

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AMERICAN CHAMBER OF COMMERCE IN LUXEMBOURG]

November 11, 2010

Internal Revenue Service,
1111 Constitution Avenue NW
Washington, DC 20224

Dear Sir or Madam:

Comments on FATCA (Notice 2010-60)

We would like to take the opportunity to provide you with our comments in connection with the HIRE Act, passed in March of this year, which contains the Foreign Account Tax Compliance provisions (“FATCA”). This letter sets out our initial view on the legislation, recognizing that much of the detail is still to be worked out by the Department of the Treasury and the Internal Revenue Service.

Firstly, we should stress that tackling tax evasion is and always has been a priority of the Luxembourg Government. Luxembourg and US have enhanced their cooperation in tackling tax evasion, primarily through the Double Tax Treaty (which, as you may know, has been recently amended to incorporate the OECD tax treaty standard on exchange of information for tax purposes).

However, we have some concerns relating to the provisions of FATCA, particularly the proportionality of the measures relative to the expected benefit.

As we understand the legislation, FATCA will create significant burdens for Luxembourg businesses. Financial institutions will have to make costly adjustments to their systems and processes for identifying their customers. We are concerned that, unless carefully targeted, the cost to firms and their customers will by far outweigh the benefit to the IRS.

Fund industry

Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross border distribution of funds. An administrable implementation of FATCA for the investment management industry is therefore crucial. The FATCA provisions have been thoroughly reviewed and debated by the Luxembourg investment management industry, which has, as a result, expressed the following concerns (the below list is not exhaustive):

- Under FATCA, Luxembourg funds will need to identify and report the identity of the US investors. Since fund distribution channels are heavily intermediated, this task may prove to be extremely difficult and in most cases not workable at all. Indeed, unlike

in the US, Luxembourg funds are very often sold through various intermediaries (banks, insurance companies and other distributors) who act as nominees on behalf of the investors. In such cases, funds are simply not in possession of the information relating to the investors. The use of multiple layers of intermediaries makes it even more difficult for funds to identify the ultimate investors.

- It is highly unlikely that exchange-traded funds, whose investor base changes in a way similar to the shareholder base of a quoted company, will be able to track each and every ownership change of their shares. Given the extreme difficulty that this category of funds faces in identifying the investors, it is likely that exchange-traded funds will simply exit the US market and restrict future investments in US securities.
- Given the complexity and relative novelty of the FATCA provisions for the fund industry (it is the first time that investment funds are confronted with such an extended scope of obligations), it can be reasonably expected that costs associated with updating the IT systems (or implementing new systems) will be extremely high.

On this basis, we believe that funds whose units are not intended for distribution in the USA or to US persons and for which subsequent transfers of units in or into the USA or to US persons are prohibited should be considered as presenting a low risk of tax evasion for US tax purposes and should therefore qualify as deemed compliant FFIs.

We also kindly ask you to consider the comments submitted by the Association of the Luxembourg Fund Industry (ALFI) through the European Fund and Asset Management Association (EFAMA).

Banking industry

For the banking industry, already subject to the “qualified intermediary” regime (a similar, but somewhat less burdensome US withholding and tax reporting regime), the following issues are of importance:

- The provisions of FATCA require that in any case in which any foreign law would prevent the reporting of required information (in this instance, the fact

that a particular account held at a Luxembourg bank is US-owned), a bank must attempt to obtain a waiver. If a waiver is not obtained, FATCA requires the bank to close the account. Accordingly, in order to comply with the disclosure requirements under FATCA, a Luxembourg bank would be required to seek consent from all customers believed to have US-owned accounts in order to report this fact to the IRS. If Luxembourg banks failed to obtain such consent, they would be required under FATCA to deny those customers account facilities (i.e. they would be required to close the accounts).

However, having accepted the customer's mandate on the basis of whatever information, undertakings or documentation was provided at the time, the bank has a fiduciary duty to hold the customer's deposit and provide banking facilities and services as set out in the contract between the parties.

This leaves the Luxembourg banks in an impossible position to the extent that Luxembourg law will prevent them complying with the requirements of FATCA (by denying them account facilities) unless they can obtain consent to disclose personal data. The corollary is that Luxembourg banks may have no alternative but to disinvest in US securities and disassociate themselves from relevant counterparties.

- It is unfortunate that the documentation requirements for purposes of chapter 4 of the US tax code (i.e. FATCA) do not always comport with the current requirements for purposes of chapter 3 (i.e. qualified intermediary) documentation. For example, where an account is documented with documentary evidence for purposes of chapter 3 withholding and the account has a US address, the chapter 3 cure would require the withholding agent to obtain an additional piece of documentary evidence (that does not contain a US address) and a reasonable explanation in writing supporting the account holder's non-US status. In addition, where there is a US birthplace on a non-US passport, the withholding agent would obtain a copy of the account holder's Oath of Renunciation (which is the document issued by the US State Department establishing that the individual has renounced his/her

US citizenship).

Under chapter 4, the same withholding agent (that now has documentary evidence and a reasonable explanation from the account holder supporting his/her non-US status) must also go back to the account holder to obtain a Form W-8BEN.

This seems to place an unreasonable burden on the foreign financial institution that already has obtained sufficient documentation to establish the individual as non-US for purposes of chapter 3 withholding.

- The treatment of any pass-through payments made to non participating foreign financial institutions or recalcitrant account holders needs to be further clarified to ensure that US withholding tax is not applied on non-US source income payments.

We also kindly ask you to consider the comments submitted by the Luxembourg Bankers' Association (ABBL) through the European Banking Federation (EBF) and the Institute of International Bankers.

Financial Sector Professionals (*Professionnels du Secteur Financier - PSFs*)

The definition of PSF covers a broad range of investment professionals, such as investment advisers, brokers in financial instruments, wealth managers, professionals acting for their own account, market makers, underwriters of financial instruments, financial intermediation firms, registrar agents, professional custodians of financial instruments, etc. Most of these entities will qualify as foreign financial institutions under FATCA, and will therefore be subject to the provisions of the new law. Specifically, they would be required to identify the account holders and to withhold tax.

Generally speaking, Luxembourg PSFs should be confronted to the same problems as Luxembourg banks, especially as concerns the conflicting obligations under Luxembourg law and FATCA. The additional difficulty for PSFs derives from the fact that they are generally limited in size and that they might not have the technical capacity to conform to FATCA.

We would appreciate that the IRS details the options under which these entities could provide assurance that their products are not sold to US persons and would therefore qualify as deemed compliant FFIs.

Insurance companies

Life insurance contracts (other than term life insurance contracts without cash value) sold in Luxembourg typically combine insurance protection with an investment component. As a result, according

to *Notice 2010-60*, these contracts do pose a risk of US tax evasion with respect to which the FATCA provisions were enacted. Insurance companies that market such products will qualify as foreign financial institutions under FATCA, and will therefore be subject to the provisions of the new law.

The additional difficulty for Insurance companies derives from the fact that they are generally limited in size and that they might not have the technical capacity to conform to FATCA. We would welcome a possibility for insurance companies to opt for a deemed compliant FFI status if they provide sufficient assurance that their products are not sold to US persons.

We hope that these comments will be of assistance and will result in the implementation of FATCA in the best conditions possible for the financial industry.

Yours sincerely,

Paul Schonenberg
Chairman & CEO
American Chamber of Commerce in
Luxembourg