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CC:PA:LPD:PR (REG-121647-10)
Room 5205
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington
D.C. 20044
U.S.A.

Comments on proposed regulations REG-121647-10

Dear Messrs. Sweeney and Taylor,

Please find below a submission from the Swedish Bankers' Association to proposed regulations REG-121647-10

The Swedish Bankers Association (SBA) is the association for banking and financial services in Sweden. We represent the majority of banking organisations in Sweden, and among our members are the four largest bank groups in Sweden. These bank groups are represented in a number of countries all over the world.

The European Banking Federation (the "EBF") and the Institute of International Bankers (the "IIB") have in separate submissions made a number of comments to the proposed regulations REG-121647-10. The SBA fully endorses the comments made in the submission by the EBF and the IIB. However, the Swedish financial industry wishes to make a few additional points that have particular bearing on the situation for taxation and legal compliance in Sweden. SBA also wishes to highlight a few points which are of particular interest to the Swedish financial industry, particularly certain legal forms of investment and Swedish pension schemes.

Furthermore, the SBA would like to point out that our national legislation currently prevents the full compliance of the FATCA legislation. The Swedish law, being in conformity with the European law, presents a number of rules which are incompatible with the requirements according to the FATCA legislation. The option for institutions falling under the FATCA legislation in the current situation will be to either respect national law and not comply with an FFI agreement with the IRS, or not comply with national law in order to fulfill the requirements according to the FFI agreement, unless substantial changes are made in the national legislation in Sweden. *If* such changes are accepted by the Swedish Parliament they will obviously not be in place in time for the entering into force of FATCA.

Below are some facts about the legal situation in Sweden.

Conflicts with Swedish internal law

The Swedish Bankers Association has identified the following conflicts with local law in Sweden:

1. **Withholding tax:** According to FATCA, in the case of any withholdable payment to a foreign financial institution and other foreign entities that do not meet the requirements stipulated in the FATCA legislation (sec. 1471 and 1472, subsections (b)), the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.
   There are no explicit rules in the Swedish tax legislation allowing withholding of a "FATCA-tax" by a financial institution in Sweden. Neither does it follow clearly from the convention between the US and Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, as lastly amended by a protocol signed on 30 September 2005,that withholding of such a tax falls within the scope of that convention.

2. **Bank secrecy:** The Banking and Financing Business Act (*Lagen (2004:297) om bank- och finansieringsrörelse*) contains a provision in chapter 1, article 10 which states that information concerning an individual's banking relationship may not be disclosed without unauthorized cause. In the event of a breach of this obligation of secrecy a bank may be obliged to pay damages to the customer. Banking secrecy covers all aspects of the relationship between the bank and the customer (for instance assets, transactions, loans). Banks are not even allowed to inform others that a certain person is or were a customer of the bank and consequently the obligation of secrecy remains in force even after the relationship has ceased. If an obligation to disclose customer information follows from Swedish legislation, such disclosure is generally treated as authorized.

   One of the most important exceptions to the rule of bank secrecy are to be found in the tax reporting legislation (*Skatteförfarandelagen [2011:1244*]) stating that it is mandatory for banks to supply the Swedish tax authorities annually with control statements on deposits, debts and interest credited and/or debited. Banks are also obliged to deduct withholding tax on dividends and interest credited.
   Currently, the tax legislation concerning <u>automated</u> reporting for tax purposes

does not allow such reporting to authorities outside Sweden. Thus, the Swedish bank secrecy provisions and the tax legislation currently prevent automated disclosure of data on payments to accounts, holdings etc. in a bank or any other credit institution to be made to the IRS.

3. **Data protection law:** The Swedish Data Protection Act (*Personuppgiftslagen [1998:204]*), based on the EU Directive on data protection, states that personal data may be processed only if the registered person has given his/her consent to the processing or if the processing is necessary in order, for example, that the controller of personal data should be able to comply with a legal obligation or that a work task of public interest should be performed.

   According to the legal analysis of the provisions of the Data Protection Act made by the Swedish Bankers Association a consent by an individual would be the only possible option in order to allow for data to be processed. In order for consent to be acceptable the consent must be given on a <u>voluntary basis</u> by the individual. According to the FATCA rules the foreign financial institution is obliged to close the account if the institution would not be able to obtain a waiver of the law from the account holder. The SBA is of the opinion that a consent given on these conditions is not acceptable according to the Data Protection Act.

