

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
FEDERAÇÃO BRASILEIRA DE BANCOS]

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Federação Brasileira de Bancos - FEBRABAN (the Brazilian Federation of Banks) is a private association that represents 121 banks out of a total of 157 Brazilian banks. We appreciate the opportunity to provide comments and suggestions on the Foreign Account Tax Compliance Act - FATCA. These comments result from an extensive effort of FEBRABAN to understand F.A.T.C.A. and its implications in the Brazilian legal and financial environment.

We present the comments and suggestions hereunder in a best effort to cooperate with F.A.T.C.A. final regulations. The decision to participate or not in F.A.T.C.A. is a business decision that will be taken individually by each financial institution in the future. Therefore, this letter does not represent a commitment of any of our associated financial institutions with the participation in F.A.T.C.A.

We are supportive of regulations that increase tax transparency and reduce tax evasion, as well as prevent money laundry. However, we also understand that these regulations should be enacted by national authorities of each country or through international treaties so that they have reciprocity and are fully compatible with the constitutional and legal order of each country concerned. Due to certain legal constraints and high operational costs, F.A.T.C.A., as currently established, may not be fully implementable in each country even if its financial institutions desire to do so, nor achieve the intended results in the most efficient manner. In order to try to minimize these legal constraints and risks, and optimize costs, while still pursuing the major objective of F.A.T.C.A., we have worked on a set of proposals and requested clarifications that we submit to your consideration.

Our evaluation has been made based on current acknowledgement of F.A.T.C.A. and possible implications in Brazil. We may need to provide you complimentary comments and suggestions in the future since our evaluation may need to be adapted to further developments of F.A.T.C.A. regulations and

implantation as well as to occasional future instructions that we may receive from Brazilian authorities in charge of establishing law and regulation concerning Brazilian banking, financial and securities market and taxation, as well as from our associated banks.

We respectfully request you to schedule a meeting at a date and time of your best convenience to discuss the suggestions presented below.

The Brazilian banking, financial and capital markets are required to abide by Brazilian regulations on market players, products, securities, services, among others. Brazilian financial institutions will need to interpret and implement F.A.T.C.A. according to local regulations and practices in order to comply with such rules. After the revision of proposed F.A.T.C.A. regulations and the publication of their final form, we intend to work on a set of interpretative guidelines that may be followed by financial institutions in the Brazilian market willing to join F.A.T.C.A. We propose to discuss and approve these specific guidelines with the Internal Revenue Service (IRS) and the U.S. Department of Treasury (Treasury) and expect to receive your suggestions in this regard.

These guidelines will help reduce gaps in the access of information and legal interpretation on F.A.T.C.A. in Brazil, and may thereby spare unnecessary operational costs, avoid legal exposure and help build a common and transparent understanding in Brazil and the US of how F.A.T.C.A. could be applicable in Brazil.

I - General overview of the Brazilian Financial Market

Brazil has approximately 193,3 million inhabitants ⁿ¹ and the economically active population is more than 101,1 ⁿ² million individuals. The number of legal entities in Brazil is around 4,3 million. This public is served by 157 banks in Brazil ⁿ³ of which just a few are retail banks. The number of customers in large financial groups in Brazil tends to be expressive.

Banks in Brazil provide services through more than 19.813 branches, 178.737 A.T.M.s, in addition to 165.228 corresponding agents and internet online services. Brazil has more than 141 million deposit accounts and more than 97 million savings accounts ⁿ⁴. There are about 11.339 ⁿ⁵ investment funds in Brazil, 89 institutions that administrate those funds and 439 investment managers.

II - Summary of Our Proposals and Requested Clarifications

Considering the dimensions of the Brazilian financial market and taking into account that in most cases information needed for F.A.T.C.A. is not available for financial institutions, we estimate that F.A.T.C.A. compliance costs in Brazil will be extremely high for a relatively low number of potential US account holders.

We envision that F.A.T.C.A., as currently structured, involves several legal constraints in Brazil. F.A.T.C.A. clashes with certain aspects of the Brazilian Federal Constitution, especially concerning the fundamental rights of non-prejudice and equality of a US person as compared to any other person, the right to privacy and secrecy of financial data, and the prohibition to use unlawful pressure to do oth-

erwise. F.A.T.C.A. also goes against the Brazilian tax system, since income tax can only be collected according to Brazilian law and to the benefit of the Brazilian Federal Union. Financial market regulations do not allow financial institutions that operate in Brazil to charge the US withholding costs to their customers contractually. The acts of Brazilian financial institutions to pursue F.A.T.C.A. enforcement may thus be considered as illegal and unconstitutional, putting those institutions in a position of having to face unfair US tax costs, civil and regulatory legal suits in Brazil.

Considering the high cost and the legal constraints, we strongly suggest you to consider reducing the scope of F.A.T.C.A. application to countries that have a general taxation burden lower than the tax burden prevailing in the US, and to countries that do not have financial market regulations that require financial institutions to identify the beneficiary of financial investments. Brazil has a high tax burden and a highly regulated and controlled financial market. We also suggest that you focus compliance measures on financial accounts opened after a given date, relieving the requirements for existing ones.

