

FINANCIAL INFORMATION FORUM

5 Hanover Square
New York, New York 10004

212-422-8568

April 11, 2013

Electronic Delivery

John Sweeney
CC:PA:LPD:PR (REG-121647-10)
Room 5205
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station,
Washington, DC 20044

Re: Comments on Final Regulations [RIN-1545-BK68]

Dear Mr. Sweeney,

The Financial Information Forum (FIF)¹ would like to take this opportunity to offer feedback following the publication of the final FATCA regulations. The FIF FATCA WG (the group) submitted comments in 2012² to the notice of proposed rulemaking published by the Internal Revenue Service, U.S. Department of the Treasury (IRS) on February 15, 2012 regarding regulations relating to information reporting by foreign financial institutions (FFIs) and withholding on certain payments to FFIs and other foreign entities. The group appreciates the harmonization and extension afforded on new account opening procedures, as well as, proceeds and pass thru payments in the final regulations, preserving the “eye-ball” test for withholding agents and exempting from chapter 4 withholding all obligations outstanding on January 1, 2014.

However, in reviewing the preamble, the group has new concerns related to issuer obligations surrounding grandfathered obligations, especially in regards to identifying material modifications that would cause a security to lose its grandfathered status. The preamble of the final regulations (see below) doesn't appear to require issuers to provide notification of a material modification that results in an instrument that was previously considered to be a grandfathered obligation, to no longer be exempt from FATCA, and thereby loses its grandfathered status under chapter 4.

Accordingly, the final regulations provide that: (1) a withholding agent, other than the issuer of the obligation (or an agent of the issuer) may, absent actual knowledge, rely on a written statement by the

¹ FIF (www.fif.com) was formed in 1996 to provide a centralized source of information on the implementation issues that impact the financial technology industry across the order lifecycle. Our [participants](#) include trading and back office service bureaus, broker-dealers, market data vendors and exchanges. Through topic-oriented working groups, FIF participants focus on critical issues and productive solutions to technology developments, regulatory initiatives, and other industry changes. The FIF FATCA Working Group includes broker-dealers, service bureaus and other vendors responsible for implementing the FATCA regulations.

² See [April 30, 2012 - FIF Comment Letter to IRS on FATCA](#)

issuer of the obligation to determine whether such obligation meets the requirements for grandfathered treatment; (2) a withholding agent is required to treat a modification as material only if the withholding agent knows or has reason to know that such modification was material; and (3) a withholding agent, other than the issuer of the obligation (or an agent of the issuer), absent actual knowledge, will have reason to know of a material modification if it receives a disclosure thereof from the issuer of the obligation (or from such issuer's agent)³

If issuers are not specifically required to provide notifications of material modification impacting an instrument pre-existing grandfathered status along the existing channels of communication, the group foresees tremendous inconsistencies in the classification and handling of grandfathered obligations and resulting treatment for withholding purposes on the part of all financial institutions/withholding agents globally. Furthermore, this would likely result in taxpayer and broker confusion due to conflicting treatment from one financial institution or withholding agent to another (i.e., under withholding, over withholding). Financial institutions have additional concerns regarding their liability for failing to withhold in situations where they simply 'did not have reason to know' while others did. There will also be substantial implications for their clients when they discover there is an inconsistency in such treatment between institutions where they have accounts or assets. In addition, issuers will likely be overwhelmed with inquiries from thousands of withholding agents to ascertain the grandfathered status of obligations which may or may not have been subject to modifications.

The group recommends that the IRS require issuers to provide the financial services industry with information when a security has a material modification that would result in the grandfathered status being revoked as of the date the notification has been received. There have been various instances where the IRS has required issuers to disseminate material information about certain securities which would result in brokers performing accurate reporting and avoiding taxpayer confusion. For example:

- There is a precedent already established under current cost basis regulations that enforces the requirement for issuers to provide the industry with notifications on corporate action events affecting basis of securities⁴. Issuers must file with the IRS or post a form 8937 (Report of Organizational Actions Affecting Basis of Securities) on its website to facilitate accurate cost basis reporting on 1099B.
- OID information is provided to the IRS by issuers annually and disseminated via IRS publication 1212⁵.
- 1099 CAP (changes in corporate control and capital structure) which is required to be provided by issuers either via the IRS which then posts it to their website or the issuance of 1099 CAPs to

³ See [Federal Register 2013-01025](#), Summary of Comments and Explanation of Revisions III, Comments and Changes to §1.1471-2, Requirement to Deduct and Withhold Tax on Withholdable Payments to Certain FFIs, Paragraph 5

⁴ See [Instructions for Form 1099-B](#), Issuer Returns for Actions Affecting Basis

⁵ See <http://www.irs.gov/pub/irs-pdf/p1212.pdf>

registered holders including DTC, which in turn disseminates the information via DTC Important Notice⁶.

