State. As discussed herein, it already is clear that other 953(d) companies will not be treated as FFIs.

purposes of Title 26 would be expected to prevail over the rule of the Final Regulations treating 953(d) companies not licensed in a State as non-U.S. entities. Indeed, Code sections 6041 through 6049 already apply to such 953(d) companies as they are U.S. persons.

To the extent there is any uncertainty about the treatment of life insurance and annuity contracts as "commercial annuities" for purposes of Code section 6047(d), we recommend that consideration be given to the issuance of clarifying guidance under Code section 6047(d) or Code section 3405(e)(6), as appropriate, rather than provide a FATCA-only rule that changes the treatment of 953(d) companies from domestic to foreign. *See, e.g.*, Rev. Rul. 91-17, 1991-1 C.B. 190, which construed the definition of a commercial annuity broadly to include contracts that fail to satisfy the definition of "life insurance contract" in Code section 7702.[5]

Notice 2013-69 ("the Notice") was released October 29, 2013 and provides guidance to FFIs entering into an FFI agreement with the IRS, as well as describing certain responsibilities of participating FFIs. The Notice also includes text of a draft FFI agreement. Relevant to the matter at hand, the Notice discusses related updates to regulations under Section III, paragraph .02. These updates include, under subparagraph F, revisions to the Final Regulations' definition of U.S. persons:

> The Treasury Department and the IRS intend to modify the definition of U.S. person in the chapter 4 regulations to include a foreign insurance company that is not a specified insurance company and that elects pursuant to section 953(d) to be subject to U.S. income tax as if it were a U.S. insurance company. [6]

It appears that the Notice proposes to supplement, rather than replace, the Final Regulations' treatment of 953(d) companies. Thus, the Notice confirms that 953(d) companies that do not issue cash value insurance contracts will not be treated as U.S. persons, regardless of whether they are licensed to do business in a State. Also, the Notice does not alter the Final Regulations' elective reporting procedure of § 1.1471-4(d)(5)(i)(B) that permits a 953(d) company that issues or is obligated to make payments with respect to a cash value insurance contract to elect treatment similar to that of a "U.S. person" if the company complies with reporting requirements under Code section 6047(d) and, as noted above, satisfies the additional requirement of reporting account balances. Thus, while the Notice provides useful clarifications, it continues to reflect the Final Regulations' treatment of some 953(d) companies – *i.e.*, those

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[5] We also observe that the government already receives information regarding account balances on Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts. Although commentators had requested an exemption in the FBAR context for the accounts of 953(d) companies based on the treatment of such companies as domestic for purposes of Title 26, this request was rejected since the FBAR requirements are imposed under Title 31. *See* 76 Fed. Reg. 10239 (Feb. 24, 2011).

[6] The draft FFI agreement includes definitions and states that a "Specified insurance company" means an insurance company described in §1.1471-5(e)(1)(iv):

> (iv) Is an insurance company or a holding company (as described in paragraph (e)(5)(i)(C) of this section) that is a member of an expanded affiliated group that includes an insurance company, and the insurance company or holding company issues, or is obligated to make payments with respect to, a cash value insurance or annuity contract described in paragraph (b)(1)(iv) of this section (specified insurance company).

For simplicity, we refer to the contracts referenced in this provision as "cash value insurance contracts."

that are specified insurance companies not licensed in any State – as FFIs subject to FATCA reporting.

We recognize that Code section 1474(f) authorizes the promulgation of regulations as necessary or appropriate to carry out the purposes of Chapter 4. In our view, this grant of authority is not the appropriate tool to create a regulatory exception to the treatment of a 953(d) company as a domestic corporation for all purposes of Title 26. Nor is the reason for doing so apparent in the Final Regulations or its preamble. A 953(d) company is subject to all of the reporting obligations of a domestic insurance company. Moreover, because a 953(d) company is treated as a domestic corporation, it is required to provide significant amounts of information on its return that other CFCs do not provide. Accordingly, the rules that apply to foreign entities under Chapter 4 need not, and should not, apply to such companies. As stated above, if the problem is uncertainty about the treatment of life insurance and annuity contracts under sections 6047(d) or 3405(e)(6), we believe that issued should be addressed in the context of those provisions.

Recommendation: We respectfully recommend that the Service confirm in published guidance that "for purposes of [Title 26]," including Chapter 4 of Subtitle A, a 953(d) company "shall be treated as a domestic corporation," and correspondingly meets the definition of a U.S. person under Code section 7701(a)(30).

2. Clarify that 953(d) companies should provide an IRS Form W-9 withholding certificate to establish their Chapter 4 status.

The appropriate FATCA documentation requirements for 953(d) companies have not been explained. On or before July 1, 2014, these companies will be asked by withholding agents to supply and certify to their status as U.S. persons **or** foreign persons. A clear rule should be established.

There are two general—and heretofore mutually exclusive—types of IRS forms that can be provided by a person receiving a payment to certify that person's U.S. or foreign status as a payee: (1) an IRS Form W-8 (e.g., BEN, ECI, or IMY), which certifies under penalty of perjury that the person providing the form is a foreign, *i.e.*, non-U.S., person; and (2) an IRS Form W-9, Request for Taxpayer Identification Number and Certification, which certifies under penalty of perjury that the person providing the form is a U.S. person.

