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EBF_035887

SUBJECT: Practical issues in complying with FATCA - request for relief

Dear Mr Kautter, Dr. Tarbert, Mr Harter and Mr Paul,

The European Banking Federation (EBF), which is the voice of European banks, is still very concerned about one of the major issues that our members are facing in the implementation of FATCA and that was the subject of several previous letters.¹

FATCA requires Financial Institutions to review their client base in order to identify US reportable accounts based on defined US indicia. When an indicium is found, the accountholder is presumed to be a US reportable accountholder, unless information (self-certification and corroborating evidence) is received by the Financial Institution that the accountholder is not a US reportable accountholder.

¹ EBF letter of 3 August 2018 (reference EBF_033618), regarding the unintended consequences of FATCA sent to the U.S. Department of the Treasury (Mr David J. Kautter and Mr William M. Paul); EBF letter of 26 April 2017 (reference EBF_026764), regarding the unintended consequences of FATCA sent to the US House Oversight Committee (Mr Jason Chaffetz, Chairman of Committee and Mr Elijah Cummings, Ranking Member).

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Since FATCA became effective in 2014, Financial Institutions have reached out to their customers with US indicia and have encountered the following issues:

- Some customers have not responded at all or the underlying bank account is dormant or inactive. Obviously, no Tax Identification Number (TIN) is available for these accounts as in many cases the indicia will either be a false positive or the indicia may be cured as the accountholder is not a US person.
- Some customers have responded back that they cannot be considered as US Tax Payers evoking a number of reasons, including the fact that they left the US 50 years ago and never went back or they were only born in the US and stayed for a few months / weeks only. This is the “accidental American” situation which has previously been acknowledged by the Treasury and IRS. These customers do not have a TIN and encounter difficulties and long delays in obtaining one only to renounce US citizenship subsequently.

As a consequence, European banks are therefore faced with a dilemma:

- Either to continue to provide financial services, including basic banking services (which is required by EU law), to European citizens that also have a US indicium but have no US TIN; or
- To stop doing so.

The Internal Revenue Service has issued a FAQ stating that replacing a TIN with a string of zeros will result in error notifications. For a reporting Financial Institution, the ultimate sanction of not complying with FATCA is a 30% withholding tax on all income streams from the US, for both itself and its customers. Given its magnitude, this issue may lead to serious financial difficulties (including bankruptcy) of banks.

To provide temporary relief, the U.S. Treasury Department published Notice 2017-46 in 2017 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 pre-existing 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 pre-existing 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 harbour 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 “U.S. Reportable Accounts without U.S. TINs” is required.

If not addressed, considering possible huge sanctions that European banks may incur if considered non-compliant, this will likely force banks to terminate existing contracts with

customers who are unable or unwilling to provide a US TIN. This, in turn, will lead to financial exclusion and impede access to finance for a very significant number of European (dual) citizens. As such this would be contrary to the G20 goals to widen financial inclusion and access to finance.

We therefore call for the US to provide pragmatic solutions and guidelines which may read as follows:

- If no US TIN is communicated and reasons for its non-availability are not communicated by the customer, the Financial Institution should report the date of birth of the customer if he is a natural person and a commercial register number or VAT identification number if it is an entity.
- Financial Institutions should make reasonable efforts to receive the US TIN from pre-existing customers within 2 years after the accounts of the customer have been identified as reportable.
- Reasonable efforts consist for instance of asking the relevant questions to the customer in person or per mail, per telephone, e-mail or other possibilities to make contact as well as by checking the data base of other businesses of the bank.
- If the US TIN has not been obtained, the customer should be contacted once per year.
- If it has made reasonable efforts, the Financial Institution should keep its FATCA-compliant status and should not be imposed with any penalties even in the absence of a US TIN and without having to close accounts.

If the permanent relief cannot be finalized very soon the temporary relief should be extended as soon as possible to ensure that client accounts are not closed and with a view of reaching a permanent solution shortly after the BEAT implementing regulation is finalized.

We thank you for your consideration and we remain at your disposal should you have any questions or comments concerning the above.

Yours sincerely,



Wim Mijs
Chief Executive
European Banking federation

CC:

1. Mr Douglas Poms, Deputy International Tax Counsel at the U.S. Department of the Treasury;
2. Mr Lawrence D. Norton, U.S. Treasury's Representative for Europe;
3. Mr John Berrigan, Deputy Director-General at DG FISMA, European Commission;
4. Mr Almoró Rubín de Cervin, Head of Unit A4 (International affairs) at DG FISMA, European Commission.