4. **Deposit guarantee legislation:** The Swedish deposit guarantee act (*Lag [1995:1571] om insättningsgaranti*) stipulates that banks and other financial institutions covered by such a guarantee scheme must allow a person to open an account with the institution. A financial institution in Sweden that is offering deposit services cannot according to the law refuse to accept such deposits unless there are special reasons for the bank to refuse. *According to our legal analysis it is highly doubtful, in view of the purpose of the rules for deposit guarantee, that it would be acceptable to refuse opening an account or closing an account because a person does not accept reporting according to FATCA rules (i.e. if the person is a recalcitrant account holder).*

Taxation in Sweden

Swedish taxation levels are the second highest in the EU. In 2009, the tax-to-GDP ratio (including social security contributions) stood at 46.9 %, a staggering over 10 percentage points higher than the EU-27 average (35.8 %). Compared to the neighbouring countries, the rate is slightly lower than in Denmark (48.1 %) – the leader in the category, but considerably higher than in Finland (43.1 %) or Norway (41.4 %).[1]

[1] European Commission report Taxation trends in the European Union, 2011 edition.

The Swedish government and the tax administration strive to improve quality of taxation by designing tax policies to achieve desired policy objectives (redistribution, allocation, stabilisation, etc.) in the most efficient way. This must be done whilst minimising undesired distortions, promoting growth, and minimising the cost of tax collection. The FATCA legislation unfortunately runs completely opposite these objectives.

Tax reporting in Sweden by financial institutions

Below you find a brief description of the Swedish tax reporting rules for the financial sector.

Apart from being big employers and as such being obliged to report salaries and other remunerations to the tax authorities, as well as withhold income tax on such payments, the financial sector is also obliged to report interests received and paid (on loans etc.) as well as dividends received by persons and deceased persons to the tax authorities. The reporting is made annually by the latest end of January the year following the income year. The financial institutions are also obliged to withhold tax on interests and dividends.

The reporting is made either electronically or on paper.

For Swedish purposes, taking into account the tax situation in Sweden, the reporting requirements in Sweden are deemed sufficient and should, in our view, be sufficient also for the US Treasury and the IRS.

Our conclusion

In view of Sweden being a high tax country with bank secrecy legislation providing waivers for the purposes of tax control etc., the Swedish Banker's Association is of the view that the FATCA measures from the US are hitting the financial sector in Sweden in a disproportionate way. The Swedish financial industry will have to make a very large and burdensome effort to supply information to the US but with an expected fairly poor tax result for the US. The long history of tax reporting, an efficient tax administration and a fairly low rate of advanced tax planning and tax avoidance should make Sweden a good partner for extended mutual assistance and exchange of information for tax purposes in the framework of the existing bilateral tax agreement between Sweden and the US.

The SBA therefore welcomes the Joint Statement made by the US, France, Italy, the United Kingdom, Germany and Spain on the 8 February 2012 and urges the US Treasury to follow the same approach for Sweden. However, the agreement on a bilateral level should be based on a standardised model agreement in order to create a level playing field for the multinational bank groups.

Swedish Bankers Association's comments on the FATCA proposed regulations of particular interest to the Swedish FFIs

1. Unclear exemption for Certain Saving Accounts

The Current Draft Regulations exempt Certain Savings accounts from the definition of "financial account" and thereby from FATCA reporting obligations. This is the case with so called retirement and pensions accounts where, if the conditions set forth in the paragraph in question ((b)(2)(i)(A) of Section 1.1471-5), FFIs are not obliged to report these accounts.

The SBA welcomes this exemption. It is a good approach by the legislator to avoid unnecessary administration for US authorities as well as participating FFIs when it comes to financial products where there is no real risk of tax evasion.

However, for insurance retirement products that fulfill the same goals as the retirements/pension accounts, who are regulated in the same strict way and who fulfill all the conditions set forth in the paragraph mentioned above and where the only real difference is the nature of the product (account or insurance policy), we believe the current wording is unclear as to the possibility to exempt insurance pension contracts from reporting. We believe that since there is no real difference between the two types of products, the exemption should include such pension insurance contracts as well.

The exemptions made for pension plans and/or retirement funds should be applicable even for foreign pension schemes of various types as for example an insurance contract based solution.

