

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AMERICA CHAMBER OF COMMERCE IN PERU]

Lima, May 24, 2011

Sir
Manal Corvin
International Tax Counsel
United States Department of Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20224

Ref.: Problem in the supply of information restricted by Bank Secrecy and Stock Exchange Confidentiality laws.

Dear Sir,

The America Chamber of Commerce in Peru ~ AmCham Peru, being an organization representing American, Peruvian and foreign companies, which promotes and supports the free market system, encouraging trade, investments and exchange between Peru and the United States, is pleased to have the opportunity to make available to the United States' Treasury Department (Treasury) and the Internal Revenue Service (IRS), our initial comments n1 with respect to *Notice 2011-34* n2, concerning the implementation of the provisions relative to the Foreign Accounts Tax Compliance Act (FATCA), passed on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act (HIRE ACT), which purpose is to prevent tax evasion and promote financial transparency.

In principal, we must state that AmCham PERU supports the general objectives of FATCA. Our members are happy to work with the Treasury and the IRS, so as to achieve an effective and practical approach and implementation of FATCA. However, we have noticed that its implementation leads to violations of the Peruvian legal system, which would make it impossible to implement FATCA as long as it remains in its current state.

Below are the contingencies noticed:

Our members are concerned, as the implementation of FATCA breaches the Bank Secrecy Act, which is enshrined in our Political Constitution, and goes against the provisions of the General Financial System Law, which regulates financial institutions' obligations related to Bank Secrecy. In addition, the Securities Market Act sets forth the obligation to keep information confidential. Both of them provide that violation thereof is considered to be a serious offense for labor purposes; and furthermore, is a criminal offense, as set forth in our Criminal Code, which prescribes, in cases involving the violation of professional privilege, imprisonment and fines.

The following are the provisions in the Peruvian Constitution and Law that currently governing the financial and stock exchange sectors, which prevent the application of the FATCA:

1. According to FATCA provisions, participating FFIs (Foreign Financial Institutions) are required to classify as a “*recalcitrant account*” holder, any account holder who refuses to provide the waiver prescribed in Article 1471(b)(1)(F).³ Then, the FFIs must withhold 30% of any “*passthru payment*” made to a “*recalcitrant account*” holder, and eventually close the account.
2. In agreement to current Peruvian law, it is impossible for the FFIs⁴ to abide by FATCA provisions against “*recalcitrant account*” holders in the manner required by the FATCA: since, under Peruvian law, it is prohibited for any financial institution to withhold funds from client accounts without the holder’s consent, unless a court or legal order is issued.
3. In that sense, in spite of the fact that Article 1471(b)(1)(D)(ii) calls for participating FFIs to withhold 30% of all “*passthru payments*” made by an “*recalcitrant account*” holder, these provisions are contrary to Peruvian law; as we have noted, the financial system’s institutions may not withhold any amount in a client account without the holder’s consent, unless a court or legal order is issued.
4. Given the previously discussed prohibitions to withhold funds from a client account, the most common remedy for a participating Peruvian IFF, with respect to a “*recalcitrant account*” holder, would simply be to close the holder’s account pursuant to Article 1471(b)(1)(F)(ii): thus, there would be no need to withhold any funds. However, this remedy is not permitted, as according to the regulations governing the financial sector, it is not permissible to unilaterally close an account;⁵ and doing so, is an infraction subject to sanctions imposed by the Superintendency of Banking and Insurance (SBS) and the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI).
5. The situation is even more complex, since, the implementation of FATCA presumes non-compliance with

the Bank Secrecy laws. As we know, the information and documentation provided by bank customers is confidential; and in order to protect this right to privacy, banks must not provide deposit information to anyone, other than the account holder or his/her representatives.

6. Likewise, the problem grows for companies belonging to the stock exchange or trust sectors; since, in accordance with FATCA terms, the IFF concept includes companies such as investment funds and mutual funds, as well as trusts, securitization companies, stock brokerage firms, insurance companies, pension fund management companies, brokers/dealers, and others of a similar nature. Therefore, given the fact that the IFF concept is quite broad, application of FATCA would affect companies in the fiduciary and stock exchange sectors; since it would involve their waving their obligation to keep the fiduciary and stock exchange confidentiality required by Peruvian regulations.

