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Washington, D.C. 20220

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Internal Revenue Service
1111 Constitution Avenue, N.W.
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10 March 2011

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

BBA Definitional Feedback

Further to our meeting of 23 November 2010 and our teleconference of 24 February 2011, we are writing to you to provide the additional information that you had requested in relation to the subject matters set out below.

Based on the global experience of British Bankers' Association (BBA) members, we are proposing solutions which we believe will have wide application but we have illustrated our points by reference to the UK experience.

1. 'Passthru' payments – just and reasonable approach

We agreed in our meeting that the BBA would revert with some illustrative examples to highlight the range of possibilities that exist with regard to the identification of 'passthru' payments. However, we consider that a more considered examination of its potential operation would be afforded if we were furnished with a clearer explanation, in guidance, of what is intended to be captured. In the absence of this understanding, we set out below some illustrative examples intended to demonstrate the degree of potential complexity associated with the application of FATCA requirements and our essential findings.

Simple illustrations

Example 1:

Institution A, a Participating Foreign Financial Intermediary (PFFI), is the issuer of a structured product¹ which is placed with a small number of direct investors. The assets that produce the return paid out by the structured product include certain US

¹ The term 'structured product' is generic and encompasses various types of arrangements. These include instances where the return is determined based on the performance of an underlying asset/index over a specified timeframe. Typically there is a de minimis investment level and a fixed investment term with an early exit redemption fee. The return of the capital invested is not always guaranteed.

assets. Institution A also acts as paying agent for the structured product. Distributions in respect of the structured product are regarded as local source income under the laws of the country in which Institution A operates.

In this example, Institution A has all of the necessary information to determine how much of the distribution is attributable to US source income or sale proceeds. Consequently, Institution A is in a position to treat the relevant proportion of the distribution as a passthru payment.

Example 2:

Institution B, a PFFI, acts as custodian for a third-party investor that has a holding in a widely held Collective Investment Vehicle (CIV). The CIV holds assets from a multitude of jurisdictions, including the US. Institution B is unconnected to the CIV in question and has no fund administration responsibilities.

Institution B subsequently receives a distribution from the CIV which is treated as local source income of the country in which the CIV is domiciled.

In this example, Institution B has insufficient information to determine how much of the distribution is attributable to US source income or sale proceeds. Consequently, Institution B is not in a position to treat the distribution or any proportion of it as a passthru payment.

However, to the extent that the CIV is able to compute how much of the distribution is allocable to US source income or sales proceeds and make that information available to Institution B, either directly or via a third-party information provider, Institution B would be in a position to treat the relevant proportion of the distribution as a passthru payment.

Example 3:

Institution C, a PFFI, provides deposit account services to its customers. Institution C holds assets from a multitude of jurisdictions, which may, from time to time, include the US. The return generated from these assets is fully fungible. The deposit accounts pay interest which is regarded as local source income under the laws of the country in which Institution C operates. There is no connection between the balance sheet management of Institution C's assets and the return to the investor on the deposit account.

In this example we consider that the deposit interest paid by Institution C cannot reasonably be construed to be a passthru payment and as a practical matter Institution C is not in a position to treat the deposit interest as such. Although we use the example of standard deposit interest, the principle would also extend to cover other interest type payments made by financial institutions. For instance, money can be deposited to fund investment opportunities with broker dealer type businesses and may well accrue interest from the Institution as a return on cash placement.

In summary, from the examples above it can be seen that the degree to which a payment can be regarded as a passthru payment is entirely dependent upon overall facts and circumstances and the information available to the PFFI.

To illustrate, although the conclusion at Example 1 is that the payment should be treated as a passthru payment, this would not necessarily extend to other structured

products where there is a more remote relationship between the issuer of the structured product and the payer of income through a series of intermediaries.

Example 2 demonstrates that a single payment source, in this case a CIV distribution, may or may not be reasonably regarded as a passthru payment, according to the amount of information available to the PFFI receiving and remitting that distribution.

Example 3 demonstrates that certain types of payment made by a PFFI, such as bank deposit interest, should not be regarded as a passthru payment in any circumstances as the correlation between the incomes made from the PFFI's activities is not directly connected to the income made to its customers.