2. Treatment of new accounts opened by existing customers (§1.1471-1(b)(49) and §1.1471-1(b)(50) and consequential sections

The proposed regulations require an FFI to treat all accounts opened after the effective date of the FFI agreement, expected to be July 1, 2013 as new accounts for the purposes of identification. Because the requirement applies to new accounts, this will also require FFI's to treat as new accounts, accounts opened by existing customers after the effective date of the FFI agreement. This will require an FFI, amongst other things, to obtain documentary evidence as defined by the proposed regulations for these ac-counts if it does not already hold such documentary evidence.

At present, most organizations treat new accounts opened by existing customers differently from new-to-bank customers. New-to-bank customers will generally be subject to AML processes and appropriate documentation will be attained. Existing customers who open new accounts may be subject to a review for change of circumstances but will not typically be asked to provide additional documentation.

As a result, there will be a significant burden placed on FFI's in respect of existing individual customers which will only apply for the purposes of FATCA compliance. We would propose that the existing definitions of new account, meaning an obligation entered into after the effective date of the FFI agreement, and existing account, meaning an obligation which is pre-existing as at effective date of the FFI agreement, is changed to refer instead to customers. A new customer would therefore be a new-to-bank customer who has not previously been identified by the bank as at effective date of the FFI agreement.

The requirements to review new information obtained from existing customers for changing circumstances would continue to apply to these rules and therefore in the case where an existing customer could avoid new information which indicated US status or contained US indicia would still be identified by the FFI and appropriate documentation could then be obtained.

3. Documentary Evidence required for new accounts (§1.1471-3(c)(5))

Whilst the preamble to the proposed regulations indicates that the intention of the proposed regulations is to generally allow reliance to be placed on information collected during existing AML/KYC processes, we note that the proposed regulations do not allow this as they are currently drafted. Instead §1.1471-3(c)(5) provides for a restricted list of documentary evidence when compared to the set of allowable documentary evidence which an FFI can obtain under local AML/KYC processes.

In their current form, we believe the if the final regulations are not updated to achieve reliance on existing AML/KYC processes then the incremental costs of complying with FATCA will be considerably greater. We fully support the aim stated in the proposed regulations to align rules to local standards.

The SBA urges the IRS to further align the proposed regulations to the current AML/KYC processes. The Swedish financial industry is to a high degree based on electronic processes and standards (Internet-banking, etc.) which includes identification via electronic means, such as the developed identification BANK-ID or devices for electronic signatures, etc. The proposed regulations seem, with regard to identification, base themselves on identification in material form (paper). It should be clear in the regulations that also electronic forms of identification are acceptable as is the case today according to the AML/KYC process (Swedish attachment).

Furthermore, we suggest that, to the extent that the documentary evidence rules cannot be broadened to accept all local AML/KYC standards, the final regulations should contain provisions accepting as valid documentary evidence for FATCA purposes any documentary evidence already agreed with the IRS in the QI Attachments. For countries that do not have a QI Attachment, the IRS and that country should be able to agree on acceptable documentary evidence. As with the QI Attachment, a list of acceptable documentary evidence could be proposed by a recognized industry body representing the financial services industry in that country.

4. Documentary Evidence Expiry (§1.1471-3(c)(6)(ii)(C))

We note that the rules in §1.1471-3(c)(6)(ii)(C) set a period of validity for withholding certificates, written statements and documentary evidence.

At present, we are not required to refresh documentary evidence obtained for AML purposes unless a triggering event such as a change in circumstances is identified. There are no existing rules which cause documentary evidence to expire for AML purposes.

The rules which define a period of validity for documentary evidence therefore require a new process to be introduced solely for FATCA compliance which is not required under local regulation.

Importantly, we would anticipate that in most cases this resolicitation of documentation would not result in change of circumstances being identified for account holders. Often the documentary evidence is obtained to prove the identity of the account holder which mostly remains the same although the documentation has expired. The U.S. indicia which our impact assessment has suggested are most likely to be subject to change (address, phone number, standing instructions) are monitored by FFIs as a matter of course and that process will be enhanced as part of implementing the FATCA rules. As a result, we do not believe that obtaining new documentary evidence will result in a cost effective approach to monitoring change in circumstances.

We would therefore propose that the rules which apply a period of validity to documentary evidence removed in their entirety.

In its place, the existing rules regarding change of circumstances would apply such that when documentary evidence is obtained by an FFI as part of business as usual processes, this information would be reviewed for FATCA related changes in circumstances under the standards of the proposed regulations.

5. Expiry of withholding certificates

We would also suggest that the period of validity for Forms W-8 obtained from account holders as part of FATCA specific processes should not be subject to the current expiry rules.

