Brussels, 25 May 2012
VH/HS/B6/12

EACB COMMENTS ON PROPOSED REGULATIONS UNDER FATCA

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The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.000 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 176 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

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EACB Comments on FATCA

I. Introductory Remark 4

II. Regulations on FATCA implementation 5

A. General 5

B. Definition of financial accounts...5

C. New accounts Documentation Procedures / Phase-in reporting obligations.5

D. Passthru payment obligation..6

E. Identification of US Accounts..6

III. Government-to-government approach 7

A. Government-to-government approach...7

I. Introductory Remark

The European Association of Co-operative Banks (EACB) appreciates the opportunity to provide comments on the proposed regulations, issued on February 8, 2012, relating to the implementation of Chapter 4 of Subtitle A of the Internal Revenue Code (the "Code"), as enacted by the Foreign Account Tax Compliance Act ("FATCA") provisions of the Hiring Incentives to Restore Employment Act of 2010 (the "Act").

We appreciate that the US Treasury and IRS issued a thoughtful and detailed set of proposed regulations, and we commend them for addressing many of the concerns that we and other interested parties have expressed regarding the implementation of FATCA. We also support the Treasury's intention to enter into intergovernmental agreements with other countries to address conflicts between FATCA's requirements and the laws of those countries and to simplify the implementation of FATCA more generally.

Nevertheless, the EACB expresses its deep concern regarding several aspects of the proposed regulations which would have excessive costs and burdens on the financial sector through the foreign financial institutions (FFIs). Indeed there remain some critical issues, particularly with regard to passthrough payments, the required periodical updating of identification after expiry of identification documents and different reporting obligations according to the QI-regime and FATCA.

II. Proposed Regulations for FATCA implementation

A. General

In our view, the draft regulations for FATCA implementation issued on 8 February 2012 by the U.S. Treasury / IRS are, in some ways, an improvement to the preliminary guidance given in the notices in the last two years.

However, certain rules remain unnecessarily onerous on the financial industry while fulfilling the objectives of FATCA. Indeed the scope and extent of the due diligence and reporting requirements set for Foreign Financial Institutions (FFIs) is still unrealistic burdensome. In addition, the interpretation of what the regulations really require FFIs to do is unclear. One reason for this is that the regulations are written as if every banking system in the world is like the US system. For the above mentioned reasons, it is unlikely that FATCA will work the way IRS and the U.S. Treasury plan.

Notwithstanding the efforts by the Treasury and IRS to minimize the costs imposed on stakeholders, there remain some critical issues, particularly with regard to passthrough payments, the required periodical updating of identification after expiry of identification documents and different reporting obligations according to the QI-regime and FATCA.

B. Definition of financial accounts

The refinement of the definition of financial accounts and the additional categories of deemed-compliant FFIs (DCFFIs) provided in the proposed regulations are not comprehensive enough and need to be further expanded. Indeed, the concept of financial account is of key importance when considering the actual scope of the regulations. Therefore it is advisable to make the definition as clear and narrow as possible.

The EACB suggests broadening the existing categories of DCFFIs provided in the proposed regulations. The "one country rule" where the FFI must have no fixed place of business outside its country of incorporation or organization should be deleted.

The criteria as regards the FFIs which are members of an expanded affiliated group should also be deleted as it would prevent subsidiaries of an expanded affiliated group established in several countries to benefit from the deemed-compliant status. To suppress this "one country rule" would not endanger the achievement of FATCA's goals.

In the case where theses deletions would not be possible, IRS should at least expand the DCFFIs status to a status where EU is considered as one country for every criteria (not only the proportion of resident clients): a FFI organized in an EU member state should be allowed to have a place of business in other EU member states, or to belong to an expanded affiliated group with members established in other EU members.

Finally, the third criteria of the definition of FFI where an entity is engaged in the business of investing, reinvesting, or trading in securities should be narrowed. Thus Family trusts or family passive investment companies would not be classified as FFIs and might be classified as passive NFFE.