Accordingly, we believe that a PFFI should only have passthru payment obligations where it is in a position to readily identify the proportion of US source income or sale proceeds behind a particular payment, provided that no artificial barriers have been put in place to prevent the reasonable flow of information to responsible parties within the PFFI.

2. A principle-based approach to FATCA reporting

We consider that autonomous arrangements (such as those set out at 3 and 4 below) do not, in principle, present opportunities for tax evasion. In our view, such a risk only materialises when funds are dispersed, after which point the funds would be subject to possible reporting under FATCA upon receipt into a bank account. Acknowledging this fact would alleviate duplicative reporting and reduce the burden on industry and government alike.

However, for the time being, we provide further feedback below on the definitional points previously requested.

3. Additional criteria for low risk vehicles for tax evasion

The Notice includes Treasury's proposal to exempt certain retirement plans from the scope of FATCA because they present a low risk of tax evasion by US persons. In our previous letter to you we advised that the criteria in the Notice are far too narrow and many retirement plans (and other low risk arrangements) would not qualify for the exemption. We therefore recommend that the criteria for products with a low risk of tax evasion be expanded to include:

- Regulated employer sponsored pension/savings schemes. Refer to Appendix 1 for examples of UK specific products.
- Regulated (non-employer sponsored) pension/savings programs. Refer to Appendix 2 for examples of UK specific products.

The above product types share certain characteristics which serve to effectively minimise potential participation by US recipients. In particular, entrance is restricted to persons that are UK resident taxpayers and the UK tax authorities require that reporting be filed on such products.

4. Retirement Arrangements

The BBA has further considered the position of retirement arrangements within the FATCA regime in the light of comments expressed at the meeting of 23 November 2010.

We suggest that a more versatile and generic description of a qualifying retirement arrangement (or pension scheme), which would have more universal application, could be derived in part from the Pension Schemes Act 1993, in the UK which refers to:

Any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement to or in respect of earners with qualifying service in an employment of any such description or category.

The above definition could be supported by adding some primary characteristics, applying to the arrangement which taken together would embrace the purpose of the exemption, where there is clearly a very low risk of tax evasion. It will be appreciated that pension product arrangements are complex however we believe that the following objective criteria could be adopted. Points 1 to 3 below are intended to reinforce the type of arrangements that should benefit from exception, with points 4 and 5 intended to address the concerns which you had raised in our conference call in relation to potentially abusive structures.

1. The arrangements must be open to employees of the employer entity/entities² sponsoring it and provide for benefits to be paid to the employee or the employee's nominated dependents upon retirement or as a result of an earlier exceptional event (e.g. death).
2. The arrangements are approved or recognised by, and/or registered with, the relevant authority as occupational pension schemes (or equivalent approved pension scheme arrangements) in the country or territory in which they are established.
3. The arrangements provide or are capable of providing benefits to or in respect of any or all of the employees of the employer entity/entities (whether or not it also has or is capable of having effect so as to provide benefits to or in respect of other persons).
4. The benefits payable by the arrangements generally reflect payments made by the employee and/or length of service of the employee.
5. The assets and the associated income funding the payments made under the arrangements are inaccessible to the recipients of those payments.

5. Agency Arrangements

Whilst we understand the intent behind the obligation in the Notice to allow 'small FFIs' to elect for a PFFI to execute FATCA obligations on their behalf, we believe that it is important that there be no compulsion to provide this service, which would be unwarranted and potentially unworkable.

To the extent that they are not otherwise excepted, we believe that all entities should follow either the PFFI route or the NFFE route as a first principle.

However, to the extent that an agency approach is retained:

² Companies, international organisations or governmental and public authorities.

- The provision of an agency 'service' should be optional.
- PFFIs offering this service should not find themselves in the position of having their own PFFI status prejudiced through the actions of the FFI they are providing a service for, subject to a 'reason to know' compliance standard.
- There should be no size limitation in terms of FFIs potentially benefiting from this service. Rather, this should be a commercial decision on the part of the PFFI/withholding agent.