7. In that sense, the problem we notice with the implementation of FATCA in the local IFFs and their related companies, is that a cross relationship between the IRS and the IFF is created, whereby, through the signing of an agreement, the latter obliges to forward an annual report listing all deposit transactions (among others) carried out by all clients with an American taxpayer status. However, the IFF and its related companies acting as financial institutions operating and incorporated in Peru, are governed by Peruvian legal provisions, which make it impossible to implement FATCA. As it is widely known, the Peruvian financial and securities exchange system, by constitutional and legal mandate, contemplates Bank Secrecy and brokerage confidentiality.

8. Pursuant to Article 2, Item 5 of the Peruvian Political Constitution, Bank Secrecy can only be broken by order of a court, the Attorney General or an Investigating Commission of Congress, with the purpose of looking into a crime or signs of a crime. To that effect, considering that the competent authorities to break Bank Secrecy are specifically stipulated; and there is a limitation to a specific

purpose, one cannot interpret that the obligations originating from a private agreement between IFF and IRS will over-rule regulations applicable to the public; especially as they have at a constitutional level.

9. Likewise, the Peruvian legal system protects securities exchange confidentiality, a right regulated by Legislative Decree No. 861, the Securities Market Act, which prohibits directors, officers and employees of Intermediation Agents, Mutual Fund Management Companies, Mutual Funds for Investment in Securities and Investment Funds, among others; to supply any information concerning buyers or sellers of the securities traded in the stock exchange or other centralized mechanisms. In addition, the above-mentioned prohibition extends to cover information relative to buyers and sellers of securities traded out of centralized trading mechanisms, as well as with reference to those who subscribe or acquire securities placed by way of primary or secondary public offerings.

10. Accordingly, in view of the Bank Secrecy and stock exchange confidentiality aspects, the possible agreement between the IFF and the IRS would imply an unavoidable breach of the country's Constitution and internal laws, which would bring about various types of legal contingencies for financial institutions, of a civil, labor, administrative, criminal and constitutional nature, including administrative sanctions by the Superintendency of Banking and Insurance (SBS) ⁿ⁶, and INDECOPI. Additionally, the affected customer could file civil suit seeking indemnity for damages, and file criminal charges against the financial institution pursuant to Article 165 of the Criminal Code. Nonetheless, the probability of lawsuits is amplified when considering that this right is protected by the Constitution; and thus, a violation would lead to a constitutional class action.

11. To that end, so as to not contravene the Peruvian legal system, and to be able to supply the information we are asked to submit, we have passed our concern on to the Peruvian Ministry of the Economy and Finance,

so that local and/or international coordination can be initiated. In addition, we hope that these observations will be the commencement of on-going useful dialogue between AmCham Peru, the IRS and Treasury. Our objective is to end up with a set of rules that will make it possible for us to supply the requested information to the IRS, to prevent tax evasion; but also taking into account the legal and business reality faced by our members with regards to the implementation of the existing FATCA rules.

Finally, if deemed pertinent, we would be grateful if a meeting could be held between a technical team you may appoint and the representatives of the Tax Committee:

- David De La Torre, Chairman of the AMCHAM Tax Committee
- Michael Zavaleta, Past Chairman of the AMCHAM Committee

Sincerely yours,

Aldo R. Defilippi
Executive Director
American Chamber of Commerce in
Peru ~ AmCham Peru

FOOTNOTES:

n1

Please note that these comments are not comprehensive, and that we or some of our members could submit additional comments. Moreover, we acknowledge that the task of drafting regulations to implement the FATCA is not simple; and that it will probably have to include a review of the proposed rules, reactions and revisions.

n2

Recently published at <http://www.irs.gov/pub/irs-drop/n-11-34.pdf>.

n3

Unless otherwise specified, all articles cited herein refer to the 1986 Internal Revenue Code, including its amendments (the “Code”) and the regulations is issued by Finance.

n4

Any specialized terms not defined herein must have the meaning given thereto by the FATCA and the Communication.

n5

See; Final Resolution No. 200-2003/CPC, dated February 26, 2003 in File No. 989-2001/CP, filed by Mrs. Julia Rojas Benites, against Banco de Credito del Pera?, complaining about a bank, which unilaterally closed the two current accounts she kept in that financial institution. At the time, it was accredited that the bank closed both accounts without any grounds for their closure having been configured; thus, the INDECOPI Consumer Protection Commission ruled the complaint well-founded.

n6

Article 141 of the General Law of the Financial System and of the Insurance System ~ Law No. 26702, stipulates that breaking Bank Secrecy is a serious offense; and on the other hand, it makes reference to Article 165 of the Criminal Code, which generically associates the concepts of breaking professional secrecy and of violation.