

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
EUROCLEAR]

CC:PA:LPD:PR (NOT-121556-10)

Room 5203

Internal Revenue Service

PO Box 7604

Ben Franklin Station

Washington, D.C. 20044

UNITED STATES OF AMERICA

Brussels, 7 June 2011

Subject: Euroclear comments on *Notice 2011-34*

Dear Sirs

We, Euroclear, welcome the opportunity to comment on *Notice 2011-34* (“the Notice”). We recognise the transparent manner in which the guidance contained therein is being given. We appreciate that the issues highlighted in the Notice are priority issues, on which guidance is being given at this stage to allow prospective participating foreign financial institutions (“PFFIs”) to prepare as best as possible for the coming into force of the FATCA provisions on 1 January 2013. We assume that the issues not addressed in the Notice are not so complex and will be dealt with in the forthcoming draft regulations. This latest Notice does show that Treasury is listening to the various comments that have been sent in response to the previous *Notice 2010-60*, including those of Euroclear in our letter dated 10 November 2010. We believe that such industry comments are vital, as it will assist Treasury and the IRS in crafting regulations that put a workable and effective system in place. It is in this respect that we further outline our comments and suggestions on the Notice.

When reading our comments further below, please be reminded that we fully support the policy goals behind the FATCA legislation.

### **The Euroclear group**

Euroclear is the world’s largest provider of domestic and cross-border settlement and related services for bond, equity, derivatives and fund transactions. The Euroclear group comprises the International central securities depository (ICSD) Euroclear Bank, based in Brussels, as well as the national central securities depositories (CSDs) Euroclear Belgium, Euroclear Finland, Euroclear France, Euroclear Nederland, Euroclear Sweden and Euroclear UK & Ireland. In 2010, the Euroclear group settled the equivalent of EUR 526 trillion in securities transactions, representing 150 million domestic and cross-border transactions, and held EUR 21.9 trillion in assets for clients.

The client base and range of services of the ICSD and CSDs are different.

**Euroclear Bank** serves close to 1,500 major financial Institutions located in more than 80 countries across the globe and manages around 10,000 accounts for these clients. Over Its more than 40 years of existence, Euroclear Bank has acquired considerable experience in dealing with international products, financial institutions and investors. The provision of an efficient withholding tax relief service is an Important part of its offering in asset servicing: Euroclear Bank is therefore a Qualified Intermediary (QI) for U.S. tax purposes and has assumed primary Non-Resident Alien and backup withholding responsibility.

The **Euroclear CSDs** manage between a few tens/hundreds and several thousands of accounts under contractual relationships. Three of the Euroclear CSDs are also involved in the set-up of up to 3 million accounts on behalf of individuals. Such accounts are either operated or sponsored by other financial institutions. The range of offering in asset servicing to clients (those with a contractual agreement) differs in each CSD. Some of the CSDs do not offer services on US securities (Euroclear Belgium and Euroclear Finland), others are QIs (Euroclear Nederland, Euroclear UK & Ireland and Euroclear Sweden).

In our letter of 10 November 2010, we discussed a number of issues, some of which were further detailed in the Notice. These were: documentation requirements, withholding on gross proceeds, the requirement to withhold on passthru payments, and timing issues in terms of implementation.

Turning first to **documentation requirements**, we welcome the fact that Treasury has provided detailed guidelines as to the identification of individual accounts, and the clarity that these bring. We have no substantive comments to make thereon, since the bulk of this new guidance deals with private banking accounts, with which Euroclear is not concerned. That said, we note that Treasury is considering whether other types of FFI should apply analogous procedures to certain classes of accounts that they maintain. We feel that such procedures should remain specific to private banking accounts, and should not be used in respect of accounts held on behalf of, for example, global custodians.

In relation to certification by a Chief Compliance Officer as to the procedures in place for the identification of accounts, regulations should make clear, as far as possible, what will be the content of that certification. Presumably such detail would be included in the provisions of an FFI agreement.

