

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
BANKERS ASSOCIATION OF THE REPUBLIC OF CHINA]

June 3, 2011

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Deputy Assistant Secretary of the Treasury (Tax Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

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Internal Revenue Service
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Comments on the Foreign Account Tax Compliance Provisions of the Hiring Incentives to Restore Employment Act. Notice 2010-60 and *Notice 2011-34*

Dear Sirs:

On behalf of The Bankers Association of the Republic of China (BAROC), we are pleased to provide comments on the Foreign Account Tax Compliance Act (FATCA) rules, as included in the Hiring Incentives to Restore Employment Act, Pub. L. 111-147 (HIRE) and to *Notice 2010-60* and *Notice 2011-34*, providing further guidance on FATCA requirements.

The BAROC was founded on 9 August 1983 to assist the government in implementing economic and financial policies, to promote economic development, and to strengthen relationships among its members so as to improve their mutual benefits. The BAROC currently represents the interest of 84 members, including banks domiciled in Taiwan, Taiwan offices of multinational banking groups and also financial holding companies.

Our members welcome the opportunity to respond to the request by the U.S. Internal Revenue Service (IRS) and U.S. Treasury (Treasury) for comments about the new FATCA rules.

Our members understand the intention of the legislation is to combat evasion of US taxes by US citizens and residents. We offer the following comments and suggestions to assist the Treasury and IRS in establishing a regime that meets the goal of preventing evasion of U.S. taxes while at the same time both is workable and economical for financial institutions and also is consistent with the legal and regulatory framework imposed on such institutions.

1. Privacy laws

The FATCA provisions contained in new Sections 1471 through 1474 of the Internal Revenue Code of 1986 (the Code) provide for the imposition of withholding taxes on certain US sourced payments. A foreign financial institution (an FFI) may avoid these withholding taxes if it enters into an “FFI Agreement” with the IRS. Under the terms of the FFI Agreement, the FFI will agree, among other things, to obtain information about the holders of its “U.S. accounts” and report such information to the IRS.

For the reasons discussed below, we would request that Treasury and the IRS examine the effect of privacy laws under FATCA and the waiver requirement.

It is explicitly stated under Article 48 of the Taiwan Banking Law that except provided by other laws or approved by competent authority, banks have to comply with the data confidentiality requirements. Although obtaining a waiver letter from bank customers may be free of complying above law, it might be administrative hassle in getting the waivers from U.S. account holders. In order to mitigate the issue of information sharing, we would suggest that Treasury and the IRS discuss with the Taiwanese and other effected governments regarding the possibility of amending applicable data privacy laws. A more preferable solution would be for the U.S. government to explore government to government contacts. In cases where there is a tax treaty between the United States and the other country, the exchange of information or competent authority provisions may be helpful. In cases where there is no tax treaty, such as between the United States and Taiwan, other inter-governmental contacts (such as under the auspices of international organizations or non-governmental organizations) may be valuable. Such contacts may help financial institutions overcome the difficulties of complying with both FATCA and local privacy/confidentiality requirements.

The requirement that accounts be closed if a waiver of confidentiality is not granted also gives rise to significant practical difficulties. This is because account closure where account holders refuse to comply with the FFI's requests is not a unilateral act by an institution under the Taiwan Banking Law. This is also subject to the content of the banking agreement signed between the financial institution and the customer. Financial institutions also need to be mindful of certain non-discrimination rules that may be implicated on the termination of an account. Closing an account marked as a U.S. account due to failure to provide a waiver may be seen as discriminating against customers who hold U.S. citizenship and hence a violation of such anti-discrimination laws.

2. Determination of U.S. accounts

a. Accounts of US\$ 50,000 or less

Under the U.S. tax regulations, an individual may qualify for tax exemption on his foreign sourced income up to an amount of US\$ 92,900 for year 2011. Based on this, it seems like the IRS would be more concern of income which is more than US\$ 92,900. Since the intention of FATCA is to combat evasion of US taxes, we believe that the amount of US\$ 92,900 could be used as the materiality level for identification of U.S. accounts.

