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Dear Sirs,

Subject: Sec. 871(m) IRC and FATCA

The European Banking Federation (EBF), which is the voice of European banks, is very concerned about the unintended consequences of FATCA and by the side effects that the regulations under Section 871(m) of the Internal Revenue Code (IRC) will have on European markets, particularly on the European securities market. We have already expressed our views on these regulatory initiatives on various occasions. We enclose herewith our latest letter dated 31 July 2017.

IRC Sec. 871(m)

The final regulations under IRC Sec. 871(m) included requirements concerning the combination of non-delta-one transactions which cannot practically be administered for securitized structured products. In addition, implementation efforts required from financial institutions providing custodial and depository services far outweigh the objectives of the law and the amount of revenue that would be generated.

Notice 2017-42 released by the U.S. Treasury and the IRS on 4 August 2017, extended the transition period for applying certain parts of the Section 871(m) IRC rules for another 12 months. It was a very welcomed relief.

In this respect, we call for an **indefinite extension of the status quo regarding Sec. 871(m) IRC**. Specifically:

- non-delta-one transactions should remain out of scope;
- the simplified standard for withholding agents ("price, marketed or sold") to determine whether transactions and combined transactions should be retained; and
- the withholding exemption for dividends received by Qualified Derivatives Dealers (QDDs) on physical securities held as hedges should be permanent.

In the absence of an indefinite extension of the status quo the EBF believes that a **thorough revision of the final regulations** is necessary. In particular, the rules regarding combined transactions in § 1.871-15(n) are operationally unworkable and need to be fundamentally amended and further detailed. Therefore, we believe the simplified standard remains the only viable option.

Due to the fact that only five months of the current transition period are left, we kindly request for an additional extension of the relief provisions currently in effect under Notice 2017-42 for at least another year as a near-term relief for the financial industry for 2019.

Furthermore, we would like to point out that the issue of the qualification of dividend equivalent payments under the applicable tax treaties is still unresolved between the tax administrations of the major EU Member States and the United States.

We call for the U.S. Department of Treasury to **discuss the implementation of Sec. 871(m) IRC with European governments in the framework of their respective Double Tax Treaties**. On 27 June 2018, the IRS released a new QI/WP/WT FAQ which provides that "a QI that is not acting as a QDD must take into account the good faith standard described in Notices 2016-76 and 2017-42 with respect to its section 871(m) transactions as an intermediary for purposes of its periodic review". As a consequence, the IRS requires that the QI discloses "any section 871(m) transactions included in [such] review that the QI believes should be subject to the good faith standard for purposes of reporting the factual information with its periodic certification that includes the 2017, 2018, or 2019 years", by uploading an attachment to the Qualified Intermediary/Withholding Foreign Partnership/Withholding Foreign Trust Application Management System.

Since the QI/WP/WT certification that is due until 1 July 2018 (or 1 March 2019 for QIs selecting year 2017 for their periodic review) covers the period that ended on 31 December 2017, we do not understand why the QIs should disclose any section 871(m) transaction and report any factual information in relation to years 2018 and 2019. Indeed, the latter may be reported by the QIs in the next periodic certification for years 2018 to 2020. We thus kindly request that the IRS clarifies that the above disclosure only deals with the section 871(m) transactions subject to the good faith standards that have been carried out during the certification period, i.e. year 2017 for the 2014-2017 periodic certification.

FATCA

Ahead of the first FATCA reporting, Financial Institutions have reached out to their customers with U.S. indicia and have encountered the following issues related to the so-called "accidental Americans":

- Some customers have not responded at all or the underlying bank account is dormant or inactive. Based on the presumption rule, these accounts then needed to be classified as U.S. reportable accounts. No TIN was available for these accounts.
- Some customers responded back saying they could not possibly be U.S. Tax Payers for numerous reasons, for instance they left the U.S. 50 years ago and never went back or they were only born in the U.S. and stayed for a few months/weeks only. They did not have a TIN and encountered difficulties in obtaining one.

In 2017, the U.S. Treasury Department published Notice 2017-46 which provides that Foreign Financial Institutions ("FFIs") in a Model 1 IGA jurisdiction will not be in significant non-compliance with an applicable IGA during 2017, 2018, and 2019 solely as a result of a failure to report U.S. TINs for preexisting accounts, provided the FFI reports the account holder's date of birth, makes annual requests for the TIN, and searches its electronic records for missing U.S. TINs before reporting information on 2017.

In any case, failure to report U.S. TINs for preexisting accounts might lead to a FATCA noncompliance, for which a significant number of EU Member States legislations provide administrative tax penalties. Therefore, U.S. Treasury Notice 2017-46 does not provide a safe harbor for reporting financial institutions in these countries.

While the Notice 2017-46 has provided some relief for Financial Institutions, it is not a complete solution because:

- It is temporary;
- It is not applicable for FFIs in Model 2 IGA jurisdictions; and
- It refers only to pre-existing accounts. The solution does not cover New accounts and Pre-existing accounts beyond the two-year grace period.

A permanent solution to address the issue of the "Accidental Americans" is required.

Other concerns relate to preexisting entity accounts with account balances exceeding $1,000,000 held by passive NFFEs with respect to which a self-certification has not been obtained. In several EU Member States, these accounts need to be treated as U.S. reportable accounts if the obligatory self-certification could not be obtained. This leads to situations where, under a number of IGAs in place, entities are reported to the United States in the absence of any U.S. beneficiaries or other link to the U.S., thus creating an exposure for such companies and their beneficiaries under U.S. law (so-called "false positives").

The scope of the default reporting should be limited only to entities for which US indicia have been identified in relation to the entity or one or more of its Controlling Persons based on AML/KYC or other information.

Yours faithfully,

Wim MIJS

Chief Executive Officer

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