

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

October 29, 2010

CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments to *Notice 2010-60*
Regulations to be Issued Implementing FATCA

Dear Sir or Madam:

These comments are submitted on behalf of the Florida International Bankers Association, Inc. (“FIBA”), a not-for profit trade organization whose membership is composed of over 70 financial institutions. The primary geographic focus of FIBA member institutions is Latin America, and the primary financial services they offer are international correspondent banking, trade finance and international wealth management/private banking services for non-U.S. residents.

I. Background.

On March 18, 2010, the Hiring Incentives to Restore Employment (HIRE) Act (the “Act”) was enacted into law. Section 501 of the Act was previously introduced as part of the Foreign Account Tax Compliance Act of 2009 (“FATCA”), which was not enacted, but was subsequently introduced with certain modifications as part of the revenue offset provisions of the Act.

Section 501(a) of the Act enacts a new chapter 4 consisting of *Sections 1471 through 1474* to Subtitle A of the Internal Revenue Code of 1986, as amended (the “Code”). These new Code sections expand the information reporting requirements imposed on “foreign financial institutions” as such term is defined in *Section 1471(d)(4) of the Code*. Chapter 4 also imposes withholding, documentation, and reporting requirements with respect to certain payments made to certain foreign entities, as more specifically defined in the Act.

Chapter 4 of FATCA was designed to prevent U.S. persons from evading U.S. tax by holding income-producing assets with Foreign Financial Institutions (“FFIs”) or through Non-Financial Foreign Entities (“NFFE”). An FFI, which is a broadly defined term, and NFFEs, will be subject to a 30 percent U.S. withholding tax on “withholdable payments,” unless the FFI enters into an agreement with the U.S. Internal Revenue Service (the “IRS”) and agrees to report information on United States accounts (the “FFI agreement”). An NFFE is subject to another reporting regime. A “United States account” is any financial account which is held by one or more specified U.S. persons or U.S.-owned foreign

entities. *Section 1471(b)(2) of the Code* provides authority to the Secretary of the United States Department of the Treasury (the “Secretary”) to determine that the application of *Section 1471* to that certain class of institutions is not necessary to carry out the purposes of such Section.

Section 1471(a) requires a withholding agent to deduct and withhold a tax equal to 30 percent on any withholdable payment made to an FFI if the FFI does not meet certain requirements. Specifically, *Section 1471(b)* provides that withholding is generally not required if an agreement is in effect between the foreign financial institution and the Secretary under which the institution agrees to:

1. Obtain information regarding each holder of each account maintained by the institution as is necessary to determine which accounts are United States accounts;
2. Comply with verification and due diligence procedures as the Secretary requires with respect to the identification of United States accounts;
3. Report annually certain information with respect to any United States account maintained by such institution;
4. Deduct and withhold 30 percent from any pass through payment that is made to a (1) recalcitrant account holder or another financial institution that does not enter into an agreement with the Secretary, or (2) FFI that has elected to be withheld upon rather than to withhold with respect to the portion of the payment that is allocable to recalcitrant account holders or to FFIs that do not have an agreement with the Secretary.
5. Comply with requests by the Secretary for additional information with respect to any United States account maintained by such institution; and
6. Attempt to obtain a waiver in any case in which any foreign law would (but for a waiver) prevent the reporting of information required by the provision with respect to any United States account maintained by such institution, and if a waiver is not obtained from each account holder within a reasonable period of time, to close the account.

In *Notice 2010-60*, the U.S. Department of the Treasury (“Treasury”) and IRS provided preliminary guidance regarding priority issues involving the implementation of the Act and requested comments on

that guidance and other issues that should be given priority. FIBA is pleased to respond to their request for comments and stands ready to assist Treasury and the IRS to combat offshore tax evasion by U.S. persons.

II. Discussion.

We recommend that Treasury fully exercise the express authority granted to it in *Section 1471(b)(2)* to promulgate regulations that clarify the scope of the term “foreign financial institution” to except U.S. branches and agencies of FFIs from the reporting requirements of FATCA. The rationale to excepting U.S. branches and agencies from the definition of a FFI is that (A) U.S. branches and agencies are subject to the same rigorous anti-money laundering program requirements that U.S. banks are subject to, and (B) U.S. branches and agencies are subject to the same U.S. federal tax-reporting requirements that U.S. banks are subject to. Accordingly, U.S. branches and agencies should be treated equally with their U.S. bank counterparts with respect to FATCA compliance.

A. KYC Rules & Customer Due Diligence. *Section 1471* requires that an FFI either enter into an agreement with the Secretary which provides the protections outlined in *Section 1471(b)* (i.e., items 1 through 6 of Section I above), or be subject to withholding equal to 30 percent of any withholdable payment. Although U.S. branches and agencies of FFIs are not separate legal entities from the foreign banking organization, they are all subject to supervision by U.S. federal (and if applicable state) bank regulatory authorities and are required to comply with strict Know-Your-Customer rulesⁿ² (“KYC”), which in practice cause such institutions to diligence the ultimate beneficial owners of corporate accounts. The protections which the Secretary seeks in requiring the FFI to enter into the agreement described in *Section 1471(b)* are presently in place without the need of applying FATCA to this category of FFIs.

