

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
TD BANK FINANCIAL GROUP]

November 1, 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

CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Re: *Notice 2010-60* and the 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 (“HIRE”) Act of 2010, P.L. 111-147, which enacted the information reporting and withholding rules of chapter 4 of the Internal Revenue Code. Our letter is specifically in response to the Treasury Department (“Treasury”) and the Internal Revenue Service’s (“IRS’s”) preliminary guidance and request for comments in *Notice 2010-60*, I.R.B. 2010-37 (August 27, 2010) (the “Notice”).

The Notice is an important step toward implementing FATCA in accordance with Congress’s intent. We appreciate Treasury and the IRS’s recognition that foreign financial institutions (“FFIs”) should be allowed to apply different account holder identification procedures for pre-existing and new accounts. We also applaud Treasury and the IRS’s intent, as expressed in the Notice, to publish (1) a draft FFI Agreement and information reporting and certification forms, and (2) guidance with respect to foreign currency translation for purposes of reporting account balances in U.S. dollars, both of which will increase consistency and certainty among FFIs implementing FATCA systems. Additional-

ly, we found the clarification of the term “obligation” and of FATCA’s application to insurance contracts and retirement plans helpful.

Moreover, the Notice was responsive to comments made in our August 11, 2010 letter, in which we respectfully requested that (1) Treasury and the IRS specify that, where information exchange under a treaty with respect to foreign accounts is sufficiently robust, reporting under FATCA with respect to those accounts would be excepted, and (2) the value of depository accounts be measured at specific points in time and not be aggregated among entities for purposes of determining whether such accounts may be excepted from the definition of “United States account” because they do not exceed the \$ 50,000 threshold. The Notice provides that a depository account’s balance for purposes of testing the \$ 50,000 threshold is measured at specific points in time, generally by taking an average of each month-end balance of the account during the year. The Notice also does not indicate that Treasury and the IRS will require accounts to be aggregated across entities.

We now write in response to the Notice’s request for comments on potential modifications to the withholding and information reporting requirements of chapter 4 where reporting under FATCA would duplicate existing reporting. As the Notice states, information required to be collected and reported by FFIs under chapter 4 may already be reported to the IRS, or may otherwise be readily available to the IRS through other means.

To alleviate duplicative reporting burdens, we respectfully request that Treasury and the IRS exercise their authority under *section 1471(d)(1)(C)(ii)*ⁿ¹ by excepting from the definition of “United States account” those accounts for which the following criteria are satisfied: (1) the country in which the account is held is a party to a tax treaty or tax information exchange agreement with the United States; (2) income generated in the account and earned by the account holder is reported to the tax authority in the country in which the account is held; (3) such information, as it pertains to nonresidents identified as U.S. persons, is automatically provided to the IRS; and (4) individual account holders resident in the country in which the account is held are subject to a sufficiently high tax rate.

FATCA imposes significant burdens on FFIs. If Treasury and the IRS do not adopt rules allowing for the use of existing information and systems, our calculations suggest that the costs for FFIs to build FATCA-compliant systems could exceed the revenue estimated by the Joint Committee on Taxation to be raised by FATCA.ⁿ² Excepting certain accounts in countries where sufficient information on nonresidents is passed to the United States and residents are subject to a high tax rate would satisfy Congress’s intention to minimize tax avoidance while reducing the costs associated with FATCA implementation. Such an exception may also create an incentive for foreign jurisdictions to provide more information to the United States through automatic information exchange.