Besides, individuals in Asian countries generally maintain large amount of deposits in banks as opposed to making other investments, that means even if an individual does not qualify as a high net worth client, he/she could easily fall above the US\$ 50,000 category and FFIs will need to spend extra effort on these accounts. As such, we would suggest that the threshold be increased to US\$ 100,000.

b. Due diligence for accounts balance of US\$ 500,000 or more

For all preexisting individual accounts that are not identified as U.S. accounts in Step 1 to Step 4 of *Notice 2011-34*, and that had a balance or value of US\$ 500,000 or more at the end of the year, the FFI must perform a diligent review of the account files associated with the account. Considering the essence of FATCA requirement, we should target on real high net worth individuals. First of all, we need to understand the investment behaviors of individuals in Taiwan. As mentioned above, Taiwanese prefer to invest money in bank deposits rather than other type of investments. Therefore, they would be easily fall above the category of US\$ 500,000 and Taiwanese FFIs would have to perform due diligence on these accounts which in fact, may not be on real high net worth.

We have requested a brief analysis from seven financial institutions in Taiwan for its existing account holders falls above the US\$ 500,000 and US\$ 1,000,000 categories. This analysis was prepared based on all the account holders currently with the seven financial institutions in Taiwan. Analysis shows that there would be average 7,841 numbers of account holders falls above US\$ 500,000 while 2,858 numbers of account holders falls above US\$ 1,000,000. This analysis was prepared based on To ease the administrative burden on the Taiwanese FFIs, we would suggest increasing the threshold to US\$ 1,000,000.

c. Definition of jointly held account

With respect to the jointly held accounts, *Notice 2011-34* defines that each account holder will be attributed the full balance or value of the joint account for purposes of determining the combined balance or value of that account holder's associated accounts. It seems like punishment to the holders of jointly held account, and it is also against local custom and banking practice. We would suggest that each account holder of a jointly held account should be attributed evenly the full balance or value of the joint account for purposes of U.S. account determination.

d. Deemed-compliant status

We suggest that the Treasury and IRS provide more flexibility in determining deemed-compliant status for FFIs. For instance, financial institutions which have potential (Accounts are currently US accounts or having US indicia) U.S. account holders with a percentage of 0.1% over the total account holders and the amount of each potential U.S. accounts are less than US\$ 100,000 as well as the financial institutions keep their eye on such U.S. accounts on no more amount of the account is exceeded than US\$ 100,000, we suggest deeming the financial institutions as complied with the FATCA requirements.

3. Definitions in connection with “private banking”

With respect to pre-existing individual accounts, *Notice 2011-34* provides a higher level of diligence for accounts that are “private banking” accounts and provides for a shorter timeline to complete the identification of accounts with US indicia and document such accounts than for non-private banking accounts.

Notice 2011-34 defines a “private banking account” as one maintained by a private banking department or as part of a private banking relationship. A “private banking department” is defined to include “any department, unit, division or similar part of an FFI that is referred to by the FFI as a private banking, wealth management, or similar department.” A “private banking relationship” exists if one or more employees or offices of an FFI are assigned to provide certain special services to clients.

We believe that definitions of a private banking department, a private banking relationship and private banking relationship manager need more specificity. Terms set forth in these definitions which have a specific meaning in the United States may be used in a different context in other jurisdictions. For example, we wish to bring to the attention of Treasury and the IRS the typical structure of the “wealth management” business in Taiwan, which is relatively different as compared to the United States. In Taiwan, the term “wealth management” and other similar terms reach a lower level of account size than in the United States. In practice, the threshold for recognizing accounts to be under wealth management in Taiwan is relatively low ~ accounts valued at NTD 500,000 (around US\$ 17,000) could qualify as wealth management accounts. These are clearly not the types of high net worth accounts thought of as private banking accounts and we believe represent a low risk for tax avoidance. For this reason, we suggest that Treasury and the IRS provide for a minimum for accounts to be treated as private banking. We believe that a reasonable minimum for private banking accounts is US\$ 250,000. Furthermore, because of the differences in terminology between markets, we suggest that the final definition on private banking requires a focus on services provided, not terminology used.

