

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
BVI BUNDESVERBAND INVESTMENT UND ASSET MANAGEMENT E.V.]

[November 12, 2010]

Mr. John Sweeney  
Attorney  
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Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

**FATCA; Comments on *Notice 2010-60***

Dear Sirs,

Thank you very much for the opportunity to comment on *Notice 2010-60*.

The BVI Bundesverband Investment und Asset Management e.V. (BVI) n1 supports the aim of FATCA to avoid tax evasion by US-persons.

Although we fully support the view of the European investment fund industry (see submission from EFAMA n2 ) we nevertheless would like to seize the opportunity to explain legal and technical specifics in the German investment fund market and the impact of FATCA. We are very concerned that FATCA causes massive administrative burdens and practical problems, if German mutual funds will not be regarded as deemed compliant FFIs by the IRS. The German structures fully enable FATCA working in the German market, even if German mutual funds are deemed compliant without any further conditions.

We would like to suggest meeting with you in order to explain our approach in detail. We therefore will contact you within the next days and would be very happy to get the opportunity to discuss this issue with you in person.

**A: Overview of the German market and fund structures**

**1. Fund types**

There are two different kinds of fund types in Germany:

Our members manage about 3.000 German institutional funds with a limited number of investors that are known to the investment management company. In most cases, there is only one investor in the fund. Although the administrative burden will be high, they should be able to fulfil FATCA reporting requirements. As to the treatment of these funds under FATCA, we refer to the EFAMA submission.

Our members also manage about 2.200 public investment funds (mutual funds). These mutual funds are open-ended, widely-held collective investment vehicles, i.e. units are issued and redeemed each valuation day (normally each market day) and may have an unlimited number of investors, unknown to the investment management company. As a matter of fact, these funds are not in a position to fulfill FATCA reporting requirements as foreseen at present (see below), because the investment management company can by no means identify the investors.

The following describes the issue of mutual funds.

## **2. Legal structure presents low risk of abuse for tax evasion**

German mutual funds present very limited risk of abuse by U.S. persons for tax evasion purposes. They are designed as retail product for the broad public and are subject to regulatory supervision for investor protection purposes.

The investors in the funds have no ability to control the assets held by the fund. Any action is taken by the investment management company of the fund, which is entitled to act in its own name to dispose of the assets belonging to the funds and to exercise any rights attaching thereto. Although, from a legal perspective, the assets are jointly owned by the investors, the investor itself is not entitled to claim any right from the assets held by the fund (e.g. voting rights from portfolio stock are executed by the investment management company, only). The investor has no rights like a limited partner of a limited partnership.

Therefore, an investor who intends to hide earnings from taxation of a foreign state would not use a German mutual fund that gives him no possibility to influence the investment strategy at all.

## **3. Fund Units**

Around 99% of mutual funds securitize the participation in the investment fund portfolio by way of a so called global certificate which is kept in safe custody with a Central Securities Depositor (CSD; in Germany "Clearstream" n3 ).

The concept of these "global certificates" means that the mutual fund does not issue physical certificates passed out to the investor but has an unlimited number of investment fund units securitized in just one global certificate ("Sammelurkunde" pursuant to the German Safe Custody Act). According to German Safe Custody Act such global certificates may be kept at safe custody banks qualifying acc. to the Safe Custody Act, only. Thus, the investor must keep its fund units in the custody of a bank in any case, which assigns this right to the investor and which is a FFI. The investor in these cases is not able to ask for issuance of a physical certificate. We have attached a presentation which summarizes our arguments and illustrates the cash flow within this concept (**attachment 1**).

These certificates, like ordinary shares, circulate freely in the market and may be transferred without formal prerequisites. As outlined above, holders of those fund units open a custody account with a

bank (custodian bank), which will then keep the fund units in safe custody for the account of the client.

As a matter of fact, the custodian bank is the only institute with specific information about the particular investor. The concept of a global certificate ~ also as a matter of fact ~ makes it for the investment fund impossible to identify the investor.

The custodian bank, however, is required under German “know your customer rules” and anti money laundering regulations to properly identify the client and to keep respective records. Nevertheless, the custodian bank is prohibited by banking secrecy and data protection rules to share this information with the investment fund.

We expect that most of the custodian banks, if not all, will be PFFIs (i.e. Participating FFI) under the FATCA regime in the future.

