



The voice of banking
& financial services

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Tuesday 14th December 2010

Dear Mr Plowgian, Mr Grinberg, Mr Eggert and Mr Sweeney

BBA follow-up on the meeting of 23rd November 2010

Thank you for your time and attention at our meeting on Tuesday 23rd November 2010. We are grateful for the opportunity to discuss our concerns and we hope that the meeting was beneficial in terms of reconciling the various issues itemised in our submission of 29th October 2010.

We thought that it would be prudent to set out our understanding of the key discussion points. We also address a number of the action points we took away from the meeting and hope that these will be of use in progressing your work on the draft Regulations.

Legal and Regulatory issues

We explained that all local legal and regulatory issues that are currently potential obstacles to compliance by Participating Foreign Financial Institutions (“PFFIs”) with the FATCA provisions must be resolved before they can expend resources to implement FATCA. We are encouraged by your efforts in resolving these issues and emphasize the need for an expeditious solution. You explained to us at the meeting that Notice 2010-60 (“the Notice”) should alleviate the various legal and regulatory issues detailed in the DLA Piper opinion. Specifically, it is our understanding, subject to your confirmation, that:

- You do not anticipate that PFFIs will need to positively establish the U.S. nationality of individual account holders by inquiring whether they are U.S. citizens or residents, but instead rely upon existing customer due diligence procedures to search for U.S. indicia and, if present, obtaining confirmation or rebuttal of presumed U.S. status. A further clarification that this will be the case for both existing and new accounts would be useful.
- Reporting of “recalcitrant” customers would only be required in aggregate form e.g., number of accounts and the total aggregate balance for those accounts (as discussed in Section IV(F) of Notice 2010-60). We would therefore assume that, for PFFIs resident in countries with either a Double Taxation Treaty (“DTT”) or a Tax Information Exchange Agreement (“TIEA”) in place with the United States, an exchange of information request could be

made by the US authorities to the relevant competent authority for additional customer information and the PFFI would be compelled by domestic statutory requirements to supply such information.

- The above reporting arrangements would therefore remove any withholding requirement for PFFIs resident in countries with either a DTT or a TIEA in place with the United States.
- The above reporting arrangements would therefore remove any requirement to close or restrict account facilities for PFFIs resident in countries with either a DTT or a TIEA in place with the United States.

Subject to your confirmation of these points we believe that most of the operational and procedural impediments to implementing FATCA from a legal and regulatory perspective would be removed for PFFIs resident in countries with either a DTT or a TIEA in place with the United States and that such a PFFI adopting these procedures would be regarded as fully compliant.

We believe however that the legal and regulatory issues detailed in the DLA Piper opinion relating to withholding and reporting requirements, and restrictions on the provision of accounts, for recalcitrant accounts will still remain for PFFIs resident in countries that have not signed either a DTT or a TIEA with the United States.

Aggregation

With regard to the \$50,000 threshold, we were unable to reach a firm conclusion with regard to the application of aggregation.

We were encouraged by your acceptance of the need for flexibility and not requiring aggregation across legal entities. Given your recognition of the need for proportionality and your appreciation that the material risk of tax evasion will vary according to product, we consider that a rule not requiring aggregation across jurisdictions and across lines of business and systems, as noted in our letter of 29th October 2010, would carry a number of benefits. In particular, high/low risk products could be readily distinguished and PFFIs would be in a better position to generally apply the \$50,000 threshold if they are so inclined.

At the meeting a member shared some data to illustrate that a very large proportion of accounts in their retail business line maintain low average balances (circa less than \$7,500). We are happy to collect further data on this if it would be helpful to the IRS in permitting PFFIs flexibility in the application of the aggregation rules.

Although we recognize the intent of the \$50,000 threshold, i.e., to exclude from FATCA customers who are likely to represent a low risk of tax evasion, financial institutions will face a number of operational and legal barriers in applying this threshold as an aggregate across their operations (even within a legal entity). As an alternative approach, we suggest that a similar outcome of excluding smaller retail banking accounts (and hence allowing PFFIs and the IRS to focus activity upon the customers who represent a higher risk of tax evasion) could be achieved under section 1471(f)(4) by defining a “class of persons.....posing a low risk of tax evasion”.

Characteristics for low risk persons, accounts or products (and high risk)

You were receptive to the idea that there is a stratified approach to depositary account service provision, which would be an acceptable tool for determining material risk of tax evasion. The most appropriate basis for excluding low risk

customers would build upon the approach that most banks use to segment their customer base, which is to apply some criteria, above which the customer receives a personalized or prioritised service offering. These criteria are typically based upon income (of the order of between \$75,000 and \$150,000 per annum although this will vary depending on the country concerned) and assets (of the order of \$25,000 to \$75,000 – again this will vary according to country), and their application tends to be actively managed, since it is a key tool in segmenting customers with a view to enhancing services provided and therefore revenues.

Below this threshold point, “mainstream” retail banking customers do not receive a personalized service for managing wealth, or financial advice or a prioritized service offering. It is that personalized, prioritized service that is the key difference above and below the threshold. Above the threshold, customers typically receive one of two service propositions:

- A premium banking service where customers are considered as “mass affluent” and receive a personalized and / or prioritized service. The service typically focuses upon priority treatment, with investment advice and financial reviews upon customer request
- A private banking service where customers are considered as “high net worth” and receive a highly personalized and proactive service, usually with a named relationship manager and including asset management, financial planning over the long term, estate, trust and inheritance advice.

We suggest that a definition of a high risk customer could therefore be constructed on the lines of “individual banking customers who are entitled to a personalized or prioritised banking service”.

The phrase “entitled to” is important, since premium banking services are offered to customers that meet the criteria, but it is possible that a customer who meets the criteria could elect not to receive the premium services. The phrase “entitled to” would ensure that customers who meet the selection criteria but decline the premium service are still captured for FATCA purposes, i.e., screened for US status.