In respect of a “private banking relationship manager”, *Notice 2011-34* has stated that he/she is an officer or other employee of the FFI who includes recommends, makes referrals to, or arranges for the provision of financial products, services, or other assistance by internal or external providers to meet those needs. We suggest removing the “internal or external providers” as the area covers may be too broad. For example, independent financial advisors who are not the employees of the financial institution could be providing special services and have close relationships with the customers. Whether the independent financial advisors will be treated as external providers and the services would fall under the definition of a “private banking account” are open issues.

4. Data quality and integrity

Notice 2011-34 adds a new requirement that the chief compliance officer (CCO) or another equivalent-level officer of the FFI must certify to the IRS when the FFI has completed the procedures as described in the Notice for its preexisting individual accounts. We wish to mention that in Taiwan, the person with the title of CCO may not be responsible for the identification of U.S. accounts process. Also, prior to signing FFI’s agreement with the Treasury and IRS, the FFIs would have performed de-

tailed internal procedures (for example, approved by Board of Directors) to ensure that they have complied with the requirements under FATCA. As such, we suggest that Treasury and IRS consider removing this CCO's requirement.

Notice 2011-34 does not provide standards for determining whether the CCO has properly made the certification nor stated the penalty for an improper certification. Our members would welcome further guidance on these matters. With respect to the standards for certification, we suggest that the CCO be permitted to rely on his or her reasonable belief that the certification was correctly made and thus penalty is avoided.

Also, the responsibilities of CCO to certify that, between the publication date of *Notice 2011-34* and the effective date of the FFI's FFI Agreement, FFI management personnel did not engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts under the FATCA procedures is too demanding for CCO. As such, we suggest removing this requirement or providing an initial grace period during which any penalties will be waived if a FFI fails to fully comply with FATCA but there is evidence to show that the FFI has exercised genuine attempts to comply.

5. Process, administration and reporting matters

a. Retention of information

According to *Notice 2011-34*, an FFI must ensure that all the written requests and responses related to the search are retained by the FFI for ten years. Based on Taiwan Commercial Accounting Act, Taiwan document retention policies require records be retained for five years for accounting records. Other Asian jurisdictions have similar retention requirements. Ten years could significantly increase administrative costs for Taiwan FFIs. We would propose that the retention period be reduced to five years, which is in line with Taiwan document retention policies.

b. Passthru payments

FATCA will impose a 30% withholding tax on FFI that receives certain payments and income from U.S. sources unless the FFI enters into an agreement with the IRS. The FFI agreement requires the FFI to withhold on payments to non-compliant FFIs and non-compliant account holders. Basically this withholding mechanism is not supported by the local legislation. In terms of implementation, it may not be practical to enforce the rules due to lack of legislation clearly indicating such withholding mechanism in Taiwan. Prior to amendments of local legislation, the withholding mechanism may not be feasible and our members may face legal issues when complying with FATCA.

We note from *Notice 2011-34* that a payment made by an FFI will be a passthru payment to the extent of: (i) the amount of the payment that is a withholdable payment; plus (ii) the amount of the payment that is not a withholdable payment multiplied by (A) in the case of a custodial payment, the passthru payment percentage of the entity that issued the interest or instrument, or (B) in the case of any other

payment, the passthru payment percentage of the payor FFI. The implementation of 30% withholding tax on withholdable payment has seen to be a heavy penalty on the recalcitrant account holders as well as FFIs which did not enter into any agreement with the IRS. Therefore, it is not advisable to further impose 30% withholding tax on the additional payments that is not a withholdable payment as defined in (A) and (B) above. Also, the passthru payment percentage for (A) and (B) might give competitors an insight into the investment strategies of the non-compliant FFIs or account holders, thus force FFIs to reduce its investment in US assets.

c. Duration of compliance

Notice 2011-34 states that CCO will have to certify the FFI's completion of Steps 1 through 3 within one year after the effective date of the FFI's FFI Agreement, and will certify to the FFI's completion of Step 4 and 5 within two years after the effective date of the FFI's FFI Agreement. In other words, the identification of U.S. accounts process has to be completed within the first two years after the effective date of the FFI's FFI Agreement. We would suggest increasing the duration of compliance to five years.

d. Recalcitrant account

As noted in *Notice 2011-34*, FFI Agreements should be terminated due to the number of recalcitrant account holders remaining after a reasonable period of time. As noted above, there would be regulatory barriers to closing accounts in Taiwan. In addition, for accounts with indicia of U.S. ownership whose owners refuse to submit requested documents. Our members hope to have more flexibility in dealing with such accounts instead of immediately treating them as recalcitrant accounts or close these due to the legal barrier.