If the concerns underlying the enactment of FATCA relate to (i) jurisdiction over the FFI in order to obtain information relating to its accounts and accountholders, (ii) secrecy laws in foreign jurisdictions where the FFI maintains the accounts and (iii) adequate KYC rules, these issues are addressed under current U.S. federal law, regulation and/or supervisory expectations in the case of U.S. branches and agencies of FFIs. The U.S. KYC rules require financial institutionsⁿ³ to develop and maintain a written customer identification program and anti-money laundering policies and procedures. Additionally, financial institutions, including the U.S. branches and agencies of FFIs, must perform customer due diligence. The due diligence requirements are enhanced where the account or the financial institution has a higher risk profile. A customer identification program at a minimum requires the financial institution to collect the name, date of birth (for individuals), address, and identification number for new customers. In fulfilling their customer due diligence requirements, U.S. branches and agencies of FFIs are required to verify enough customer information to enable the financial institution to form a “reasonable belief that it knows the true identity of each customer.” For a U.S. person the identification number is the U.S. Taxpayer Identification Number (i.e., Social Security Number). For a non-U.S. person the identification number could be a U.S. Taxpayer Identification Number, passport number, alien identification number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.ⁿ⁴

Further, the Examination Manual used by federal banking agency examiners auditing the U.S. branch or agency of an FFIⁿ⁵ require that KYC procedures established by the institution must allow for the collection of sufficient information to develop a “transaction profile” for each customer. The primary objective of such procedures is to enable the institution to predict with relative certainty the types of transactions in which a customer is likely to engage. The Examination Manual further requires that internal systems be developed for monitoring transactions which are inconsistent with the customer’s transaction profile. The level, detail and documentation of “Know Your Customer” information should be greater for customers with larger balances and transaction volumes.

These requirements which already apply to U.S. branches and agencies of FFIs should satisfy Treasury that the concerns behind enactment of FATCA should not apply, and that regulations promulgated under the Act should specifically exempt, U.S. agencies and branches of FFIs as a class of institutions with respect to which the application of the FATCA provisions is not necessary to carry out the purposes of the legislation.

B. Information Reporting Requirements. With regard to information reporting, current law provides that in the case of U.S. source investment income, the information reporting, backup withholding and nonresident withholding rules apply broadly to any financial institution or other payor, including FFIs.ⁿ⁶ The technical explanation of the HIRE Act provisions prepared by the Joint Committee on Taxation indicates that

“[a]s a practical matter, however, these reporting and withholding requirements are difficult to enforce with respect to foreign financial institutions, unless these institutions have some connection to the United States, e.g., the institution is a foreign subsidiary of a U.S. financial institution, or the foreign financial institution is doing business in the United States.”ⁿ⁷
institution is doing business in the United States.”ⁿ⁷

Thus, the legislative history to the Act specifically recognizes that the noncompliance concerns which resulted in enactment of FATCA do not apply in the case of U.S. branches or agencies of FFIs which are doing business in the United States. U.S. branches and agencies of FFIs are subject to long-standing information reporting requirements, including IRS Form 1099 reporting in the case of payments to U.S. persons and to backup withholding, if applicable.

Accordingly, we urge the Secretary to except U.S. branches and agencies of foreign banks from the definition of FFIs.

III. Conclusion.

Taking into account the foregoing considerations of the regulatory scheme which U.S. branches and agencies of FFIs are already subjected to, we urge you to consider promulgating regulations which

provide for a specific exception for these types of FFIs so that they are deemed to meet the requirements of *subsection 1471(b)(2) of the Code*.

Notwithstanding the foregoing, please rest assured that FIBA members are prepared to assist in the fight against U.S. federal tax evasion by U.S. persons and will continually strive to establish training and education programs for its membership to ensure that FIBA members meet the compliance requirements resulting from enactment of FATCA.

Thank you in advance for your kind consideration of these matters. Please do not hesitate to contact the undersigned or FIBA's Executive Director, Patricia Roth, at 305-579-0086 if you should require any additional information, clarification of our comments or if FIBA may be of further assistance.

Sincerely,

Patricia Roth
Executive Director
Florida International Bankers
Association (FIBA), Inc.
Miami, FL

FOOTNOTES:

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H.R. 3933 and S. 1934, 111th Cong. (1st Sess., 2009).

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The US know-your-customer rules are primarily found in the Bank Secrecy Act of 1970 and in the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, which is Title III of the USA PATRIOT Act of 2001.

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The term "financial institution" is broadly defined under *31 U.S.C. section 5312(a)(2) or (c)(1)* and includes U.S. banks and agencies or branches of foreign banks doing business in the United States, insurance companies, credit unions, brokers and dealers in securities or commodities, money services businesses, and certain casinos.

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31 C.F.R. section 103.121(b)(2)(i)(4).

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Board of Governors of the Federal Reserve System, Examination Manual for US Branches and Agencies of Foreign Banking Organizations, available at http://www.federalreserve.gov/boarddocs/supmanual/us_branches/usbranch.pdf.

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See *Treas. Reg. section 1.1441-7(a)* (definition of withholding agent includes foreign persons), 31.3406(a)-2 (payor for backup withholding purposes means the person (the payor) required to file information returns for payments of interest, dividends, and gross proceeds (and other amounts)), 1.6049-4(a)(2) (definition of payor for interest reporting purposes does not exclude foreign persons), 1.6042-3(b)(2) (payor for dividend reporting purposes has the same meaning as for interest reporting purposes), 1.6045-1 (a)(1) (brokers required to report include foreign persons). But see *Treas. Reg section 1.6049-5(b)* (exception for interest from sources outside the U.S paid outside the US by a non-U.S. payor or a non-U.S middleman), 1.6045-1(g)(1)(i) (exception for sales effected at an office outside the U.S. by a non-U.S. payor or a non-U.S. middleman), 1.6042-3(b)(1)(iv) (exceptions for distributions from sources outside the U.S. by a non-U.S. payor or a non-U.S. middleman).

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Joint Committee on Taxation Publication, 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 (23 February 2010).