

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
THE FLORIDA INTERNATIONAL BANKERS ASSOCIATION]

April 30, 2010

Internal Revenue Service  
CC:PA:LPD:PR (REG-146097-09)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**Re: Comments Regarding the Foreign Account Tax Compliance Act of 2009**

Dear Sir/Madam:

The Florida International Bankers Association (FIBA), Inc. ("FIBA") n1 appreciates the opportunity to provide these comments in response to Announcement 2010-22 concerning regulatory and administrative interpretation and implementation of the Foreign Account Tax Compliance Act ("FATCA"), which was enacted on March 18, 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010 (Pub. L. 111-147).

In providing our comments, we would like to describe some general policy concerns that we hope you will consider throughout the process of developing regulations and other guidance with regard to FATCA. In addition, we specifically request that you exclude U.S. branches and agencies of foreign financial institutions from the application of FATCA pursuant to the regulatory authority provided to you in the legislation. U.S. branches and agencies of foreign banks already are covered by U.S. laws because they are located in the United States, so this exclusion is consistent with the policy objectives of FATCA ~ as expressed in the legislative history of FATCA ~ and would significantly ease our general concerns about FATCA as they relate to the particular profile of our members.

**ABOUT FIBA**

FIBA is a 25-year old trade association whose membership includes more than 70 financial institutions from 18 countries, the vast majority of which are either the international offices of U.S. banks headquartered in the United States or foreign banks which maintain U.S. branches, U.S. agencies or U.S. representative offices. The primary business focus of both U.S. and foreign bank FIBA members is Latin America, particularly in the realm of U.S.-based wealth management/private banking services for non-U.S. persons, as well as trade finance and supporting activities.

FIBA has long been recognized by U.S. and non-U.S. regulators and law enforcement for its knowledge and expertise in anti-money laundering ("AML") compliance and its world-renowned training programs. FIBA has offered training on AML for more than two decades, including the widely successful FIBA Annual AML Compliance Conference attended by nearly 1,200 individuals, and the FIBA AML Institute which provides specialized training to industry practitioners.

**GENERAL POLICY CONCERNS**

We appreciate the efforts of the Obama Administration and Congress ~ through the enactment of FATCA and other measures ~ to combat U.S. Federal income tax evasion through the use of offshore tax havens. As always, FIBA supports and stands ready to assist Congress and Federal regulatory agencies in the fight against U.S. tax evasion by U.S. citizens.

As can be expected with any legislation of the scope and magnitude of FACTA, we have some policy concerns that we believe merit your consideration as you develop regulations and other guidance to implement FATCA. We generally agree with the views of industry groups and other commentators who have expressed reservations about the distortive effects that FATCA may have on global capital flows, and these effects will need to be balanced against the anticipated improve-

ment in compliance by U.S. taxpayers with U.S. Federal tax laws resulting from the enactment and implementation of FACTA.

Another policy concern of FIBA in particular relates to the possibility that FATCA will result in the retaliatory enactment and imposition of similar disclosure regimes by other countries, especially if those regimes emanate from countries which do not share our values concerning the sanctity of maintaining the privacy of sensitive taxpayer and financial information.

Non-U.S. persons who maintain banking relationships in the United States do so principally to mitigate transfer (i.e., foreign exchange), political, and country risk in their home countries, as well as to ensure personal safety. To the extent that FATCA diminishes the U.S. financial system as a safe haven from these risks because of retaliation by other countries, we expect a significant amount of foreign capital would be removed from financial institutions in the United States, with an attendant impact on U.S. financial services employment that currently is supported by this foreign capital ~ all to the detriment of non-U.S. persons who look to the safety and soundness of the U.S. financial system and the quality of trust and financial planning services which U.S. citizens already enjoy.

Depending upon how it is implemented, the enactment of FATCA could risk diminishing the trust and wealth planning business in the United States for non-U.S. global customers, so U.S.-located institutions ~ which pay significant U.S. corporate taxes and employ thousands of Americans ~ could see revenues curtailed and potentially could be forced to move their trust and wealth planning business to foreign jurisdictions. Furthermore, even as policymakers continue to look at ways to encourage the flow of foreign capital into the United States to ease the ongoing strains in our capital markets, the flight of foreign capital from the United States resulting from the imposition of FATCA would undermine these efforts.

FIBA also is very concerned about the non-tax regulatory and legal risk created by the combination of an enormous tax compliance burden with the potentially severe penalties that could result from even technical non-compliance with the requirements of FATCA. FATCA imposes a significant amount of enforcement responsibility on financial institutions, compelling them to be "insurers" of U.S. tax compliance ~ a role that they are not capable of implementing with 100% precision. In order to avoid the inappropriate imposition of civil money penalties, cease-and-desist actions, and other reputationally-harmful enforcement consequences that U.S. bank regulatory authorities have the authority to levy, financial institutions will need to have adequate safe harbors from legal and regulatory liability based on technical FATCA compliance failures shown to be due to reasonable cause and not willful neglect.

We are hopeful that the Treasury Department and IRS, in implementing FATCA, will be sensitive to these general policy concerns so that FATCA can accomplish its policy objectives without an inordinate impact on the operation of capital markets and financial services employment in the United States, and without increasing the exposure of financial institutions to legal and other consequences resulting from imperfect technical compliance with FATCA.

#### **EXCLUSION OF U.S. BRANCHES AND AGENCIES**

As enacted in FATCA, section 1471 n2 generally requires U.S. withholding agents to withhold a tax equal to 30 percent on certain "withholdable payments" (as defined in section 1473(1)) that are made to foreign financial institutions ("FFIs") which have not entered into an agreement with the IRS to disclose and annually report to the IRS information concerning "United States accounts" (i.e., any account maintained by the FFI which is held by one or more "specified United States persons" or "United States owned foreign entities").

