

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
DUTCH BANKING ASSOCIATION]

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Ms. Manal S. Corwin  
International Tax Counsel  
United States Department of the Treasury  
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Mr. John Sweeny  
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Mr. Steven A. Musher  
Associate Chief Counsel (Int'l)  
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Mr. Michael Danilack  
Deputy Commissioner (Int') LB&I  
Internal Revenue Service  
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**Reference** BR1424

Re: Comments of the Dutch Banking Association on the Foreign Account Tax Compliance Act, as well as *Notice 2010-60* and *Notice 2011-34*

Dear Mr. Shay, Ms. Corwin, Mr. Musher, Mr. Danilack and Mr. Sweeney:

The Dutch Banking Association n1 welcomes the opportunity to write to you on behalf of the Dutch banks and to comment on *Notice 2010-60* and *Notice 2011-34*.

Like many of the other commentators on FATCA and the *Notices 2010-60 and 2011-34* we are concerned that the costs and management time required to implement and on an ongoing basis comply with FATCA is disproportional to the purposes the legislation tries to achieve, especially where such legislation exports domestic tax law concepts to foreign countries. A similar approach of other tax authorities around the world would require banks to access the legislation of multiple countries on every account it holds worldwide. In this respect we would suggest a coordinated approach of states similar to what has been done in the area of transfer pricing, where through development of common concepts compliance efforts have been limited to a manageable position for taxpayers. In this respect we fully support the views of the European Commission which are mentioned in mr. [197]’s letter to Mr. Geithner and Mr. Shulman of 24 March 2011 (see attachment).

We also think that the introduction of some clarifications and changes could be helpful in limiting the work for the foreign financial institutions while at the same time still achieving the original goals of FATCA.

### **1. Identification process ~ Individual clients**

As also noted by other commentators on FATCA a client identification procedure is introduced that differs from procedures that are currently applied in domestic situations. These procedures will be more complex and costly due to stratifications of client groups and thresholds in *Notices 2010-60 and 2011-34*.

FATCA delegates the introduction of verification and due diligence procedures to the Secretary of Treasury; this allows the Treasury and the IRS to effectively link these procedures to client identification procedures that are applied in the other country. Proposals to use existing domestic procedures are applauded by the DBA as they are less costly and cumbersome.

To illustrate the costliness of the due diligence process we would like to point at the introduction of the review of the private banking account in *Notice 2011-34*. This is a step that will give rise to practical problems and substantial costs:

- The definition of a Private Banking account is sufficiently vague to cover in excess of 10% of the clients of banks. In Notice 2011-34, Section I.A.1.(4) it is stated that “A “private banking relationship” exists when one or more officers (. . .) are assigned by the FFI to provide services such as those described in clause (D)(i) of the definition of a private banking department (. . .)”. The services described in Clause (D)(i) are “banking, investment advisory, trust and fiduciary, estate planning, philanthropic, or other services not generally provided to account holders”. A substantial number of banks assign account managers to clients that are positioned between the standard

retail clients and the high net worth clients. These account managers will be the prime point of contact and advise on normal banking matters. In the definition introduced in *Notice 2011-34* these relations will fall under the Private Banking relationships and would therefore be subject to the high net worth individual testing. The costs associated with individual testing could be substantial. Assume that an account manager would have to spend 30 minutes on average for a full file review and that 5% of 20 million Dutch bank accounts have “assigned banking officers”. In the Netherlands alone the review would take 500,000 hours, or 250 FTEs.

- *Notice 2011-34* gets even more out of perspective where it requires not only the “branding” of the accounts of the recalcitrant account holder but also introduces the family member. In Section I.A.2, Step 3 (A)(iv) the participating FFI is required to also “treat all accounts associated with a client as U.S. accounts”; in the second paragraph the notion “association” is further explained as “an account held by a family member”. We want to emphasize that FFIs are effectively barred to retain these type of data that are generally only available with public authorities. We seriously request Treasury to reconsider this proposal.

## 2. Identification process ~ Entities

The identification process of foreign entities could be simplified substantially, thereby decreasing the compliance burden for financial institutions as well as the IRS itself.

- An FFI has been defined broadly in FATCA as any entity that is engaged primarily in the business of investing, reinvesting or trading in amongst others securities and commodities. *Notice 2010-60* describes a proposed procedure to divide all account holders into U.S. Persons, non-U.S. persons, FFIs and NFFEs. The compliance burden on the FFIs is much heavier than on other Foreign Entities.

As also noted by other commentators, there is a group of non-U.S. entities that will be qualified as FFIs even though there is a low risk of tax evasion either

in the United States or in their countries of residence.

Based on the request for comments as to whether certain small FFIs should be required to be treated as NFFEs in Section II.B.3 of *Notice 2010-60*, we propose to include a procedure to give a deemed NFFE status to those FFIs that are subject to taxation in the Netherlands (or any other country that applies an acceptable tax rate) and that have a limited number of ultimate shareholders that are non-U.S. persons.