We believe that this approach would effectively capture all high risk depositary accounts. However, it could capture charitable and similar entities which are clearly not vehicles for tax evasion. We therefore propose to revert with additional criteria for excluding: clubs, societies, charities and similar entities.

Regarding low risk accounts, we would reiterate the request made in our earlier submission; that non interest bearing current/checking accounts be excepted from the definition of Financial Account on the basis that these accounts pose a low risk of tax evasion. In the United Kingdom, our members have tens of millions of such retail accounts and the current proposals would result in a significant administrative burden and cost. We additionally propose to revert in due course on your request for additional criteria for excluding pensions and retirement funds.

We understood from the meeting that:

- All NFFEs should be treated similarly for FATCA purposes irrespective of whether they are incorporated or not and consequently all active trading NFFEs are excepted.
- FFIs need only undertake action on accounts where US indicia have been identified or subsequently found and recorded as electronically searchable data. However we understood that this would only be the case where an FFI

did in fact have some electronic search capability and that if this was not present it would be unacceptable for the FFI to do nothing.

Please confirm that this is the correct interpretation of our discussions.

Whether you have to have US indicia to be recalcitrant

In the meeting we discussed recalcitrant account holders and we believe that you indicated that only if US indicia is present and the customer fails to respond to our enquiries would they fall within your definition of recalcitrant account holder. Please confirm that if no US indicia are present from electronically searchable data the customer cannot become recalcitrant.

FFI register

During our meeting, we recommended that the IRS maintain a searchable online real time database that would allow for the validation of PFFI status. By this we mean a database that would provide the ability to check that an FFI has entered into an agreement with the IRS. We believe that such a tool is important in order to minimise the possibility of either mistakes or misrepresentation caused by an incorrect assertion of PFFI status. The Notice states that Treasury and the IRS contemplate that PFFIs will receive an Employee Identification Number ('EIN'). However, the Notice provides no further details as to how a PFFI will be able to verify an EIN provided by another intermediary. During our meeting, it was indicated that this will be verifiable with the IRS on request. However, it was not clear to us whether this process would be capable of the real time validation that we seek or whether this would be through a delayed response to a written request. Again we encourage you to consider building such a real-time validation system.

Paragraph 16

You requested further clarification of the point raised in paragraph 16 of our letter of 29th October 2010. In the letter we questioned whether, as set out in Notice 2010-60, "legal agreements without a definitive expiration" intended to create a distinction between fixed term bank deposits and other bank deposits.

By way of further explanation a customer of a PFFI could have two accounts with a PFFI; one would be an instant access interest bearing deposit account and the other a fixed term deposit account. The latter would be a grandfathered obligation and hence out of scope, whilst the former would be reportable. The BBA now understands that this was your intended outcome..

Paragraph 18

We understood from the meeting that an ETF would be an FFI under the statute, but equity interests in the ETF would not be "financial accounts" and therefore the ETF would not be required to report or withhold with respect to such interests. Presumably the ETF would enter into an FFI agreement to become a PFFI so that it can receive US source income without FATCA withholding, but it would not be required to do any actual FATCA reporting or withholding because it has no U.S. "financial accounts". We would welcome your confirmation of this understanding.

Paragraphs 29-33

The BBA notes your request for further commentary on these paragraphs and will revert in due course.

Paragraph 57

During the meeting we sought confirmation that the thresholds as set out in Notice 2010-60 apply to “depository accounts” and that this term included securities accounts. You explained to us that the thresholds apply to depository accounts only. The BBA is disappointed by this and considers that the limit should extend equally to securities accounts.

For the reasons outlined in many comment letters, individuals often supplement their long term savings and retirement plans by investing in securities, generally via fund vehicles. Given your recognition of the need for proportionality and your appreciation that the material risk of tax evasion lies at the heart of FATCA, the BBA considers it disproportionate not to allow the threshold to extend equally to securities accounts.

Paragraph 59

You explained to us at the meeting that the PDF files and images would not be considered electronically searchable. We agreed to revert with a fuller definition of what is “electronically searchable information”.

We suggest that, for the purposes of compliance with FATCA and the procedures outlined in Notice 2010-60, “electronically searchable information” should be confined to structured, static data that can be extracted in an automated manner and without manual intervention, from pre-defined data fields held on customer databases. We further suggest that the term “electronically searchable information” should not extend to all information that is stored in electronic format.

Passthru payments

We acknowledge your affirmation that the treatment of passthru payments is a key issue. We therefore can only re-iterate our concerns about the practical barriers affecting PFFIs as set out in our letter of 29th October 2010 and those of other commentators. The BBA will revert with illustrative examples in due course.

Grace period

There was a general discussion regarding the issuance of both draft and final guidance notes. We re-iterated the points highlighted in our letter of 29th October 2010 which focussed on the lead times to implement processes and systems to enable PFFIs to comply with FATCA. We further commented that even with the extended implementation and phase-in periods provided by the Notice, it is unlikely that there will be perfect compliance on day one despite an FFIs’ best efforts. We further commented that additional issues, such as in relation to data communication and secure information transfer, will require further discussion and these factors may also affect timely implementation. We suggested that guidance or other notices make provision for a grace period to provide PFFIs with some comfort that they will not be unduly penalised. You indicated an understanding of this point and we would be grateful for confirmation of your intended approach.

Conclusion

We trust that this is an accurate reflection of the discussion and that you will be able to provide swift confirmation of the points raised in the letter. Should there be any points which you disagree with, we would welcome the opportunity to discuss at the earliest opportunity via teleconference.

The BBA will revert with additional commentary where indicated above.

Yours sincerely,



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