

Dear Sir or Madam,

With great interest EFAMA¹ has learned of your legislative proposal for a 'Foreign Account Tax Compliance Act' ("the Act"). We understand the legitimate intent behind the proposed legislation of clamping down on tax evasion and of giving the IRS new means of detecting and discouraging offshore tax abuses.

EFAMA has reviewed the Act and is committed to engage constructively with the Internal Revenue Service with a view to ensuring that the Act can be implemented in a meaningful and practical manner whilst minimising any possible damage to the US capital market as well as to the European fund industry investing in the US. Our concern lies with the practical difficulties which UCITS and other Collective Investment Vehicles (CIVs) will face in seeking to comply with the Act given the distribution models for CIVS which applies throughout the EU/EEA.

We note that the proposed legislation introduces a new reporting regime for both foreign financial institutions (FFI) and non-financial foreign entities, but also increases the potential penalties for failure to comply with the proposed rules.

It is our understanding that the scope of application of the new regime would go beyond traditional financial institutions and cover virtually every type of foreign investment entity. As US commentators² are pointing out, the notion of an FFI seems to comprise not only foreign banks and foreign custodial businesses but also any foreign entity engaged primarily in the business of investing or trading in securities, partnership interests, commodities or any derivative interests therein ("foreign investment entities"). According to the Joint Committee on Taxation Explanation ("JCT explanation") investment vehicles such as hedge funds and private equity funds among other entities will also fall within the scope of this regime. In addition, commentators are of the view that the measures will also extend to other investment vehicles, whether widely held or privately owned.

¹ EFAMA is the representative association for the European investment management industry. It represents through its 26 member associations and 44 corporate members approximately EUR 11 trillion in assets under management of which EUR 6.4 trillion was managed by approximately 53,000 funds at the end of June 2009. Just over 37,000 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds. For more information about EFAMA, please visit www.efama.org.

² Cleary Gottlieb Steen & Hamilton, 2009

Under the new regime withholding agents would be required to withhold a 30% tax of *all* payments to an FFI of (1) US source dividends, interest or other “FDAP”³ income, and (2) any gross proceeds from the sale of assets that can produce US source dividends or interest (collectively, “withholdable payments”), *unless* the FFI enters into an agreement with the IRS that requires the FFI to follow the new information reporting and withholding rules that apply to payments to US persons

We understand that European funds that invest in US securities will suffer 30% withholding on gross sales proceeds and other “FDAP” income, such as dividends, interest etc. *unless* they can either show i) the new provisions are not applicable in their precise circumstances, or ii) they comply with the requirement to report underlying US holders to the US government.

Clearly, suffering 30% withholding on proceeds would be commercially fatal to a US benchmark fund. However, substantial complexities are connected with entering into an agreement with the IRS that requires the fund to report details on every US account holder. The reason for this difficulty consists in the little that is usually known at fund level about the investors of the fund.

In general fund contexts are heavily intermediated. Share or unit purchases are rarely made by retail investors directly with the CIV or its transfer agent. In the overwhelming majority of cases CIVs will enter into distribution arrangements with distributors who will themselves enter into further arrangements with downstream distributors or “intermediaries” in the distribution chain (such as banks, insurance companies or independent advisors).

Intermediated purchases of CIV shares or units are typically held in an omnibus or nominee account. These kinds of accounts are a particular manifestation of the fact that individual customer information is generally regarded as valuable proprietary information which is, therefore, not passed up the chain of intermediaries to the CIV. In an omnibus account sales and purchases are usually made on behalf of collections of investors on a net purchase or net sales basis. Those transactions can thus not be attributed to individual investors behind the nominee. An additional difficulty emanates from the fact that the investor base of a widely-held CIV changes on a daily basis.

For all these reasons it will be extraordinarily difficult for a fund to get hold of the required information about its potentially existent US investors on an ongoing and all- comprehensive basis.

However, it should be noted that many European funds have distribution restrictions that limit distribution of shares in the funds to non-US persons. These cases should be excluded from the general application of the proposed mechanisms.

The US authorities are engaged in the ongoing OECD project dealing with issues in the context of cross-border investments and reporting. The work undertaken in this project as

³ FDAP income = “Fixed Determinable Annual Periodical” income. This covers a very broad range of income payments, i.e. payments of US –source fixed or determinable annual or periodical gains, profits, or income. FDAP income includes interest and dividends, but generally does not include gross proceeds or gains from sales.

well as the findings reached take the complexities addressed above fully into account and should be of help also in the context of the current discussion.

In view of the swift progress of the debate we will provide you with any additional information as soon as possible and stand ready to answer any questions you may have.

With kind regards,

A handwritten signature in black ink, appearing to read 'Peter DE PROFT', with a large, sweeping flourish extending to the right.

Peter DE PROFT
Director General