6. Proportion of low and average balances

We agreed at the meeting to collect further data to support the fact that a very large proportion of accounts in our members' mainstream retail business lines maintain very low average balances. Two of our members have been in a position to collate such data and we attach this data for your information (Appendix 3).


You will recall that we proposed that such mainstream retail customers, who do not receive any personalized or prioritized services, or who are not entitled (based on a particular financial institution's criteria for selection of customers for such a service – these criteria are typically based on annual income and assets) to receive such services should be deemed to be of low risk of tax evasion and therefore excepted from FATCA. We believe that this data supports that view.

For the avoidance of doubt, we would emphasise that this proposal should be considered as supplementary to the \$50,000 exemption.

Conclusion

We hope that the above information provides a further clarification that you were seeking and we remain at your disposal to provide any further assistance or explanation that you require.

Yours sincerely,



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Appendix 1 – Regulated employer sponsored pension/savings schemes (UK examples)

Product	Description	Regulations	Restrictions	Reporting	For more information refer to:
Registered employment pensions schemes	Pension schemes in which employer and employee make tax free contributions, subject to annual allowance. Upon maturity, after the age of 55, individual may take up to 25% of fund (subject to a maximum amount) as a tax free lump sum, with the remainder subject to income tax.	Schemes registered with HMRC.	<ul style="list-style-type: none"> - Annual allowance of £50,000³ - Lifetime allowance of £1,500,000⁴ 	<ul style="list-style-type: none"> - Pension Trustee file annual returns - Individual may have to report on personal tax return 	http://www.hmrc.gov.uk/MANUALS/RPSM MANUAL/Index.htm
Share Incentive Plans (SIPs)	<p>Employee receives shares that are held in a trust by the plan trust. The trust holds the shares until the employee either decides to take them out of the plan or leaves the company. Employer can offer free shares, partnership shares, matching shares and dividend shares.</p> <p>Tax relief given as follows:</p> <ul style="list-style-type: none"> - Income Tax and National Insurance Contributions not chargeable when shares are awarded -Employees who keep shares in a plan for 5 yrs pay no Income Tax or National Insurance Contributions on shares - If shares taken out of the plan after 3 yrs, employees pay Income 	Only HMRC approved plans can participate.	<ul style="list-style-type: none"> - Maximum value of free shares per tax year is £3000 - Free shares must be left in the plan for a minimum of 3 years -The maximum pre-tax and pre-National Insurance Contribution salary that can be used to buy Partnership shares is £1500 p.a - The maximum value of dividends that can be reinvested is £1500 p.a 	<ul style="list-style-type: none"> -Form 39 filed annually by employer -Employee may have to include on tax return 	http://www.hmrc.gov.uk/manuals/ersmmanual/ERSM300000.htm

³ Effective 6th April 2011

⁴ Effective 6th April 2011 subject to transitional provisions

Product	Description	Regulations	Restrictions	Reporting	For more information refer to:
	Tax and National Insurance Contributions on no more than the initial market value of those shares.				
Company Share Option Plan (CSOP)	Employer sets up a share option scheme which allows employees to buy shares in the company. Employees do not have to pay income tax when they are given the option or when they use the option to buy shares.	Must be approved by HMRC.	<ul style="list-style-type: none"> -Option price is not less than the market value at the time when it is fixed -Total value of all options the employee holds under the scheme is not more than £30,000 - The employee uses the option no sooner than 3 years and no later than 10 years after it was granted - The employee has not used another option within the previous 3 years 	<ul style="list-style-type: none"> -Form 35 filed annually by employer -Employee may have to include on tax return 	http://www.hmrc.gov.uk/manuals/ersmmanual/ERSM300000.htm
Save as you Earn Scheme	Employee enters a savings contract, at the end of the period they can use the money that they have saved to buy shares at the option price. Employee will not have to pay tax on the interest or any bonus as well as when the option is given to them or when they buy the shares.	Must be approved by HMRC.	-Payments under the savings contract must be made on a weekly or monthly basis from salary or wages. The monthly savings under all current schemes must be between £5 and £250. The minimum number of monthly contributions is 36. The maximum is 60.	<ul style="list-style-type: none"> -Form 34 filed annually by employer-- Employee may have to include on tax return 	http://www.hmrc.gov.uk/ctf/ctfguidancenotes.pdf