I. FATCA Background

FATCA is intended to increase information reporting by exempting an FFI from 30% withholding on U.S. source payments (“withholdable payments”) if it reports certain information regarding its U.S. account holders to the IRS. Specifically, FATCA provides that withholdable payments made to an FFI

after December 31, 2012 will be subject to 30% withholding unless the FFI has entered into an agreement with the IRS to obtain and report certain information regarding its U.S. accounts. n3

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. n4 If an FFI enters into an agreement with the IRS to report on United States accounts, the FFI will be required to report: (1) the name, address, and TIN of each account holder that is a specified 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), including U.S. individuals; (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 receipts and gross withdrawals or payments from the account (determined at such time and in such manner as provided in guidance). n5 Alternatively, an FFI may elect to report under *sections 6041, 6042, 6045, and 6049* as if 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 FFI may elect Form 1099 reporting). n6

One catalyst for FATCA was Congress’s view that current procedures, including information exchange provisions in tax treaties or other bilateral agreements, available to gather information about income generated by U.S. persons abroad are not in all cases sufficient tools to combat U.S. tax evasion. In particular, Congress was concerned about the United States’ inability to obtain information about U.S. tax evaders from bank secrecy jurisdictions. n7

II. Alleviate Duplicative Reporting under FATCA

In contrast to the ineffective information exchange that was a driving force for FATCA, the United States has robust, and even automatic, exchange of information with certain countries. When FFIs are already required to report information on nonresident account holders to their home tax authorities and such information is provided to the IRS automatically through information exchange, FFIs should not be required to report such information again to the IRS. Rather, automatic information exchange should form a basis for an exception from the reporting of “United States accounts” under FATCA.

As described below, the automatic information exchange of bank account information between the United States and Canada is an example of robust and automatic exchange for which additional FATCA reporting would be duplicative. n8

A. Automatic Information Exchange under U.S.-Canada Tax Treaty

In Canada, financial institutions (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, whether such withholding tax is reduced by treaty or not. n9 The information required to be reported to the Canada Revenue Agency on the Form NR4 includes: (1) the nonresident recipient’s name and address; (2) the country in which the recipient is a resident for tax purposes; (3) the type of income being reported; (4)

the amount paid; and (5) the nonresident tax withheld. Information received by the Canada Revenue Agency on the Form NR4 is regularly reported to the IRS through information exchange under the U.S.-Canada tax treaty.

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. n10 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.” n11

The information contained in the Form NR4s provided by Canada to the United States has been recognized as similar to Form 1099 reporting. n12 In fact, the Form NR4 was once accepted in lieu of Form 1099 reporting. In 1964, the IRS stated that it would accept as substantial compliance with reporting required under *sections 6042 and 6049* “the filing by * * * banks with the Canadian Department of National Revenue for transmission to the United States of legible copies of Form NR4 . . . containing the information with respect to those items requiring Forms 1096 . . . and 1099.” n13 This was because “Canadian banks subject to the reporting requirements of *sections 6042 and 6049* . . . have offered to supply the information required . . . on Forms NR4, copies of these forms to be transmitted to the United States through Canadian tax authorities.”

Forms NR4 were accepted in lieu of Forms 1099 from 1964 to 1987. The decision to cease accepting Forms NR4 appears to have been made *not* because the IRS was concerned that they did not provide adequate information, but rather because the Forms NR4 did not contain certain newly-required advisory language for Form 1099 reporting. The Interest and Dividend Tax Compliance Act of 1983 created a requirement that information returns required under certain Code provisions, such as Forms 1099, contain a clear statement that the income being reported is subject to tax, has been reported to the IRS and, if not reported, would generate a negligence penalty. *Revenue Procedure 87-17* provided that language substantially similar to the advisory language on the official Form 1099 must also be included in substitute Forms 1099, such as the NR4. n14 Because the Form NR4 did not contain this language, the IRS stated in *Revenue Ruling 87-123* that it would no longer accept Form NR4 in lieu of Form 1099. n15

As described above, *section 1471(c)(2)* provides that an FFI may elect Form 1099 reporting rather than report the items described in *section 1471(c)(1)(C)* and (D), showing that Congress believed the reporting of income generated in an account, as an alternative to the standard FATCA method of reporting the inflows to and outflows from an account, is sufficient to help the IRS combat offshore tax evasion. Accordingly, where such information is provided by an FFI to the tax authorities in the country where the account is held and then provided to the United States automatically through information exchange, as is the case in Canada with the NR4 and automatic exchange with the United States, such information should be sufficient to meet the objectives of FATCA.

