



Bank Financial Group

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August 11, 2010

The Honorable Michael F. Mundaca
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: Foreign Account Tax Compliance Act Provisions in the Hiring Incentives to Restore Employment Act of 2010

Dear Sirs:

TD Bank Financial Group is pleased to provide comments on the Foreign Account Tax Compliance Act ("FATCA") provisions of the Hiring Incentives to Restore Employment Act of 2010, P.L. 111-147, in response to the Treasury Department's ("Treasury's") and the Internal Revenue Service's (the "IRS's") request for comments in Announcement 2010-22. We look forward to helping Treasury and the IRS carry out FATCA's goal of combating offshore tax evasion.

We understand that Treasury and the IRS have received many comments regarding FATCA and, in particular, the operational challenges presented by the reporting and withholding requirements of new sections 1471 to 1474.¹ Rather than repeat herein many of these comments, we wish to make two specific suggestions that we believe serve FATCA's goal of combating offshore tax evasion while at the same time minimizing the compliance burden on foreign financial institutions.

We respectfully request that Treasury and the IRS issue guidance relating to two exceptions from the definition of "United States account." These exceptions are: (1) the exception for accounts where FATCA reporting would be duplicative under section 1471(d)(1)(C)(ii); and (2) the exception under section 1471(d)(1)(B) for depository accounts with less than \$50,000 in aggregate value.

¹ Unless otherwise specified, all section references herein refer to the Internal Revenue Code of 1986, as amended.

Background

FATCA provides that withholdable payments made after December 31, 2012 to foreign financial institutions will be subject to 30% withholding unless the foreign financial institution has entered into an agreement with the IRS to obtain and report certain information regarding the United States accounts held at that institution.² A “United States account” is defined as any financial account that is held by one or more specified U.S. persons or U.S.-owned foreign entities.³

If a foreign financial institution enters into an agreement with the IRS to report on United States accounts, the foreign financial institution will be required to report (1) the name, address, and TIN of each account holder that is a U.S. person (or, in the case of a United States owned foreign entity, the name address, and TIN of each substantial United States owner), (2) the account number, (3) the account balance or value (determined at such time and in such manner as provided in guidance), and (4) except to the extent provided in guidance, the gross recipients and gross withdrawals or payments from the account (determined at such time and in such manner as provided in guidance).⁴ A foreign financial institution may elect, however, to report under sections 6041, 6042, 6045, and 6049 as if it were a U.S. person and each holder of a United States account who is a United States person or United States owned foreign entity were a natural person and citizen of the United States (i.e., the foreign financial institution may elect Form 1099 reporting).⁵ Notably, in that case, reporting with respect to account balances and withdrawals would not be required, given that such information is not reported on Form 1099.

Duplicative Reporting

Under section 1471(d)(1)(C)(ii), a United States account does not include a financial account in a foreign financial institution if “the holder of such account is otherwise subject to information reporting requirements which the Secretary determines would make the reporting required by this section with respect to United States accounts duplicative.”

We respectfully request that, pursuant to section 1471(d)(1)(C)(ii), Treasury and the IRS exempt from the definition of “United States accounts” depository accounts held in a jurisdiction that requires information reporting to local tax authorities and routinely exchanges such information with the United States. With respect to Canada, banks (as payers or agents) are required to report amounts paid or credited to non-residents that are subject to Canadian withholding tax on Form NR4.⁶ The information required to be reported to the Canada Revenue

² Section 1471(a).

³ Section 1471(d)(1)(A).

⁴ Section 1471(c)(1).

⁵ Section 1471(c)(2).

⁶ See Canada Revenue Agency, “NR4—Non-Resident Tax Withholding, Remitting, and Reporting (2009), available at <http://www.cra-arc.gc.ca/E/pub/tg/t4061/t4061-09e.pdf>.

Agency on the Form NR4 includes the non-resident recipient's name and address, the country in which the recipient is a resident for tax purposes, the non-resident's country of residence tax identification number, the type of income being reported, the amount paid, and the non-resident tax withheld.

Form NR4 reporting is thus similar to the Form 1099 reporting required of U.S. financial institutions. As described above, a foreign financial institution may elect to conduct such Form 1099 reporting rather than report the items described in section 1471(c)(1)(C) and (D), suggesting that Congress believed that reporting on the income attributable to an account (which is required under Forms 1099 and NR4) is sufficient to help the IRS combat offshore tax evasion.

Information received by the Canada Revenue Agency on the Form NR4 is regularly reported to the IRS through information exchange conducted under the U.S.-Canada income tax treaty. In fact, the United States has found the Canadian information reporting system (and the subsequent provision of information received under that system to the United States) to be sufficiently robust to support reciprocal reporting from the United States. In 1997, when Treasury and the IRS finalized regulations requiring reporting certain bank deposit interest paid with respect to a U.S. bank account to a resident of Canada, Treasury and the IRS stated that they decided to finalize the regulations "in light of our obligations under the United States-Canada income tax treaty and the reporting by Canadian banks of U.S. depositor interest to Canadian tax authorities."⁷

Section 1471(d)(1)(B) Depository Accounts Exception

Under section 1471(d)(1)(B), a United States account generally does not include any depository account maintained by a foreign financial institution if each holder of such account is a natural person and, with respect to each holder of such account, the aggregate value of all depository accounts held (in whole or in part) by such holder and maintained by the same financial institution which maintains such account does not exceed \$50,000.

The statute does not provide explicit guidance regarding when foreign financial institutions must measure whether the aggregate value of a depository account exceeds \$50,000. To provide greater certainty and eliminate excessive administrative burdens, we believe that this \$50,000 threshold should be measured at a limited number of specific points in time, perhaps quarterly, rather than require ongoing monitoring of each account. Such a requirement should equitably balance the burdens on banks with the more limited risk of tax evasion posed by depository accounts with balances that remain under \$50,000 on each quarterly testing date.

Section 1471(d)(1)(B) provides Treasury with authority to treat financial institutions that are members of the same expanded affiliated group (as defined in section 1471(e)(2)) as one financial institution for purposes of the \$50,000 depository exception. Given the significant operational challenges that would be created by the required aggregation of affiliates, we respectfully request that Treasury limit the exercise of this authority. Entities in affiliated groups

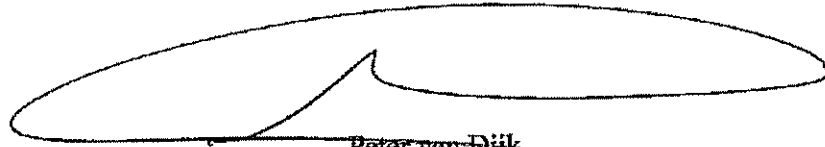
⁷ T.D. 8664 (Mar. 27, 1996).

often have different systems that do not allow for account information sharing across affiliates. Further, foreign legal restrictions may prevent such sharing of information.

Conclusion

We appreciate Treasury and the IRS's diligent efforts to provide foreign financial institutions with guidance on the new information reporting and withholding provisions and we hope that you will favorably consider the comments herein. We look forward to continuing to work with you on this important project.

Very truly yours,



Peter van Dijk
Senior Vice President; Taxation
TD Bank Financial Group

cc:

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