For instance, the financial institution may prove to the Treasury and IRS that they have made efforts in obtaining the requested information from the potential U.S. account holders with supporting documents, e.g. emails, phone calls notes, letters and etc. Except that, financial institution could send warning notices to these potential U.S. account holders that no further transactions will be performed until they provide with the requested information instead of terminating these accounts with indicia of U.S. ownership.

e. Reporting documentation

Under *Notice 2011-34*, an FFI will be required to report annually the gross amount of dividends, interest, proceeds from the sale or redemption of property, and other income paid or credited to each U.S. account. Further guidance on the definition of other income would be welcome.

Our members have expressed their concerns that reporting such information especially "proceeds from the sale or redemption of property and other income paid or credited to each U.S. account" will very likely be impractical as the financial institutions may not have sufficient information on the nature of the income credited into each of the U.S. account. Also, *Notice 2011-34* has stated that the amount and character of dividends, interest, other income and gross proceeds may be determined under the same principles that the FFI uses to report information on its resident account holders to the jurisdiction in

which the FFI is located. We would like to clarify what if the reporting information of the local country does not include some types of income listed above.

f. Refund procedures

The Joint Committee on Taxation report accompanying the HIRE Act notes that persons who are subject to withholding tax under FATCA may file for a tax refund if the recipient is eligible for relief under a treaty or a statutory provision. We would request the IRS to provide guidance on the qualification for obtaining a refund and to have in place a simplified refund procedure.

To facilitate the IRS in dealing with the overwhelming refund claims, we would suggest an option in which financial institutions will refund withholding tax that were instituted during the year due to documentation errors, miscommunications, or improper documentation, but correction and proper documentation was established prior to the end of the calendar year. This would mean that as long as the errors have been corrected at any time prior to the filing of information returns, financial institutions are able to refund the amounts to either another FFI or individual account holders. Also, the withholding tax applied on the recalcitrant account, if sufficient document provided, then such account turns into non-recalcitrant account, we also suggest a refund of such withholding tax is feasible. By doing so, this will definitely relieve the burden on the IRS and the financial institutions can maintain good client relations with their FFI and individual customers.

g. Expanded Affiliated Groups (“EAG”) of FFIs

We seek clarifications on the reporting requirements for EAG on whether EAG is able to report the requested information to the Treasury and IRS on a group or individual affiliate basis.

Under *Notice 2011-34*, an affiliate will be grouped into EAG if their shareholdings are at least 50%. However, these affiliates may not be allowed to share information. As such, our members would like to clarify if they are permissible to initiate the identification of U.S. account holders at group (i.e. accumulate the value of the U.S. account holders across EAG) or affiliate level (i.e. treat the value of the U.S. account holders separately in each affiliate).

6. Subsidies from implementation of FATCA

Passage of FATCA has posed a huge operational and system challenges to financial institutions. Our members could foresee that they will require a significant amount of time to structure, test and implement new systems and also provide training to employees in coordinating with customers during the implementation process. For this reason, we would suggest Treasury and IRS to consider providing subsidies to FFIs who are cooperating and committed to working with Treasury and IRS to successfully implement FATCA.

7. In Summary

The enactment of FATCA will place significant and extensive diligence requirements on financial institutions in Taiwan (as well as globally) and affect the relationship between financial institutions and their customers more so than any other recent pieces of legislation. We appreciate the opportunity to participate in the consultation process to communicate the practical issues to the legislative drafters with an aim to ensure the FATCA provisions are a proportionate, practical and ultimately successful piece of legislation.

We would welcome the opportunity to discuss the implementation of FATCA with representatives from Treasury and IRS. In the meantime, if there is any further information we can provide or questions raised by our comments and suggestions that you would like answered, please do not hesitate to contact us.

Yours faithfully,

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Chairperson
For and on behalf of
The Bankers Association of the
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