B. Exception is Narrowly Tailored

1. Exception is Account-By-Account

The Notice expresses concern about exempting from the FATCA requirements FFIs that are also controlled foreign corporations (“CFCs”). Comments had requested that CFCs “be treated as deemed-compliant FFIs under *section 1471(b)(2)* because CFCs already are subject to various information reporting requirements.” Treasury and the IRS observed, however, that CFCs’ Form 1099 reporting obligations do not apply in the case of certain payments to domestic corporations and U.S. owners of foreign entities, two classes of account holders required to be reported under FATCA. n16 The Notice states that, instead of a wholesale exemption for CFCs from FATCA reporting, Treasury and the IRS anticipate coordinating the reporting required of financial institution CFCs under chapter 4 with other U.S. tax reporting obligations, with the objective of avoiding duplicative reporting. Thus, while CFCs will not be wholly exempted from FATCA reporting, information that they already provide may not be required to be reported again under FATCA.

Our proposal is consistent with the Treasury and IRS’s desire not to exempt completely certain FFIs, but instead to coordinate FATCA with existing reporting to prevent duplicative reporting. An exception from the definition of “United States account” for certain accounts would be narrowly targeted to alleviating inefficiencies in reporting, rather than exempting entire entities from FATCA. n17

2. Exception Minimizes Risk that U.S. Persons Would Claim to be Local Residents to Avoid Reporting

By requiring that residents of the country in which the account is held must be subject to a sufficiently high tax rate in order for accounts in that country to qualify, the exception minimizes the risk that U.S. residents would claim to be local residents to avoid having their income reported in the home country and automatically provided to the IRS. For example, Form NR4 reporting is required only for nonresidents of Canada. Thus, some U.S. individuals who are (or state they are) residents of Canada would not be subject to NR4 reporting. However, because income on such individuals’ accounts would then be reported to the Canada Revenue Agency and taxed as Canadian residents’ income at a rate comparable to the rate in the United States, the risk of U.S. persons masquerading as Canadian residents to evade NR4 reporting and U.S. taxes appears to be low.

C. Exception Incentivizes Trading Partners to Strengthen Information Exchange

Providing an exception for accounts for which information is already reported to foreign authorities and automatically provided to the United States could encourage other countries to further develop their information exchange programs. If countries already require institutions to report certain information regarding the income of nonresidents but such information is not yet provided automatically to the United States, these countries may determine that they should automatically report such information to minimize the need for their financial institutions to engage in costly duplicative reporting. n18

III. Conclusion

We respectfully request that the Treasury and IRS except from the definition of “United States account” those accounts for which (1) the country in which the account is held is a party to a tax treaty or tax information exchange agreement with the United States; (2) income generated in the account and earned by the account holder is reported to the tax authority in the country in which the account is held; (3) such information, as it pertains to nonresidents identified as U.S. persons, is automatically provided to the IRS; and (4) individual account holders resident in the country in which the account is held are subject to a sufficiently high tax rate.

We believe this exemption would carry out Congress’ goals of combating U.S. tax evasion while minimizing duplicative reporting. Further, by allowing information exchange programs to satisfy at least part of FFIs’ reporting obligations, Treasury and the IRS will create an additional incentive for countries to enter into or enhance their automatic information exchange with the United States.

We look forward to continuing to work with you on this important project and hope that you will favorably consider the comments herein.

Very truly yours,

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

cc:

Mr. Stephen E. Shay
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury

Mr. Steven A. Musher
Associate Chief Counsel (International)
Internal Revenue Service

Ms. Manal S. Corwin
International Tax Counsel
Department of the Treasury

Mr. Michael Danilack
Deputy Assistant Commissioner (International)
Internal Revenue Service

Mr. Jesse Eggert
Attorney Advisor, Office of the International Tax Counsel

Department of the Treasury

Mr. Itai Grinberg
Attorney Advisor, Office of the International Tax Counsel
Department of the Treasury

FOOTNOTES:

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Under *section 1471(d)(1)(C)(ii)*, a “United States account” does not include a financial account in an FFI 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.”