- The requirement that issuers file IRS form 8811 (Information Return for Real Estate Mortgage Investment Conduits (REMICs)) with the IRS which then posts issuer tax contact information to IRS Publication 938 to help facilitate 1099 reporting⁷.

Individuals within our working group representing issuers have also commented that making the determination that a modification is material may be both challenging and subject to interpretation based on currently defined criteria. Therefore, the group recommends that the material modification definition be much more explicit, particularly in the areas of structured and complex product modifications.

Members of the group met with IRS staff to discuss issuer requirements and clarify “reason to know” and “actual knowledge”. The group requests confirmation from the IRS in their understanding from this discussion that:

- If a withholding agent obtains a disclosure/written statement from the issuer regarding a material modification to a grandfathered obligation, this constitutes a “reason to know” and withholding agents should act to update the exemption status of the materially modified instrument.
- If a withholding agent discovers that a material modification may have occurred from a trusted source other than the issuer, this would be considered “actual knowledge”. The IRS anticipates that the withholding agent would, in the normal course of business, attempt to obtain a disclosure/written communication from the issuer confirming that a material modification occurred. Once the disclosure/written communication is received, the withholding agent now has “reason to know” regarding a material modification to the grandfathered obligation. If no such notification is provided the withholding agent simply does not know.

Typically, the security master groups operating within a financial institution have no standard way of being notified on securities undergoing a material modification, but will rely heavily upon market data vendors for instrument-related updates. In contrast, vendors have business processes and procedures in place to routinely check issuer and SEC websites for any updates regarding any change to underlying securities and may also receive notifications directly from the issuer on various matters. Appendix 1 shows information in an issuer released notification. On the rare occasions, where a financial institution receives an issuer notification directly, they will in turn forward the notification to the vendors for handling. This holds true even in cases where the financial institution is an issuer.

The FIF and its members continue to be supportive of the IRS’s initiative to implement FATCA and thereby enhance US taxpayer compliance. The industry is working hard towards the successful

⁶ See <http://www.irs.gov/pub/irs-pdf/i1099cap.pdf> and <http://www.irs.gov/Businesses/Corporations/Form--8806--Information-Return-for-Acquisition-of-Control-or-Substantial-Change-in-Capital-Structure>

⁷ See <http://www.irs.gov/pub/irs-pdf/p938.pdf>

implementation of this important project and urges the IRS to mandate the issuers, via an official communication, to provide notifications when a material modification affects the grandfathered status of a security. Members of the FIF FATCA WG welcome a dialogue with the IRS to answer any questions on the grandfathered obligations and material modifications topic. Please don't hesitate to contact us at fifinfo@fif.com or 212-422-8568 with any questions.

Regards,

A handwritten signature in black ink, appearing to read 'Arsalan', written in a cursive style.

Arsalan Shahid
Program Director, Financial Information Forum
On behalf of FIF FATCA Working Group

Appendix 1: Issuer Notification on Corporate Action Event

Hornbeck Offshore Announces Tender Offer and Consent Solicitation for Its 8.000% Senior Notes Due 2017

COVINGTON, La., March 14, 2013 /PRNewswire/ -- Hornbeck Offshore Services, Inc. (NYSE: [HOS](#)) (the "Company") announced today that it has commenced a cash tender offer (the "Offer") to purchase any and all of its \$250,000,000 in outstanding aggregate principal amount of 8.000% Senior Notes due 2017 (CUSIP 440543 AH 9) (the "8.000% Notes"). In connection with the Offer, the Company is soliciting consents (the "Consent Solicitation") to proposed amendments that would eliminate most of the restrictive covenants and certain default provisions contained in the indenture governing the 8.000% Notes (the "Indenture").

The Offer is scheduled to expire at 11:59 p.m., New York City time, on April 10, 2013, unless extended or earlier terminated (the "Expiration Time"). Holders who validly tender their 8.000% Notes and provide their consents to the amendments to the Indenture before 5:00 p.m., New York City time, on March 27, 2013, unless extended (the "Consent Expiration"), will be eligible to receive the Total Consideration (as defined below). The Offer contemplates an early settlement option, so that holders whose 8.000% Notes are validly tendered prior to the Consent Expiration and accepted for purchase could receive payment on an initial settlement date ("Initial Settlement Date"), which is expected to be as early as March 28, 2013. Tenders of 8.000% Notes may be validly withdrawn and consents may be validly revoked until the Withdrawal Time (defined below). Holders who validly tender their 8.000% Notes after the Consent Expiration and prior to the Expiration Time will be eligible to receive payment on the final settlement date, which is expected to be April 11, 2013.

