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29th July 2010

Mr. Steven A. Musher
Internal Revenue Service
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Mr. Michael Danilack
Deputy Commissioner (Int'l) LMSB
Internal Revenue Service
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Dear Gentlemen

Re: The Foreign Account Compliance Tax Act

The purpose of this letter is to advise you of our concerns regarding some of the provisions of the Foreign Account Compliance Tax Act (FATCA), which was signed into law in March 2010 as part of the Hiring Incentives to Restore Employment Act (HIRE Act). We understand that the U.S. Department of the Treasury (the "Treasury") and the Internal Revenue Service (IRS) are in the process of drafting regulations to implement the provisions of FATCA. We would note that individual members of the International Banking Federation (IBFed) may be providing input to the IRS during this process; however, we are providing you with a very broad overview of the industry's global concerns, which we believe must be addressed as the IRS embarks on its consultation process for possible regulations.

The IBFed is the representative body for national and international banking federations from leading financial nations around the world. Its membership includes the American Bankers Association, the Australian Bankers' Association, the Canadian Bankers Association, the European Banking Federation, and the Japanese Bankers' Association. The China Banking Association, Indian Banks' Association, Korean

Federation of Banks and the Bankers' Association of South Africa are associate members. This worldwide reach enables the IBFed to function as the key international forum for addressing legislative, regulatory and other issues of interest to the global banking industry. We welcome the opportunity to comment.

Goals of FATCA

The IBFed supports the goals of the United States Government in enacting FATCA – to ensure that all citizens pay their fair share of tax. Nothing in this letter should be perceived as an attempt to challenge the authority of the U.S. government to tax its citizens on a worldwide basis. Rather, our objective in writing this letter is to bring to the attention of the IRS and Treasury compliance challenges that FATCA will create and offer some solutions that may address some of those challenges without compromising the policy objectives of FATCA.

Proportionality as a Guiding Principle

Above all, the IBFed believes that if FATCA is to achieve its objective of maximizing the flow of usable information to U.S. tax authorities, the regulations must be guided by the principle of proportionality. The burden of compliance that FATCA places on financial institutions, and the burden that institutions then need to place on their clients, must be proportionate with the likelihood that those compliance activities will yield sufficient incremental tax revenue to U.S. government and/or identify any meaningful number of otherwise unidentified U.S. persons.

A lack of proportionality would almost certainly thwart the effectiveness of FATCA. For example, if the U.S. government casts its net too broadly, the flood of information flowing into the IRS - much of which would be not be useful - could become unmanageable. This would make it more difficult for the U.S. government to quickly obtain the useful, actionable information that it is trying to get through the FATCA provisions.

The principle of proportionality is embodied in the legislation. In a number of areas, the legislation provides the Secretary with discretion to grant exemptive relief to institutions, individuals, or payment types where the likelihood of tax evasion is low and/or where enforcement is unnecessary to achieve the objectives of the Act. Therefore, the success or failure of FATCA will depend on the appropriate use of that flexibility by U.S. authorities to ensure that the compliance burden is proportionate.

We believe FATCA's goal of identifying U.S. persons investing offshore will only be achieved if the vast majority of "foreign financial institutions" ("FFIs") and non-financial foreign entities ("NFFEs") participate in the new system and supply the data identifying their U.S. customers and owners. For most FFIs and NFFEs, the decision about whether or not to participate will be based on a commercial decision as to whether the profits from their U.S. sourced investments and operations outweigh the costs, burdens and risks of complying with FATCA. An additional technical point is whether they have the capability to provide their clients with access to U.S. sourced

investments. For some, the decision will also be influenced by whether they can comply while still adhering to their own domestic banking and privacy laws.

Proportionality in Practice

The following suggests areas that the Treasury should make use of its authority to be flexible:

- *It is much more difficult to document existing customers' nationality than that of new customers.* The reasons for that are relatively simple – there are far more existing clients at any given time than there are new clients at any given time, and documenting new clients is simpler than going back to existing clients to seek additional information. To be proportionate, therefore, the compliance burden associated with existing clients needs to be lower than that associated with new clients.
- *The risk of tax evasion among countries is not uniform.* All other things being equal, those countries that already exchange tax information with the United States would seem to present a lower risk of tax evasion than those that do not. Proportionality would suggest, then, that the compliance threshold for those that already have such agreements, or are willing to enter into them, should be lower than institutions in countries that do not have such agreements.

The IBFed is concerned that the broadness of some of the provisions of the law, absent regulatory measures, may violate the principle of proportionality by capturing activities and entities that are not the intended targets of the law. It is important to point out that FATCA does not simply modify the current U.S. withholding tax system – it creates a new U.S. withholding tax system. Financial institutions and non-U.S. entities worldwide will now be assessing whether or not to participate in the new regime.

We request that, as the Treasury and IRS start to draft regulations to implement FATCA, the suggestions outlined below should be seriously considered in order to help ensure that the law is proportionate.

Overly Broad Definitions

The FATCA definition of FFI is quite broad and includes not only banks and broker/dealers but also virtually every type of investment vehicle, including hedge funds, private equity funds, widely held and private investment funds, and a myriad of other financial structures (such as securitization vehicles, pension funds, and insurance company accounts), that invests in U.S. securities.