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See Joint Committee on Taxation, “Estimated Revenue Effects Of The Revenue Provisions Contained In An Amendment To The Senate Amendment To The House Amendment To The Senate Amendment To H.R. 2847, The ‘Hiring Incentives To Restore Employment Act’ Scheduled For Consideration By The House Of Representatives On March 4, 2010” (Mar. 4, 2010, available at <http://www.jct.gov/publications.html?func=startdown&id=3650> (estimating that the FATCA provisions of the HIRE Act will raise \$ 7.6 billion over 10 years).

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Section 1471(a).

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Section 1471(d)(1)(A).

n5

Section 1471(c)(1).

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Section 1471(c)(2).

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See U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Select Revenue Measures, Hearing on Foreign Bank Account Reporting and Tax Compliance, Opening Statement of Subcommittee Chairman Neal (Nov. 5, 2009), *available at* <http://waysandmeans.house.gov/Hearings/transcript.aspx?NewsID=10411>.

n8

Such automatic information exchange under the U.S.-Canada tax treaty clearly contrasts with the provisions for information exchange upon request (and absence of automatic information exchange) under the U.S.-Swiss tax treaty.

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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>.

n10

The United States’ exchange of information with Canada is discussed in the JCT Technical Explanation to the FATCA provisions of the HIRE Act. The JCT Technical Explanation states: “Treasury regulations require a bank to report interest if the recipient is a resident of Canada and the deposit is maintained at an office in the United States. *Treas. Reg. secs. 1.6049-4(b)(5), 1.6049-8*. This reporting is required to comply with the obligations of the United States under the U.S.-Canada income tax treaty.” JCX-4-10, p. 24, n.104 (February 23, 2010).

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T.D. 8664 (Mar. 27, 1996).

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With respect to regular depository accounts of individuals, *section 6049* requires interest payers to report: (1) the name, address, and TIN of each account holder that is a U.S. individual; (2) the account number; (3) the aggregate amount of interest payments; and (4) the amount of tax deducted and withheld under the backup withholding rules. As described above, Form NR4 similarly requires the reporting of: (1) the nonresident recipient’s name and address; (2) the country in which the recipient is a resident for tax purposes; (3) the type of income being reported; (4) the amount paid; and (5) the nonresident tax withheld.

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Rev. Rul. 64-304, 1964-2 C.B. 466 (Jan. 1, 1964). *Revenue Ruling 64-304* revoked a revenue ruling issued one year earlier that had stated Forms NR4 could not be accepted. *See Rev. Rul. 63-262, 1963-2 C.B. 598.* Five months prior to *Revenue Ruling 64-304*, a private letter ruling had denied the use of Forms NR4 in lieu of Form 1099 and Form 1096 reporting. *PLR 6308024490A (Aug. 2, 1963).* In denying the use of Forms NR4, the private letter ruling stated that NR4s with regard to persons with addresses in the United States are sent by the Canadian Department of National Revenue to the U.S. Treasury Department in accordance with the U.S.-Canada tax treaty.

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Rev. Proc. 87-17, 1987-1 C.B. 688 (May 4, 1987).

n15

Rev. Rul. 87-123, 1987-2 C.B. 268 (Nov. 16, 1987).

n16

FATCA requires reporting to U.S. corporations, but CFCs are not required to report certain payments to U.S. corporations. FATCA requires reporting with respect to certain owners of corporate account holders, whereas CFCs are not required to report on U.S. owners of corporate account holders. In addition, FATCA requires FFIs to obtain waivers of foreign law to allow reporting on U.S. accounts or where the waiver cannot be obtained to close such accounts but no such requirement applies to CFCs.

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The exception could also be limited to reporting with respect to individuals if the IRS remained concerned that corporate accounts could still be used as nominees to hide U.S. beneficial owners.

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In addition, an exception for accounts for which information is provided to the United States through information exchange could be the basis for an exception for information provided to the United States under any future multi-lateral information exchange agreements.