The "Total Consideration" for each \$1,000 principal amount of 8.000% Notes validly tendered and not validly withdrawn prior to the Consent Expiration is \$1,071.20, which includes a consent payment of \$30.00 per \$1,000 principal amount of 8.000% Notes. Holders tendering after the Consent Expiration will be eligible to receive only the "Tender Offer Consideration," which is \$1,041.20 for each \$1,000 principal amount of 8.000% Notes, and does not include a consent payment. Holders whose 8.000% Notes are purchased in the Offer will also receive accrued and unpaid interest from the most recent interest payment date for the 8.000% Notes up to, but not including, the applicable payment date.

In connection with the Offer, the Company is soliciting consents to certain proposed amendments to the Indenture. Holders may not tender their 8.000% Notes without delivering consents or deliver consents without tendering their 8.000% Notes. No consent payments will be made in respect of 8.000% Notes tendered after the Consent Expiration. Following receipt of the consent of holders of a majority in aggregate principal amount of the 8.000% Notes, the Company will execute a supplemental indenture to amend the Indenture to eliminate substantially all of the restrictive covenants and certain events of default in the Indenture.

Tendered 8.000% Notes may be withdrawn and consents may be revoked before 5:00 p.m., New York City time, on March 27, 2013, unless extended (the "Withdrawal Time"), but generally not afterwards, unless required by law. Any extension or termination of the Offer will be followed as promptly as practicable by a public announcement thereof. The Offer is subject to the satisfaction of certain conditions including: (1) receipt of consents to the amendments to the Indenture from holders of a majority in principal amount of the outstanding 8.000% Notes governed by the Indenture, (2) execution of a supplemental indenture effecting the amendments, (3) consummation of the capital markets debt financing announced today raising proceeds on terms satisfactory to the Company in an amount sufficient to fund the Offer and (4) certain other customary conditions.

The complete terms and conditions of the Offer are described in the Offer to Purchase and Consent Solicitation Statement dated March 14, 2013, copies of which may be obtained from Global Bondholder Services, the depository and information agent for the Offer, by calling (866) 294-2200 (US toll-free) or (212) 430-3774 (collect).

The Company has also retained Barclays Capital Inc., J.P. Morgan Securities LLC, Wells Fargo Securities, LLC and DNB Markets, Inc. as dealer managers for the Offer and solicitation agents for the Consent Solicitation. Questions regarding the terms of the Offer may be directed to Barclays Capital Inc., Liability Management Group, at (212) 528-7581 (collect) and (800) 438-3242 (US toll-free), J.P. Morgan Securities LLC at (212) 834-4802 (collect) and (866) 834-4666 (US toll-free), Wells Fargo Securities, LLC, Liability Management Group, at (704) 410-4760 (collect) and (866) 309-6316 (US toll-free) and DNB Markets, Inc. at (212) 681-3911 (collect).

This announcement is not an offer to purchase, a solicitation of an offer to sell or a solicitation of consents with respect to any securities. The Offer is being made solely by the Offer to Purchase and Consent Solicitation Statement dated March 14, 2013. The Offer is not being made to holders of 8.000% Notes in any jurisdiction in which the making or acceptance thereof would not be in compliance with the securities, blue sky or other laws of such jurisdiction.

The Company is a leading provider of technologically advanced, new generation offshore supply vessels primarily in the U.S. Gulf of Mexico and Latin America, and is a leading short-haul transporter of petroleum products through its coastwise fleet of ocean-going tugs and tank barges, primarily in the northeastern U.S. and the U.S. Gulf of Mexico. The Company currently owns a fleet of 79 vessels primarily serving the energy industry and has 24 additional high-spec Upstream vessels contracted, approved or under construction for delivery on various dates through 2015.

Forward-Looking Statements

This news release contains forward-looking statements, including, in particular, statements about the Company's plans and intentions with respect to the purchase of the 8.000% Notes, the proposed amendment to the Indenture and the construction of certain vessels. These have been based on the Company's current assumptions, expectations and projections about future events. Although the Company believes that the expectations reflected in these forward-looking statements are reasonable, the Company can give no assurance that the expectations will prove to be correct.

SOURCE Hornbeck Offshore Services, Inc.