Appendix 2 - Regulated (non-employer sponsored) pension/savings programs (UK examples)

Product	Description	Regulations	Restrictions	Reporting	For more information refer to:
Self-invested personal pension (SIPP)	UK Government approved personal pensions scheme, which allows individuals to make their own tax free investment decisions from approved investments. Upon maturity, after the age of 55, individual may take up to 25% of fund (subject to a maximum amount) as a tax free lump sum with the remainder subject to income tax.	Government approved scheme. Investments must be approved by HMRC.	<ul style="list-style-type: none"> - Annual allowance charge of £50,000⁵ - Lifetime allowance of £1,500,000⁶ 	- Individual to report on personal tax return	http://www.hmrc.gov.uk/manuals/psimanual/index.htm
Individual Savings Accounts (ISAs)	Tax free savings that can be held in a Cash ISA and Stocks and Shares ISA subject to various restrictions.	<ul style="list-style-type: none"> - For stocks and shares ISAs, investments must be 'HMRC qualifying investments' - For cash ISAs, cash must be deposited in a a deposit account with a building society or a person falling within section 840A(1)(b) or a deposit account with a relevant European institution. 	<p>To pay into an ISA client must be:</p> <ul style="list-style-type: none"> -a UK resident - aged 16 or over for a cash ISA - aged 18 or over for a stocks and shares ISA - Note if person moves to the US the subscription becomes frozen - ISA subscription limits for the tax year is £10,200, up to £5,100 of which can be saved in cash for all ISA investors - Customer can only have 1 ISA account for cash ISAs and 1 account for stocks and shares ISA per year 	<ul style="list-style-type: none"> - ISA manager files annual returns - Investors do not have to declare income and capital gains from ISA savings and Investments 	http://www.hmrc.gov.uk/manuals/saimmanual/saim2310.htm

⁵ Effective 6th April 2011

⁶ Effective 6th April 2011 subject to transitional provisions

Product	Description	Regulations	Restrictions	Reporting	For more information refer to:
Junior ISAs ⁷	Similar to ISAs, allows a parent to make tax free savings into their child's account. The child can not access the account until adulthood.		Yet to be confirmed but likely to be as per ISAs above.		http://www.direct.gov.uk/en/NI1/Newsroom/DG_192028
Child Trust Funds	A long-term savings or investment account, in the beneficial ownership of a child, and from which the child (but no-one else) may withdraw funds after their 18th birthday. There is no tax to be paid on the account until the child is 18.	Provider must be HMRC approved.	<ul style="list-style-type: none"> - Child must qualify for Child Benefit - Child must be living in the UK - Maximum of £1,200 can be added to the account per year 	<ul style="list-style-type: none"> - Providers required to make fortnightly and annual return of information - Participant does not need to declare on a tax return 	http://www.hmrc.gov.uk/ctf/ctfguidancenotes.pdf

⁷ Product launch Autumn 2011

Appendix 3 - Proportion of low and average balances data

Bank A

CONSUMER BANKING STATISTICS

Average deposit account balance (across total population: relationship-managed plus retail)
Average deposit account balance - retail
Average deposit account balance - relationship-managed
Total number of customers (across total population: relationship-managed plus retail)
Number of customers - retail
Number of customers - relationship-managed
Average number of deposit accounts per customer (across total population: relationship-managed plus retail)

\$8,000
\$4,000
\$37,800
15.4m
14.3m
1.1m
2

Bank B

CONSUMER BANKING STATISTICS

Average deposit account balance (across total population: relationship-managed plus retail)
Average deposit account balance - retail
Average deposit account balance - relationship-managed
Total number of customers (across total population: relationship-managed plus retail)
Number of customers - retail
Number of customers - relationship-managed
Average number of deposit accounts per customer (across total population: relationship-managed plus retail)

\$ 9,000
\$ 3,000
\$ 47,000
19.8m
18.4m
1.4m
1.5