C. New accounts Documentation Procedures /Phase-in reporting obligations

In addition, the Members of the EACB express their deep concerns as regards the proposed 2013 effective date for new account due diligence and documentation procedures. Financial institutions would need more time to upgrade existing IT systems, to make operationals and systems changes in order to comply with FATCA. It would be extremely difficult to meet the first effective dates having new account opening procedures by July 2013. The EACB therefore suggests extending the effective dates for new account due diligence and documentation to January 1, 2014.

In addition, the phase-in of the reporting obligations provided in the proposed regulations gives not sufficient time to prepare to comply with them. It will be extremely challenging to be prepared for the new regulations in time, especially with regard to passthru payments.

D. Passthru payment obligation

The Members of the EACB think that the phase-in of the scope of the "passthru" payment obligation provided in the proposed regulations is not an effective solution even not a temporary solution. The implementation of passthru payments should totally be abandoned.

E. Identification of US Accounts

We understand the proposed regulations' aim to better coordinate FATCA with existing Anti Money Laundering (AML) and Know Your Customer (KYC) practices. Nevertheless, the proposed new due diligence procedures for the identification of U.S. accounts is not workable. From the European point of view, it must be pointed out that identification procedures related to the AML-Directive already fulfill identification requirements sufficiently. This is also true for the required updating of documentation. Additionally, identification is updated when a new account is opened or when customers data change (due to relocation or change of name, etc.).

Therefore, the obligation to update identification each time at the expiry date of a document presented for identification purposes (passport, identification card) seems to be inappropriate as measured by the additional operating expense it would cause.

There is no clear rule to distinguish cases which, for identification purposes, require identification of the payee (§ 1.1471-3) from cases which require identification of the account holder (§ 1.1471-4).
From the point of view of a 'participating' FFI (PFFI), it must, in the first instance, be assumed that the account holder himself is the payee and, consequently, the successive steps of examination have to start with identifying the account holder. Only in cases where the due diligence required to comply with AML rules comes out with indications that the account holder is not the beneficial owner, an identification procedure will also have to be started for the beneficial owner.
To eliminate any confusion, the regulations should explicitly state that the payee identification rules of § 1.1471-3(a) are not applicable to PFFIs and their account holders.

III. Government-to-government agreement

A. Government-to-government agreement

We attach attention to the intergovernmental agreement named "government to government approach through bilateral agreements with the US". This approach, included in the joint statement issued by the U.S. and five EU Member States on 7th February 2012, would likely facilitate the problems related to the data protection regulation. Moreover, it would reduce the compliance costs and legal risks that would be associated with direct contractual arrangements with the US tax authorities. The ultimate goal should be that all EU member states have the same technical approach as regards the data on this matter.

Nevertheless, the government-to-government approach has some particular technical difficulties. This will not remove technical difficulties that banks will face when implementing FATCA in their processes and systems. In addition, it should be taken into account what technical difficulties national tax authorities might face if they are given new tasks related to the FATCA reporting.

Moreover, some entities cannot fully comply with FATCA due to foreign legal constraints. FFIs that would have to expend huge amounts of money to comply with FATCA will become nonparticipating FFIs. The U.S. Treasury / IRS should determine a workable solution in order that FFIs could assess the consequences of entering into FFI agreements.

It has to be clarified that the due diligence procedures already applied by European financial institutions are sufficient to identify customers [US-accounts]. There is no benefit in expanding these procedures by the FATCA Regulations.

In addition, the adoption of a government-to-government approach for implementing FATCA might have an impact on the TRACE/FISCO work and this should be taken into account in future work in this area.The reporting procedures for US-customers prescribed by the FATCA should be integrated into the current QI-reporting. The reporting of dividend incomes and capital gains supplemented by current account statements could be made according to the rules of the Interest Information Regulation (EU-Directive 2003/48/EG). Then, cost-basis-reporting should be dropped without substitute.