Comments of

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On Behalf Of The

Institute of International Bankers

Before the

U.S. Internal Revenue Service

Public Hearing on Proposed Regulations

26 CFR Parts 1 and 301 [REG-121647-10]

"Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities"

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I am Andrew Barkin, a Managing Director and the Head of US Tax at Bank of Tokyo Mitsubishi UFJ. I appreciate the opportunity to appear here today on behalf of the Institute of International Bankers, which together with the European Banking Federation submitted extensive and detailed comments on the proposed regulations. We commend Treasury and the IRS for issuing a thoughtful and detailed set of proposed regulations that address many of the concerns that we and other interested parties have previously raised. We continue, however, to have serious concerns regarding the operational and systemic burdens that these rules, if adopted in the current format, would place on financial institutions.

Today, I would like to address broadly how Treasury and the IRS might better achieve their stated goal of balancing between the compliance objectives of FATCA and minimizing the burdens on stakeholders.

Essentially, we have four recommendations for achieving this goal:

- First, the FATCA requirements should be more closely harmonized with AML/KYC rules and existing practices at financial institutions.

- Second, the FATCA regulations should expand their reliance on technology, centralized functions, and the manner in which businesses organize themselves.

- Third, the entity classification rules – including in particular the scope of Category 3 investment entity FFIs and NFFEs, but also the types of deemed-compliant FFIs – should be reformulated and simplified.

- Fourth, overall, the rules need to be streamlined and simplified significantly so that they can be applied by back-office personnel around the world, many of whom do not speak English and are not intimately familiar with U.S. tax reporting laws and regulations.

I will now expand on these recommendations.

While the proposed regulations generally rely on AML/KYC rules and existing practices of financial institutions in a number of areas, they almost always layer on additional requirements, some of which are quite burdensome for both financial institutions and their customers, so that instead of achieving synergies, the end result is really a supplanting of the AML/KYC rules and existing practices. For example, under the proposal, a financial institution will be required to

periodically re-solicit customer identification (such as a passport or driver's license) from every one of its post-FATCA new accounts, even though the likelihood of a change in the account holder's chapter 4 status of which the financial institution would not otherwise be aware is minimal.

Under the proposal, a financial institution will also need to secure U.S. tax-centric certifications under penalties of perjury from virtually every new entity account and every existing FFI account, even though in many, if not most, cases there are less burdensome alternatives for determining the chapter 4 status of the account. These are just two of the more troubling examples where the proposal does not adhere to current AML/KYC practices.

Apart from the enormous costs involved in fulfilling these labor-intensive requirements, we cannot overemphasize how disruptive it is to customer relations generally to continuously seek customer identification documentation. Moreover, it is commercially impractical for a French or Japanese bank, for example, to solicit and periodically re-solicit U.S. tax-centric certifications and documentation from their local individual and entity account holders. Imagine the reaction if the bank branch around the corner were required to solicit similar certifications under penalties of perjury from DC-resident customers regarding French, Japanese, Russian and a litany of other foreign requirements.

In addition to more closely harmonizing the FATCA requirements with AML/KYC rules and existing practices at financial institutions, there are significant systemic cost-savings, efficiencies and more accurate compliance results that can be achieved by expanding the reliance on technology, centralized functions, and the manner in which businesses organize themselves. Here are several illustrations of this important point:

- First, on the technology front, the IRS should require each FFI to provide it with its ISIN or BIC identifying code (if any), and should electronically disseminate a list of participating FFIs with their identifying code as well as FFI-EIN. Withholding agents that can make a positive identification of a counterparty based on this information should be relieved of having to obtain a W-8 from that FFI counterparty. Also, the rules should permit the use of dematerialized withholding certificates through web-based applications.

- Second, the rules should permit broader reliance on centralized due diligence and documentation review functions. Financial institutions generally centralize their due diligence and document review functions, as it makes no sense to require each legal entity within an expanded affiliated group or under common control (such as in a family of PE or hedge funds) to separately perform these responsibilities. In addition, and building on current KYC practices, financial institutions should be able to rely on certifications provided by a USFI, PFFI or an agent regarding the FATCA status of identified account holders.