We have also prepared a set of specific suggestions to address some of the Brazilian legal constraints and to reduce compliance costs of F.A.T.C.A. We provide those suggestions in detail in the attached document.

We suggest that final regulations do not provide for US source payment allocation to non-participating foreign financial institutions or recalcitrant account holders based on pass-thru payment percentages. Alternatively, US source payments could be attributed to such counterparties if the transactions they pursue with the participating foreign financial institutions (FFI) have a direct contractual or factual connection with a US asset and US source payment. The situations that create a contractual or factual connection should be defined in an internal policy of the FFI that must be followed by the FFI, and evaluated by internal and external independent compliance agents. The policy must be made available to the IRS and Treasury and follow F.A.T.C.A. specific regulations as applicable.

We suggest that F.A.T.C.A. provides for certain “de minimus” or safeharbor conditions that, when followed by participating financial institutions, prevent them from having to compute and withhold US taxes on passthru payments as well as to publish passthru payment percentages if F.A.T.C.A. regulations otherwise maintain the need to compute and publish such percentages.

F.A.T.C.A. regulations should also clarify other thresholds that, if trespassed, may cause the termination of F.A.T.C.A. Agreement. We strongly suggest that prior to any such termination the US authorities formally notify the foreign financial institution and give it the chance to justify its actions and agree to a specific term of commitment or ruling to govern the situation.

In order to reduce unnecessary and ineffective compliance costs, we request additional clarifications that we briefly summarize below. We suggest that final regulations exempt non-financial foreign entities (NFFE) from F.A.T.C.A. when they are taxed in more than 30 percent on financial income and assets. Charitable non-profitable organizations involved in education, social care, cultural or environmental activities should also be exempt from F.A.T.C.A. Additionally, we request that F.A.T.C.A. expressly clarifies that governmental debt securities as well as securities traded in regulated exchanges and similar markets are already exempted from F.A.T.C.A. application. Therefore, the clearing houses dealing

solely with these types of assets should be equally exempted. We request exemption from F.A.T.C.A. for capitalization entities and pension funds since they represent a low risk of tax evasion.

With regard to the investment fund industry, we request clarifications on whether or not Brazilian investment funds qualify as foreign financial institutions, since they do not have legal veil. We also suggest clarifications on the obligations under F.A.T.C.A. for each market player. We suggest that the allocation of US assets to quotaholders is made in the current period based on an estimate of US assets of the previous period, because it is impossible to allocate assets in the fund to the individual quotaholder since portfolio of assets and composition of quotaholders change daily and the fund does not record real time information on the composition of assets, especially in the case of fund of funds. Funds that have more than a given number of quotaholders should also be exempt from F.A.T.C.A. since they may be in the same situation as publicly traded portfolios or entities.

We also request further clarifications on the obligations of each market player under F.A.T.C.A. in the case of other types of financial assets.

We offer a set of additional operational suggestions that may reduce costs and optimize F.A.T.C.A. implementation. We suggest that the percentages of participation in the NFFE defined by local regulations be accepted by F.A.T.C.A. in order to identify the ultimate beneficial owner. In Brazil, the ultimate beneficial owner is identified if he/she owns more than 25 percent of the NFFE. We suggest that the local rule be accepted by F.A.T.C.A.

We suggest that the thresholds of US\$50,000.00 and US\$500,000.00 to determine F.A.T.C.A. compliance can be fixed in local currency for a given period of time since local accounting of FFI is usually made in local currency. We suggest the extension of the US\$50,000.00 exemption threshold to all financial accounts within a same FFI, not only to deposit accounts. F.A.T.C.A. should provide for an exception of not undertaking due diligence of inactive accounts, and establish more flexible due diligence procedures to accounts with a balance below US\$500,000.00, allowing that FFI chooses the specific way it will conduct the due diligence of its client base, either electronically or physically, or using file information.

F.A.T.C.A. should clarify that the FFI may consider an individual not to be a US person, in the absence of US indicia, if the FFI has proof that the individual is either (i) a Brazilian citizen, or (ii) an alien from a country other than the US, or (iii) a Brazilian resident, or (iv) an alien resident in a country other than the US, or if the FFI has obtained a declaration from the individual that he is not a US person. Only if US indicia are present, the FFI should additionally obtain a specific declaration of non-US status with supporting documents.

We look forward to the opportunity of discussing our comments on F.A.T.C.A. in a meeting with you and your staff, and thank you in advance for the opportunity of providing you with our comments, and for your efforts and attention to evaluate our suggestions presented herein.

Best Regards,

[signed]
FEBRABAN ~
Federação Brasileira de Bancos
Murilo Portugal
Chairman
Sao Paulo

FOOTNOTES:

n1

Source: IBGE ~ Institute Brasileiro de Geografia e Estatística/Brazilian Institute of Geography and Statistics

n2

Source: IBGE ~ Institute Brasileiro de Geografia e Estatística

n3

Source: Banco Central do Brasil/Central Bank of Brazil (BACEN) ~ 2010

n4

Sources: Banco Central do Brasil/Central Bank of Brazil (BACEN) ~ 2010

n5

Source: ANBIMA ~ Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais/Brazilian Financial and Capital Markets Association ~
<http://www.anbima.com.br/mostra.aspx/?id=4810>.