While we recognise that the main aim of FATCA is to collect and report information with respect to US accounts, we would argue that to terminate an FFI agreement where only a small number of long-term recalcitrant account holders remain would be a disproportionate solution. We strongly believe that by continuing to withhold on those types of accounts, PFFIs would have an ever-decreasing number of recalcitrant account holders and non-participating FFIs on their books.

The increased level of detail as to what will constitute “electronically searchable information” is to be welcomed. Of particular interest to Euroclear (which has amongst its entities QIs with or without primary NRA withholding and reporting responsibility) is the inclusion of information maintained in tax reporting files within that definition. It is helpful that scanned documentation and documents in pdf format are not considered to be electronically searchable.

In relation to **passthru payments**, we appreciate that one of the intentions underpinning the concept is to provide PFFIs with a tool to incentivise non-participating FFIs to enter into an agreement with the Treasury in order to become a PFFI, and to avoid the creation of a ring of “blockers” around the PFFIs. This is a policy goal that we support, however, we consider that as presently envisaged, the concept is one that Euroclear and the market as a whole would have great difficulty in applying.

a) Impossibility for Euroclear to apply correct withholding

Euroclear, as a market infrastructure, processes settlement instructions that have already been netted by a central counterparty or at the level of the participant who would typically hold the assets of several clients in the same account (“omnibus accounts”). Therefore Euroclear is not aware of how many trades have actually been made or at what price.

Similarly, Participants of the Euroclear entitles will bulk cash movements without providing Euroclear with information on the character or source of the money or on whether it even constitutes income or gross proceeds.

Withholding by Euroclear on net trades or on cash movements would therefore lead to incomplete and completely arbitrary withholding. Also, the reporting that would accompany such withholding would not be easily reconcilable by the IRS with reporting received from PFFIs further down the chain. These issues would apply to withholdable payments and passthru payments alike.

b) Need for a data feed of the passthru payment percentage (PPP)

It is also not clear how these percentages can be “plugged in” to a system at the level of Euroclear Bank or the Euroclear CSD in a particular market. As a market infrastructure, much of the benefit of what we offer clients is a result of the degree of straight-through processing that exists in our systems. It is not clear, how the many PPPs will be communicated between the various players on the market. It would seem that, in addition to the simple publication on a given PFFI’s website, some form of official register should be established, as well as a mechanism whereby the issuer or its paying agent is obliged to communicate the PPP at the time of payment. The data feed from such a register would allow market infrastructures such as Euroclear, and market players as a whole, to ensure timely and correct payment, in cases where PPP was to be employed. Indeed, It would be impossible for Euroclear to determine (and automate) for each of the securities it services (around 1 million different securities are eligible in Euroclear Bank alone) whether a payment on such security is subject to a passthru payment, as information on whether such security is issued by a financial institution, and therefore potentially subject to a PPP, is not easily available. Also, on the basis of our experience with the French “credit d’impôts” (which relieves investors from withholding tax on foreign income), we foresee great difficulty for the payor FFIs to provide this PPP. This would result in the application of the default PPP of 100%, which would unduly impact the payment processing and lead to unavoidable payment reversals and major reconciliation issues.

c) Definition of a US asset

Linked to the passthru payment concept is the question of what will constitute a US asset. As a QI with primary NRA withholding and reporting responsibility, Euroclear Bank is required to identify securities as being subject or not subject to federal withholding tax. There are a number of securities in respect of which it is not always straightforward to determine what the tax treatment should be. Ongoing reconciliation with our upstream depositories allows us to determine whether the same treatment is being afforded to a given security. However, opinions will differ, and Euroclear Bank might tax income payments where the depository is of a different view. Where it is found that either party has made an error in its classification, such error can be corrected by withholding or crediting amounts that should or should not have been withheld. The credit and offsetting system that the QI regime permits allows us to rectify the situation. With passthru payments, such a safety net will not exist. The market needs to have a clear and consistent view on what will constitute a US asset, so that passthru payment percentages can be relied upon by all market players.