- Third, consistent with the business organization and regulatory compliance framework of the financial industry, FFI agreements should allow FFIs to elect to organize their compliance and reporting along business and geographic lines instead of only on an entity basis.

The proposed entity classification rules are also very problematic. First, the proposed rules do not provide a practical and workable approach for the hundreds of thousands of noncommercial investment entities around the world – such as a family trust or a passive investment vehicle, or even an SPV – to comply with FATCA. It is highly unlikely that these entities, the vast majority

of which have no U.S. connection, will opt to become PFFIs or owner-documented FFIs. We urge Treasury and the IRS to use the certification mechanism provided for in section 1472 for these noncommercial investment vehicles.

The entity classification rules are also problematic with respect to the definition of active NFFEs. This can and should be a relatively straightforward determination, based on the withholding agent's AML/KYC information and existing commercial practices. It should not require the NFFE and every withholding agent to annually perform a PFIC-like asset value test.

A third major concern with these classification rules is that they provide no relief for holding companies and certain members of banking and other active financial groups, which collectively issue many billions of dollars of medium term notes and other debt that should be exempted from FATCA to the same extent as similar debt issued by a bank has been exempted.

Finally, while we appreciate the fact that the proposed regulations provide exceptions for various types of deemed-compliant FFIs, the reality is that most of these exceptions contain conditions that will make them unavailable for large numbers of entities that ought to be covered. In addition, other categories of low-risk entities and accounts (such as retirement and escrow accounts) should be included within the deemed-compliant FFI classification.

I want to take a moment to highlight a troublesome issue facing U.S. branches of foreign banks and their U.S. counterparts. Because the proposed regulations do not incorporate the chapter 3 presumption that every payment to a U.S. branch of a foreign bank is ECI, it appears that a U.S. branch of a foreign bank will need to provide each withholding agent with a withholding certificate or other documentation with respect to each payment made to that branch. The proposed regulations also do not permit reliance on the eyeball test for purposes of chapter 4.

These departures from the existing reporting and withholding framework will require U.S. branches and USFIs to build very expensive systems to track, solicit and accept Forms W-8ECI for each of tens of millions of transactions each year, and will place U.S. branches at a competitive disadvantage to USFIs, who may decide to avoid such an expensive system build by ceasing to transact with U.S. branches of foreign banks.

Finally, I have two overarching comments. First, as one reads through the detailed and precisely crafted prescriptions of the proposed regulations, one cannot help but wonder how these rules can possibly be digested and applied by the back-office staffs of financial institutions around the world, many of whom do not speak English. If FATCA is to be successfully implemented, the regulations need to be dramatically simplified and streamlined. While we understand that the many exceptions and detailed requirements are designed to capture every possible US account holder, such complexity must be the exception, not the rule. Otherwise the goals of FATCA cannot be achieved, regardless of the good intentions of the foreign financial community.

Second, we urge Treasury and the IRS to take a practical approach to effective dates. We and others have previously advised that financial institutions will require 18 – 24 months to implement FATCA once a complete package of final regulations, FFI agreements and new IRS reporting forms are released. Given the current timeframe for finalizing this guidance, not to mention the intergovernmental agreements with FATCA Partners, it will simply not be possible for financial institutions to implement new account documentation processes by 2013. It is also not feasible for financial institutions to renegotiate thousands of ISDA master agreements before 2013 in order to address potential withholding on collateral security arrangements and passthru payments that are made in 2017 or later in respect of derivatives contracts entered into after

2012. Our written comments explain the implementation issues and contain recommendations regarding both the general effective date and the ISDA master agreement issues.

In conclusion, the Institute of International Bankers appreciates the opportunity to appear here today. The IIB stands willing and ready to continue to assist Treasury and the IRS in its efforts to implement FATCA in a manner that achieves its compliance objectives while minimizing unnecessary burdens on stakeholders.

Thank you.