We believe that there could be potentially tens of thousands, and perhaps even hundreds of thousands, of foreign entities defined as FFIs under the FATCA statutory definition. This potential inclusion of all sorts of entities in the definition of FFI presents significant problems for both the IRS and foreign entities. The IRS would be overwhelmed with information from entities that should not be deemed FFIs under FATCA and foreign entities would have to go through the onerous task of making the

determination of whether or not they are covered by the definition. We believe that regulations could be drafted in a manner that will address these problems by:

- (1) including a carve out for FFIs that present a low risk of being vehicles for U.S. tax evasion because they are highly unlikely to have direct U.S. customers; and
- (2) providing a relatively easy election and verification regime for an FFI to certify that it has no U.S. accounts.

Due Diligence Issues

An FFI entering into a reporting agreement would potentially expose itself to significantly expanded due diligence risks and costs (in addition to the costs of modifying internal systems and administrative routines).

We believe that it is essential that the unique due diligence issues that arise from FATCA are carefully considered and managed and that potential carve out opportunities for FFIs are maximized. In that respect, we suggest the following:

- (1) The requirement to obtain information regarding each holder of each account maintained by the FFI, as is necessary to determine any such accounts that are United States Accounts, should be applied very flexibly and pragmatically. A suitably pragmatic approach would be, for example:
 - For existing account holders, there should be no requirement to collect additional KYC information, unless triggered by an AML/CTF risk trigger or by a request from the IRS to review a list of named U.S. persons.
 - There should be a presumption that existing account holders are non-U.S. persons unless existing customer data provides evidence to suggest otherwise (e.g., U.S. address, U.S. passport or U.S. driver's license presented as ID at account opening, etc.) FFIs should only be required to conduct further search of existing electronic data for indicia of U.S. personage and only follow up with those clients where such indicia exists.
 - For new accounts, additional KYC should be collected and verified where there is some indication of AML/CTF risk. While FFIs may be required under their agreements with the IRS to ask about nationality, failure by the account applicant to provide such indicia of nationality should not trigger a requirement that the FFI refuse to open an account.
- (2) Due diligence should be applied separately to each FFI, without regard to any other members of its Expanded Affiliated Group. Further, we urge the IRS to work with industry to develop a publicly available list

of particular business areas that would be out of scope under the Expanded Affiliated Group provisions.

- (3) FFIs and NFFEs should be allowed to rely on a self certification or amended Form W-9 from the U.S. person or be given the option to deem a U.S. person to be a Specified United States Person in the absence of reliable evidence to the contrary.
- (4) The exemption for small deposit accounts (i.e., under \$50,000) should be made more flexible by relaxing the requirement that it is calculated on an aggregate basis within an FFI, and the IRS and Treasury should provide reassurance that they will not exercise the option to require that it be aggregated across the entire expanded financial group.
- (5) Flexibility should be applied with respect to the FFI reporting agreement: We suggest that there be flexibility on the FFI reporting agreement, particularly as it pertains to global financial institutions. It is important that obligations under the reporting agreement are clearly set out and written in a form that is capable of being easily understood by the operational staff responsible for its operation. The compliance standard to which global institutions are held should also be sufficiently flexible to make allowance for the myriad of domestic legislative and regulatory environments in which they operate. The lack of compliance by one FFI within the affiliated group due to legislative or other local impediments should not cause the entire expanded affiliated group to be deemed to be out of compliance. Further, we suggest that consideration be given to having an option within the regulations for an enhanced Foreign Financial Institution-Qualified Intermediary agreement specifically focused on existing compliant and established QIs.

Account Openings and Closings

Flexibility must be a feature, especially as it pertains to retail banking. Governments sometimes tend to view retail bank accounts as requirements for social inclusion and sometimes create legislative, regulatory, or other obligations to give effect to that view. If FATCA compliance were to be viewed by national regulators as restricting access to banking services, it is likely that prudential banking regulators would view that very negatively and potentially provide a strong response that would make it even more difficult for FFIs to comply with the terms of FATCA. Again, the principle of proportionality should be considered here. In this case, the regulatory and reputational risk that institutions could face from being seen as denying access to accounts and the influence that has on their decision about whether to comply with FATCA would be disproportionate to the amount of additional tax revenue that the U.S. government could hope to achieve by attempting to document all of these

individuals. This is magnified when considering that a standard transactional account is unlikely to be used as a tool for generating material levels of income.

Publication of FFI List

We suggest that a list of FFIs that have entered into reporting agreements be published on the IRS web site and that the IRS notify all such FFIs of any changes or updates to the list (additions and deletions) by e-mail. In addition, Form W-8 series should be modified so as to identify FFIs that have entered into a reporting agreement.

Identification of Substantial United States Owners

We suggest that the current ownership limit of 10 percent for identifying a "Substantial United States Owner" be revised to 25 percent or any alternative percentage required under relevant AML requirements and that Form W-8BEN be amended so as to include Substantial United States Owner details (name, address & TIN).

Refunds of Amounts Withheld

We urge the IRS to develop an efficient and timely process for the refund of excess withholding and issue clear guidance explaining how this process will work. The IBFed additionally seeks clarification in relation to how withholding on gross proceeds can be relieved under treaty and the potential for treaty provision to be overridden.

Transitional Period

We suggest a three year transitional period starting from the enactment of final regulations and guidance, during which an FFI would not be subject to claims for under-withholding or penalties if it is able to demonstrate that it is taking reasonable steps to modify systems and ensure internal administrative compliance with FATCA requirements.

We would welcome an opportunity to further discuss any of our comments with you at your convenience. Please contact me at (phone #) or (email) if you have any questions or would like to meet to discuss our comments.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Sally Scutt". The signature is fluid and cursive, with a large initial "S" and a distinct "Scutt" at the end.

Mrs Sally Scutt

Managing Director

CC:

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