



General Secretariat of the Council
Chair of the High Level Working Party on Taxation

The Honourable Steven T. MNUCHIN
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
United States of America

Brussels, 3 December 2019

Subject: FATCA – Exchange of information under Intergovernmental Agreements

Dear Mr. Secretary,

With reference to the letter sent to the Department of the Treasury on the 8 May 2017 during the Maltese Presidency of the Council of the EU, we as the European Union Member States would like to come back to the matter of FATCA. In that letter, we drew your attention to the problems faced by residents, financial institutions and governments of the EU Member States in relation to FATCA. Unfortunately, these issues have not been definitively resolved over the past years. I therefore write to you as Chair of the EU Council High Level Working Party, which discussed the issue recently.

Financial Institutions

We were pleased to learn, that after the letter has been sent, the Internal Revenue Service (IRS) published a Notice 2017-46 (Revised Guidance Related to Obtaining and Reporting Taxpayer Identification Numbers and Dates of Birth by Financial Institutions) in September 2017. In this notice was explained that a failure to report U.S. TINs will not be deemed as significant non-compliance with the obligations under a Model 1 IGA solely based on a failure to report U.S. TINs. The extension given by the IRS has offered leniency and we have noted from information given by the financial institutions that the numbers of the missing US TINs have declined. The extension will be expiring with reporting for calendar year 2019.

We have also noted that on 15 October 2019, the IRS released updated FATCA – FAQs. The question 3 on “Reporting” concerns the missing US TIN. In its answer, the IRS states that a reporting Model 1 FFI is not required to immediately close or withhold on accounts that do not contain a TIN beginning January 1, 2020. The IRS mentions that they will not automatically conclude that the absence of a TIN leads to a determination of significant non-compliance.

We acknowledge that this will ease some of the problems of the financial institutions that will emerge after the transition relief expires. The main concern of the financial institutions still is that if the TIN is not provided, the IRS will evaluate the data received and determine through a consideration of the facts and circumstances whether a financial institution is in significant non-compliance. Even though the IRS will not automatically conclude that the absence of a TIN leads to a determination of significant non-compliance, the wording of the FAQ is not binding and it leaves a lot to depend on the discretion of the IRS. The FAQ states that the IRS will take account of the facts and circumstances leading to the absence of the US TIN, such as the reasons why the US TIN could not be obtained, whether the financial institution has adequate procedures in place to obtain US TINs and the efforts made by the financial institution to obtain them. The financial institutions are concerned over the possibility that the IRS will determine that there is significant non-compliance despite the fact that the financial institution has done all in its best efforts to obtain the US TIN.

We strongly believe the FAQ should be complemented by additional technical exchanges between the IRS and EU Member States' fiscal administrations. In our understanding, the situations where a financial institution has not been able to obtain the US TIN despite their best efforts, should be clearly addressed in this guidance which should apply for existing and new accounts. These situations seem to be the most frequent source of concern for banks and other financial institutions.

TIN and American citizens

As a result of FATCA, a considerable number of EU residents have realized that they qualify as US Persons under US national law. Their citizenship may have been acquired as a result of birth in the United States (*jus soli*) or birth abroad to a U.S. citizen parent (*jus sanguinis*). We are receiving an increasing amount of signals that this group is confronted with administrative hurdles. An example is the filing of a US tax return as a foreign resident, whilst in the majority of cases no US tax is due. A part of this group is considering to relinquish their US citizenship, but this procedure is lengthy, costly, and complex. The renunciation fee alone amounts to \$2,350 on top of which the costs of filing tax returns and any tax liabilities would be added.

We have noted that the IRS announced Relief Procedures for Certain Former Citizens on 6 September 2019. This is a step in the right direction, as it would alleviate tax burdens for most US persons given the thresholds that apply (net worth below \$2,000,000 and aggregate tax liability of \$25,000 or less for the taxable year of expatriation and the five prior years). However, these persons are still confronted with the aforementioned obstacles. We would therefore propose to lower the cost of renunciation, to simplify the filing procedure and not require it for all cases.

Reciprocity

We regret to note the lack of equivalent reciprocity in exchange of financial account information between the United States and the EU Member States. In Paragraph 3 of Article 6 of the IGA's all EU Member States with Model 1 IGA are committed to the development of Common Reporting and Exchange Model with the United States. The EU Member States with Model 1 IGA's have also committed to working with other Jurisdictions, the OECD, and the European Union, on adapting the terms of the IGA's to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions.

We would also like to recall that in Paragraph 1 of Article 6 of the Model 1 IGA the Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange. The Government of the United States also committed to further improving transparency and enhancing the exchange relationship by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.

We would like to point out that in February 2014 the OECD unveiled a new single global standard for the automatic exchange of information between tax authorities worldwide. Since then 105 jurisdictions have committed to the CRS MCAA. Most of the Member States have been exchanging financial account information for three years now. We regret to note that the United States is the only major financial centre that has not committed to the Common Reporting Standard.

Bearing in mind what was stated above, we as the European Union Member States would like to be informed about the actions taken by the Government of the United States in order to further improve transparency and enhance the exchange relationship. We would appreciate to be informed of the plans of the Government of the United States to achieve equivalent levels of reciprocal automatic information exchange as well as the schedule for such actions.

We are hoping to find a workable solution for the EU financial institutions and the US persons living in the EU Member States, without affecting the goals of the exchange of information, and we would like to continue discussions to that end. We also believe that a solution to the above-mentioned problems could contribute positively to the quality of the information exchange on a reciprocal basis and further promote convergence with the international standard.

Yours sincerely,



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