With this in mind, we respectfully submit that the passthru payment concept, as currently drafted, is unworkable, as it remains so broadly drafted that the manner in which it should be applied is extremely complex.

In terms of **timing of implementation** of the regulations, we appreciate that it is unlikely that the date of 1 January 2013 will be pushed back, as to do so would require the intervention of Congress. That said, we would like to make clear that, in view of the fact that draft regulations are expected only during fall later this year, and that a number of concepts remain unclear, many FFIs who will be otherwise willing to comply with FATCA, will find themselves unable to properly fulfil their obligations as of 1 January 2013. We would suggest, therefore, that Treasury and the IRS give strong consideration to some form of transitional period, during which reporting will be made without the requirement to withhold. Such transitional relief could be extended to those FFIs who commit to entering into an FFI agreement prior to the effective date of the legislation.

Even where a refund mechanism is developed, such a “safety net” would not cure overwithholding. Indeed, where a payment is received by Euroclear, that payment is credited to the relevant participants’ accounts, from which it will in turn be credited (on the participants’ own books) to a series of underlying clients. All of these movements will occur in quick succession. Were it to be ascertained post-payment that the payment should not have been subject to withholding, to have to unravel the series of transactions would be very problematic. Given the short timeframe for Implementation of the regulations (once they are issued), It is inevitable that mistakes will be made on a large scale.

The additional categories of **deemed-compliant FFI** are so narrowly drafted as to apply to only a small number of FFIs. This is particularly true when one considers the free movement of goods, persons, services and capital within the European Union. Whilst we understand and appreciate that Treasury and the IRS will not allow large sectors of the financial system to be carved out from some of the FATCA responsibilities, we welcome the fact that Treasury is looking seriously at additional categories of deemed-compliant FFIs.

We note and welcome the fact that Treasury and the IRS intend to issue guidance providing that PFFIs that are not US payors will not be required to report *section 6045* tax **basis information** with respect to

an account. That said, we understand that there remains some doubt as to whether this will also apply to QIs across the board. We would be grateful if Treasury and the IRS would provide further clarification on this point.

We note Treasury's intention to require FFIs currently acting as QIs to consent to include in their **QI agreements** the requirement to become participating FFIs unless they qualify as deemed-compliant FFIs under *section 1471*, and that there will be transitional rules to accommodate this change. We would encourage Treasury to give serious thought as to how the FATCA regime can be tailored as far as possible to fit with the existing QI regime, for example, by reflecting the documentation requirements of *Section 5* of the QI agreement in the FATCA system where at all possible.

We welcome the guidance on the application of *section 1471* to **expanded affiliated groups**, and the clear administrative benefits that that will bring. That said, we would be interested to read the results of the Treasury and IRS study into the possibility for a FFI group to include one or more non-participating FFI affiliates. It would be useful if the regulations could make clear exactly what a Chief Compliance Officer will be required to certify. This same comment holds true for the certification of procedures for Identification of individual accounts, as mentioned above in relation to documentation requirements.

## Conclusion

We would like to reiterate our concern, as outlined in this letter and in our letter of 10 November 2010 in response to *Notice 2010-60*, that there is a way to achieve the policy goals of FATCA while at the same time keeping to a minimum the Impact on the market as a whole.

In order to discuss the issues highlighted above and to develop more workable solutions, I would therefore encourage you to make contact with Sophie Biourge, Director, Product Management, [sophie.biourge@euroclear.com](mailto:sophie.biourge@euroclear.com); +32 2 326 2863.

We thank you for the opportunity to voice our concerns in respect of the above. We hope the comments and recommendations made above will be considered and provide useful guidance in the drafting of the definitive regulations.

Sincerely,

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