An FFI is defined in section 1471(d)(4) to mean any financial institution (as defined in section 1471(d)(5)) which is a foreign entity. Furthermore, section 1471(e)(1) provides that the disclosure and annual reporting requirements of FATCA generally are applied to United States accounts maintained by either the FFI or any other FFI which is a member of the same expanded affiliated group (as defined in section 1471(e)(2)) as the FFI.

However, certain classes of FFIs may be treated as meeting the disclosure and annual reporting requirements of FATCA if the Treasury Secretary determines that the application of FATCA to the class is not necessary to carry out the purposes of FATCA (section 1471(b)(2)(B)). The Joint Committee on Taxation Technical Explanation of the HIRE Act provides some

insight into how Congress intended the Treasury Department and IRS to implement this deemed compliance provision, stating:

[T]he Secretary may identify classes of institutions that are deemed to meet the requirements of this provision if such institutions are subject to similar due diligence and reporting requirements under other provisions in the Code. Such institutions may include . . . certain ***U.S. branches of foreign financial institutions*** that are treated as U.S. payers under present law. n3 (emphasis added)

It is our understanding that FATCA would not apply to the U.S. operations of an FFI if those operations are conducted through a subsidiary that is a separate entity organized in the United States, since the entity would not be a foreign entity. However, many FFIs conduct U.S. operations through a U.S.-based branch or agency that is not within a separate U.S. entity. The financial services provided through such operations tend to be very specialized and limited in scope, and generally do not include taking FDIC-insured deposits or providing other U.S. retail banking services. Therefore, even in the absence of FATCA, the ability of U.S. citizens or residents to open accounts at these branches or agencies ~ for purposes of evading U.S. Federal income taxes or otherwise ~ does not exist as a practical matter. Stated differently, tax evasion-minded U.S. individuals will not look to park their financial assets at a U.S. branch or agency of an FFI because the tax secrecy that they seek is totally unavailable.

Furthermore and more pertinent to the legislative history cited above, U.S. branches and agencies of FFIs already are generally subject to the same tax information reporting requirements, and must comply with IRS information requests to the same extent, as U.S. financial institutions. For instance, the information reporting requirements for brokers (section 6045), interest payments (section 6049), dividend payments (section 6042), and other transactions requiring the filing of Form 1099 or similar forms all apply to U.S. branches and agencies of FFIs. n4 Similarly, U.S. courts have jurisdiction over U.S. branches and agencies of FFIs, so the IRS has the ability to issue a third-party summons to such branches pursuant to section 7602(b) and enforce the summons pursuant to section 7604.

Even in the absence of the specific guidance concerning U.S. branches and agencies of FFIs provided in the legislative history cited above, excluding these branches and agencies because of tax information reporting and IRS information request compliance requirements that are comparable to those of U.S. financial institutions is permitted and supported by the statutory definition of a "United States account", which excludes any account the holder of which is otherwise subject to information reporting requirements which the Treasury Secretary determines would make the reporting required by FATCA duplicative. n5

Subjecting U.S. branches and agencies of FFIs to the disclosure and annual reporting requirements of FATCA ~ beyond those for which both they and U.S. financial institutions already are responsible ~ would have little or no impact on enhanced tax compliance while imposing substantial administrative burdens on these branches and agencies. Therefore, we respectfully request that you give full effect to the legislative history of FATCA and exclude U.S. branches and agencies of FFIs from FATCA.

## CONCLUSION

As you undertake the difficult and laborious task of implementing FATCA, we hope that the general policy concerns we have described will help to inform the regulatory and administrative process. In addition, we specifically urge you to exclude U.S. branches and agencies of FFIs from the application of FATCA so that these branches and agencies will not be subjected to burdensome reporting requirements that would provide only marginal (if any) tax compliance benefits.

Notwithstanding the foregoing, you can rest assured that FIBA members stand ready to assist the Treasury Department and IRS in the fight against U.S. tax evasion by U.S. persons. Once FATCA has been fully implemented, FIBA will con-

tinue to revise and update its training programs to ensure that FIBA members meet the compliance challenges that will ensue as a result of FATCA.

We thank you in advance for your time and consideration. Please feel free to contact me at 305-579-0086 if you should require any additional information or if FIBA can be of further assistance.

Sincerely,

Patricia Roth  
Executive Director  
FIBA  
Miami, Florida

**FOOTNOTES:**

n1

FIBA is a non profit corporation organized and existing under the laws of the State of Florida; For more information about FIBA, please visit <http://fiba.net/>.

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All section references contained herein are to the Code or the Treasury Regulations (the "Regulations") promulgated thereunder, unless otherwise specified.

n3

Joint Committee on Taxation, Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate (JCX-4-10), February 23, 2010, p. 41.

n4

See, e.g., Treas. Reg. secs. 1.6042-3(b)(1)(iv) (treating U.S. branches of foreign banks as U.S. payors or U.S. middlemen for purposes of interest payment reporting requirements), 1.6045-1(g)(3)(iii)(B)(1) (treating a sale effected by a broker at an office outside the United States as a sale effected by a broker at an office inside the United States if the customer has opened an account with a U.S. office of that broker or a U.S. office of the broker negotiates the sale with the customer or receives instructions with respect to the sale from the customer), and 1.6049-5(c)(5)(i)(F) (treating U.S. branches of foreign banks as U.S. payors or U.S. middlemen for purposes of interest payment reporting requirements).

n5

Section 1471(d)(1)(C)(ii).