As discussed above, Code section 7701(a)(30)(C) defines a "U.S. person" to include a domestic corporation, and an insurance company electing under Code section 953(d) is treated as a domestic corporation.[7] Accordingly, a 953(d) company completes an IRS Form W-9 when asked to certify as to its status for all U.S. income tax purposes. But as discussed above, Regulation section 1.1471-1(b)(132) provides that a 953(d) company is **not** a U.S. person unless it is licensed to do business in a state of the United States, so a 953(d) company that has not obtained a license to do business in at least one state would presumably not be permitted to supply a Form W-9 when requested by a withholding agent to certify its FATCA status.

[7] *See also* Treas. Reg. §1.1446-1(c) (a partner in a partnership is a U.S. person for all income tax purposes if it elects under section 953(d) to be taxed as a U.S. company and provides a valid Form W-9).

All 953(d) companies should be subject to the same reporting regime. The rules should not require certain 953(d) companies to provide one of two mutually exclusive IRS forms depending on the context, *i.e.*, a W-9, for all non-FATCA purposes and a W-8 for FATCA purposes only. Such a rule would result in unnecessary confusion and serve little tax administration purpose.

Recommendation: If the Treasury and the Service decide to follow our recommendation above regarding the treatment of 953(d) companies as U.S. entities for FATCA purposes, the current confusion about withholding certificates for 953(d) companies would be eliminated; it would be clear that these companies are to provide an IRS Form W-9 to withholding agents in all circumstances.

If the Treasury and the Service decline to follow our recommendation above, then we respectfully recommend that guidance be promulgated to instruct 953(d) companies specifically which type of withholding certificate to supply, *i.e.*, an IRS Form W-9 or an IRS Form W-8, and in which circumstances, when providing documentation to withholding agents for FATCA purposes.

3. Holding companies in an expanded affiliated group ("EAG") that includes property and casualty insurance companies or reinsurance companies, but does not include specified insurance companies, should be classified as NFFEs (Final Regulation section 1.1471-5(e)(1)(v)(A)).

The Final Regulations do not provide definitive guidance concerning whether a foreign holding company in an EAG that includes an insurance company will be classified as an FFI or an NFFE. The Final Regulations contain two definitions: Regulation section 1.1471-5(e)(1)(iv), which appears to limit FFI treatment to holding companies in an EAG if the group includes an insurance company that issues cash value insurance contracts, and Regulation section 1.1471-5(e)(5)(i)(A), which omits that limitation. This discrepancy leaves foreign compliance officers and U.S. withholding agents uncertain about holding companies' treatment.

The definition of a "financial institution" in Regulation section 1.1471-5(e)(1)(iv) provides that the definition of an FFI includes an "insurance company or a holding company" that is a member of an EAG that includes an insurance company *and* the insurance company issues or is obligated to make payments with respect to cash value insurance contracts. In short, if the holding company's group includes an insurer that is an FFI because it issues cash value insurance contracts, the holding company will also be an FFI. On the other hand, if the EAG includes only property and casualty insurance companies, reinsurance companies, or life insurance companies that do not issue cash value insurance contracts—companies that are excluded from FFI status—the holding company appears to be excluded from the definition of an FFI under this subsection. This entirely rational result is not reached by the terms of other provisions defining financial institutions.

In Regulation section 1.1471-5(e)(1)(v)(A), a holding company that is part of an EAG that includes an "insurance company" is a "financial institution." The list of excluded entities in Regulation section 1.1471-5(e)(5) expressly excludes a holding company, Regulation section 1.1471-5(e)(5)(i)(C), but also provides that an insurance company or holding company described

in Regulation section 1.1471-5(e)(1)(iv) is not excluded from FFI status. This definition, read alone, appears to require *all* holding companies for insurance groups to register as FFIs, **even though none of the insurance subsidiaries are themselves FFIs.**

The relevant discussion in the preamble to the Final Regulations[8] provides no clarification. It states: "a holding company that is a member of an expanded affiliated group that includes an insurance company will be treated as an FFI if it issues or is obligated to make payments with respect to a cash value insurance contract or annuity contract, regardless of whether it would otherwise be treated as an FFI." This statement brings into FFI status a rare breed of holding company—one that issues cash value insurance contracts—but provides no guidance about the treatment of the typical holding company for insurance groups, *i.e.*, one that does not issue insurance contracts.

As a policy matter, there seems to be no reason to classify holding companies of groups that include only property and casualty, reinsurance, or life companies that do not issue cash value insurance contracts as FFIs. None of those entities present the opportunity for tax avoidance that FATCA was intended to prevent. None of those entities are FFIs.

Recommendation: If, as appears likely, the intent is to exclude from the definition of an FFI holding companies for insurance groups that do not include a company writing cash value insurance contracts, a mere wording change would accomplish the needed technical correction. We respectfully recommend that Regulation section 1.1471-5(e)(1)(v)(A) be amended to define a financial institution as

> "a holding company ... that (A) is part of an expanded affiliated group that includes a … **specified** insurance company…" (emphasis added).

This simple amendment would resolve confusion about the treatment of holding companies for insurance groups. It would also prevent fruitless FFI registrations, *i.e.*, registrations that produce no attendant reportable financial accounts, for holding companies within property and casualty EAGs.

[8] 78 Fed. Reg. 78, 5874, 5888 (Jan. 28, 2013).