In the past, German mutual funds have issued “physical” certificates in a very small scale. Their total amount is less than 1% of all fund certificates. The vast majority of them is held in the custody of a bank, which is a FFI.

#### **4. Fund prospectus and distribution agreements**

In principle, German mutual funds are not distributed to US-Persons. The sales prospectus already provides for sales restrictions to US-Persons. We are confident that all sales prospectuses of German funds will be adapted for selling restriction to US-Persons as defined by FATCA in the future.

The distribution agreement provides that the distributor has to follow the rules as outlined in the sales prospectus when selling the fund units. In this respect, please refer to the attached answers from BVI on the questions of IRS with regard to legal aspects of sales restrictions (**attachment 2**).

Nevertheless, we would like to outline that in an insignificant number of cases there might be no distribution agreement between the fund and the custodian bank of the investor and the fund might not even know that the fund units are in safe custody with this/bank. Only the CSD or sometimes the depositary of the fund knows where the fund units are in safe custody, but with no information about the respective investor. Thus, sales restrictions in fund prospectus and distribution agreements only may work where the fund units are sold by distributors of funds. They may not work in cases where fund units for example are bought on a stock exchange and put in safe custody with custodian bank (FFI) that has no distribution agreement with the fund.

As a matter of fact, a German fund or its management company neither has the function of a custodian, nor a register of Shareholders is kept, nor is it possible to ascertain the actual composition of the unit holders.

#### **B: Why (German) funds should be regarded as deemed compliant**

First of all we would like to highlight that a deemed compliant status of German mutual funds shall not avoid reporting of US-persons to IRS or avoid WHT to be levied, if any.

### **1. Concept with one global certificate in safe custody with Clearstream (over 99% of the German mutual fund market)**

The concept with only one global certificate will automatically support the aim of FATCA, as:

- (1) All fund units are in safe custody with custodian banks (FFIs)
- (2) Depository, CSD and custodian banks are FFIs
- (3) Custodian banks as PFFIs will report US-persons
- (4) Custodian banks as PFFIs will levy FATCA-WHT on earnings for recalcitrant account holders, if any
- (5) The depository/CSD will have to levy FATCA-WHT if the custodian bank further down the chain should be a non participating FFI.

Thus, as the fund units are only held through FFIs and all payments in the chain are made through FFIs, irrespective of whether the fund is a PFFI, the IRS will be able to obtain reporting or withholding from the other FFIs in the chain. Therefore, the treatment of German funds as deemed compliant would eliminate duplicative reporting (as foreseen in *Notice 2010-60*; section IV E.). Due to this fact, from our point of view the IRS may be comfortable with regarding German mutual funds as deemed compliant even if there was no selling restriction with regard to US-Persons in the distribution agreement.

### **2. Concept where fund units are issued physically (approx. less than 1% of the German mutual fund market)**

In the unlikely event that an investor keeps a physically issued fund unit outside a safe custody account, the investor may have the earnings from the fund units only being cashed out via an FFI, because due to German law only the paying agent of the fund (FFI) or the depository bank of the fund (also FFI) can cash out distributions from the fund or redeem the fund units. Therefore, there is no direct contact with the management company of the fund. The same applies if an investor would like to buy fund units directly from the fund that issues physical certificates. Also in this case the investor will have to contact the paying agent or depository bank of the fund.

In order to explain our approach in more detail we suggest having a meeting with you in the near future.

Yours sincerely,

BVI Bundesverband Investment und  
Asset Management e.V.

Thomas Richter

Holger Sedlmaier

Encl.

**FOOTNOTES:**

n1

The BVI is the representative of the German investment fund industry. Its 84 members currently manage round about 6,000 regulated investment funds with assets under management in excess of ?? 1.0 trillion, approximately 20% of which is invested in US-assets. The units of these funds are held by some 16 million private and institutional unit holders.

n2

EFAMA is the representative of over 52,000 European-based funds with approximately ?? 6,8 trillion of assets under management.

n3

Clearstream is a leading European supplier of post-trading services. The wholly owned subsidiary of Deutsche Borse ensures that cash and securities are promptly and effectively delivered between trading parties. It also manages, safekeeps and administers the securities that it holds on behalf of its customers. Over 300,000 domestic and internationally traded bonds, equities and investment funds are currently deposited with Clearstream.