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May 29, 2012

The Honorable Emily S. McMahon
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
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The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
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The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Report on the Proposed FATCA Regulations

Dear Ms. McMahon, Mr. Wilkins and Mr. Shulman:

We write to provide comments and recommendations on the recently issued proposed regulations (the "Proposed Regulations") under Sections 1471 through 1474 ("FATCA"), as well as on the joint statement on FATCA implementation by the governments of the United States, France, Germany, Italy, Spain and the United Kingdom (the "Joint Statement").

By way of background, FATCA is a new reporting and withholding tax regime governing certain cross border and other payments to and by foreign financial institutions ("FFIs"). When fully effective, FATCA will impose a 30% withholding tax on "withholdable payments" and "foreign passthru payments" to any FFI that fails to comply with the statute's requirements. Unlike the chapter 3 reporting and withholding tax regime for domestic financial institutions under Subtitle A, FATCA's objective is not to raise revenue. Its purpose instead is to facilitate the collection of information by the IRS about U.S. taxpayers who attempt to evade U.S. tax by hiding their money in offshore accounts.

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The Proposed Regulations represent the most extensive guidance to date on FATCA. Among other things, the guidance provides rules for identifying those FFIs that can avoid adverse treatment under FATCA only by entering into an FFI agreement and complying with a broad range of requirements (“participating FFIs” or “PFFIs”), determining types of FFIs that are eligible for “deemed-compliant” status without an FFI agreement (so long as they meet more limited requirements) and designating types of foreign entities that are excluded from the FATCA regime entirely. The guidance also describes the nature of the information subject to reporting under FATCA, the categories of payments subject to withholding and the broad mechanical rules that implement the new reporting and withholding regime. Finally, the guidance proposes to phase in many of the reporting and withholding requirements under FATCA through a series of transition rules, as well as to grandfather certain payments under existing obligations.

The Joint Statement describes a possible approach to implementing FATCA that would involve a series of bilateral agreements between the United States and its partner countries. Under these FATCA implementation agreements, each partner country would collect the information required to be reported under FATCA directly from that country's own FFIs and provide the collected information to the United States. In addition, each partner country would seek to remove any existing legal barriers to FATCA compliance under local law. These agreements would also impose certain reciprocal obligations on the United States.

With regard to the Joint Statement, we believe the approach that it proposes may over time eliminate or at least mitigate many of the legal and compliance burdens associated with the regime currently envisioned under the Proposed Regulations. To maximize the likelihood that the United States will have an effective network of FATCA implementation agreements with partner countries, we recommend that --

- for FFIs that operate primarily or exclusively in a single partner country, the implementation agreement with that country should provide rules for such FFIs that are tailored to take into account any unique or distinguishing legal, regulatory or commercial features of the financial services industry in that country; and
- for multinational FFIs that may be subject to multiple implementation agreements, the reporting and other requirements of such agreements should be standardized.

With regard to the Proposed Regulations, we believe that they represent a substantial step forward by Treasury and the IRS in their effort to place appropriate limits on the types of FFIs that are subject to the full reporting and withholding requirements of FATCA. Recognizing that an unduly broad definition of an FFI would inevitably capture many foreign entities that Congress never regarded as likely vehicles for U.S. tax evasion, the Proposed Regulations seek to grant excepted status to several categories of foreign entities, which would be completely excluded from FATCA. Although we support this objective, we believe that many of the foreign entities that Treasury and the IRS intended to target will not qualify for excepted status under the

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Proposed Regulations. We therefore recommend that final regulations replace most of the proposed categories with a single, simplified category that would treat *all* members of an “expanded affiliated group” as excepted FFIs excluded from FATCA *other than* those members of the group directly engaged in a banking, custodial, insurance or other financial services business, so long as the group as a whole is principally engaged in a trade or business other than financial services.

In addition, we recommend that final regulations modify the special regime governing “owner-documented” FFIs under the Proposed Regulations. Specifically, we recommend that they relax the documentation requirements for these entities and allow them to borrow, to have any type of payor as an authorized withholding agent and to have other owner-documented FFIs as owners. We also recommend that final regulations simplify the requirements associated with other categories of deemed-compliant FFIs, as well as combine some of those categories.

With respect to foreign passthru payments, we recommend that the IRS issue interim guidance limiting the definition to payments on financial accounts. Although withholding on foreign passthru payments is postponed until 2017, transactions already being negotiated in the financial markets need to account for the potential impact of withholding on future payments and allocate the economic cost among the participants. By confirming that the definition of foreign passthru payments will be confined to payments on financial accounts, the IRS should quell much of the current confusion among FFIs and their advisors on this issue.

Finally, we recommend that final regulations relax the “all or nothing” rule of the Proposed Regulations to permit an expanded affiliated group of FFIs to continue to hold indefinitely (rather than just through the end of 2015) any historically owned FFI member that is prohibited by a pre-FATCA law from complying with the rules governing PFFIs and from closing its existing U.S. accounts, provided that the group adopts specific safeguards with respect to such member.

The report also includes a number of other comments and recommendations.

Respectfully submitted,



Andrew W. Needham
Chair

Enclosure

cc: Michael Caballero
International Tax Counsel
Department of the Treasury

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