We have identified at least three groups that would qualify for this status:

- i. A group of farmers in the Netherlands is trading in products that are traded on an established exchange in the sense of U.S. law. The products are milk powder, potatoes, beef and pork. A lot of testing may be required to determine whether or not they are primarily engaged in the business of trading. We expect that some of them may incidentally fall within the definition of the law.
- ii. Under Dutch law there is the possibility for self-employed individuals as well as for individuals that have received a severance payment, to contribute funds into a corporate entity. The corporate entity has as its main purpose investing these funds to secure payment of a pension plan later on in life. The Dutch tax authorities only allow these contributions if the income will be subject to normal Corporate Income Tax or Personal Income Tax in subsequent years. We understand that this concept also applies in various other countries.
- iii. Legal entities with a limited number of shareholders that are actively involved in intraday trading.

Additionally we hope that the introduction of an NFFE status for entities that otherwise would have qualified as FFIs would ensure that the banking market will not be disturbed by the creation of niche players that focus on the attraction of funding from entities that are retreating from excessive compliance burdens with internationally operating banks.

### **3. Withholding process ~ Passthru payments**

In Section II of *Notice 2011-34* the concept of passthru payments has been further developed. We understand that the intention of the concept of passthru payments is to withhold tax on any income from U.S. sources that is paid directly or *indirectly* to either FFIs that do not meet the requirements of *Section 1471(b)* or to recalcitrant account holders. The indirect sourcing is covered by the passthru payment concept. The passthru payment concept is justified with a reference to FFIs being used as “blockers”.

- As an organization representing a group of banks that operate internationally, we are very concerned about the proposed application of the passthru payment concept on banks. Banks are generally funded by their shareholders and depositors. The funds then are used to generate business, through a network of international branches. All funds may be used to finance (or are deemed to finance) every asset. This is not done to “block” tax authorities from lifting the corporate veil, but is inherent in the way large international banks operate. Applying the passthru payment concept would have a significant adverse operational impact. There are millions of clients that receive interest payments on a regular basis from their banks. The consequence of the passthru payment concept would be that some small percentage of that interest would be regarded as a passthru payment that could become subject to US taxation. This clearly would not serve the purpose of FATCA to identify U.S. persons that do not report their investments.

We therefore would like to suggest that the payment of interest by banks (as defined under U.S. law) to their account holders should not be treated as a passthru payment subject to potential FATCA withholding.

- There is still uncertainty with respect to the application of the passthru payment concept on other types of payments, especially with respect to derivative financial instruments and transactions. We understand that payments under such transactions could be considered to be passthru payments even where the payments are non-U.S. source income, and the economics of the transaction are in no way “attributable” to any withholdable payment a party to a transaction may have received. This application could lead to large costs at the level of the compliant bank without the possibility

of recourse.

We think it is extremely unlikely that any person would use a derivative financial instrument as an indirect way to “block” the view of U.S. tax authorities.

We therefore propose a clear statement from the U.S. tax authorities that it is not intended that payments with respect to derivative financial instruments will be passthru payments.

- We also would like to point out that the introduction of a withholding system would require Dutch financial institutions to do a major overhaul on their IT-systems. Currently there is no withholding on interest and a non-variable withholding on dividends. The introduction of a variable withholding on interest and dividends in the Netherlands would therefore require all banks to make major changes in their existing banking IT environment. There is a worry that the majority of the institutions will not be able to develop, test and implement a system before January 1, 2013, especially because final regulations are not available yet.

On top of that we think that the financial burden for the banks developing this IT-environment is disproportionate to the interest of the IRS.

#### **4. Sanctions ~ Financial accounting aspects**

As a last point we would like to draw your attention to some financial accounting aspects related to the implementation of FATCA. FATCA has been drafted in such a manner that there is secondary liability for withholding tax upon incorrect withholding by the FFI.

Obviously none of the participating FFIs plans to incorrectly withhold taxes. The risk that this might happen is not unrealistic though. There is the risk that passthru payment percentages have been computed incorrectly by the FFI or by one of the FFIs where they have put funds on deposit; the consequence could be an over- or underwithholding by the FFI.

Participating FFIs may also be confronted with a situation that one of their entities, part of an expanded affiliated group, is non-compliant. In a strict reading of the law this may cause the entire group to be a non-participating FFI.

FATCA is unclear on what the financial impact of various forms of underwithholding will be. Lack of clarity will require financial institutions to report tax risks and maintain capital at maximum levels, which will potentially exceed the amounts actually required.

In summary, we propose to ask US Treasury and the IRS:

- to accept account holder identification as applied in the home jurisdiction;
- to enter into an open discussion to come to a definition of Private Banking that does not cover in excess of 10% of all bank accounts;
- to create the status of NFFEs for those foreign entities that have a limited number of shareholders, all of which are non-U.S. persons and are subject to taxation at a generally acceptable tax rate;
- to exclude the general funding of FFIs that are Banks from the passthru payment concept; and
- to exclude the payment on derivative contracts from the passthru payment concept.

Yours sincerely,

Wim Mijs  
Chief Executive Officer  
Dutch Banking Association  
Amsterdam, Netherlands

#### FOOTNOTES:

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*The Dutch Banking Association was established in 1989 to represent the common interests of the Dutch banks. Virtually all banks operating in the Netherlands, including foreign bank branches, are members of the Dutch Banking Association. For its members and stakeholders, the Dutch Banking Association services as a knowledge and information centre. Banks work together in restoring the trust. The Banking Code is in force since January 2010. This code applies to all banks in the Netherlands and puts the client in the centre of all activities. Diversity and a strong, healthy and internationally competitive between Dutch banks are key principles in the policy of the association.*