As indicated above, we anticipate that monitoring for a change in circumstances is a more robust approach to identifying non-US persons who become US residents or citizens. We would suggest that all withholding certificates, written statements and documentary evidence collected for FATCA purposes should be treated as valid until the FFI knows or has reason to know that a change of circumstances has invalidated that documentation.

We recognize that certain documentation, in particular Form W-8BEN, is also used to support claims to relief under income tax treaties. We would suggest that the rules should distinguish between documentation used claim treaty relief, which would continue to expire, and documentation used solely for Chapter 4 purposes which would be subject solely to the change in circumstance rules.

6. Treatment of non-profit organizations (§1.1471-3(d)(6)(iii))

We note that the entity categorisation rules contain specific documentation requirements to support and FFI's classification of the non-profit organization.

For new obligations in particular, those rules typically require an FFI to obtain a statement from counsel that concludes that the entity is a non-profit organization always concludes that the entities form for charitable purposes. This places an administrative burden on non-profit organizations which are disproportionate to the size and purpose of the organization and the likelihood that such an organization could be used for the evasion of tax.

Outside of the US, obtaining a letter from counsel would typically require charity or other non-profit organization to incur third-party legal costs as a result of appointing external legal representation. Where a similar process is in operation within the existing QI regime (where certain tax-exempt organizations may choose to prevent a Form W-8EXP, which also requires a letter from counsel) many charitable organizations choose to suffer withholding tax rather than incur the costs of a third-party opinion.

We would suggest that for both new and existing obligations held by non-profit organizations, the primary source of information to be relied on by FFI should be a local register of charities maintained by the government, an agency of the government or the tax authorities were such a register is available.

If there are concerns about the application of non-profit status globally to entities, we would suggest that the QI attachment for those countries that have agreed them with the IRS could be amended to include the name of acceptable local register of charities and other non-profit organizations.

7. Conflicts with local laws, limited FFIs and FFIs with limited branches (§1.1471-4(e)(2) and §1.1471-4(e)(3))

The Draft Regulations allow a transition period until 31 December 2015 for Group entities in countries in which a legal barrier is imposed which prevents full FATCA compliance. During this transition period, these FATCA non-compliant entities will become "limited entities" or "limited affiliates" (limited FFIs being broadly treated as non-participating FFIs with respect to withholdable payments but no withholding being required with respect to foreign passthru payments).

Whilst we welcome the recognition that a group may be FATCA compliant where all FFIs who can comply do so, we are concerned that despite the transition period, entities in those countries which have legal challenges to overcome will not be able to do so by the end of this period, resulting in the rest of the Group becoming non-compliant as a result of issues over which it has no control.

Furthermore, there is a concern that a country could pass a law in the future which is in-compatible with FATCA, causing a the whole group to cease being able to comply with its FFI Agreement.

We would propose that rather than a time limited provision for conflicts of law, the final regulations contain a permanent approach that can be used in circumstances where complying with FATCA would cause the FFI to breach local law. That process would provide that in such circumstances, the FFI would:

i. make reasonable efforts to comply with the spirit and intent of the FFI Agreement without breaching the offending local law or regulation,

ii. identify the conflict between the FFI Agreement and local law to the IRS in such form as the IRS may prescribe or require, and provide further detail as necessary to the IRS to support them in engaging with the relevant/competent authorities.

iii. identify the conflict to local tax authorities or regulatory bodies as appropriate.

We would also suggest that the regulations should explicitly state that in circumstances where a member of the expanded affiliated group was unable to comply with FATCA as a result of a conflict with local law and had informed the IRS and local authorities of the conflict, the rest of its affiliates could continue to be treated as PFFIs.

8. The need to tie implementation deadlines for FATCA to publication of the final regulations

Given the limitation deadline of 1 July 2013, any delays in issuing final regulations will cause significant knock-on effects on the ability of FFI's to comply with FATCA in time. The SBA therefore proposes that the implementation deadlines for FATCA are linked to the date that final regulations are issued. For example, the effective date of the FFI agreement should be a minimum 18 months after final regulations are issued. Thereafter the phased in approach should be maintained.

It would also be more practical to implement new routines and calculate all thresholds from the beginning of a year.

9. Expiry of KYC

The existing processes of KYC do not require the financial institutions to refresh evidence obtained from individual account holders. However, the validity periods imposed on documentary evidence would require financial institutions to introduce a new process for the purposes of FATCA limitation. This process seems unnecessary as a result of the monitoring for change of circumstances, which should identify change of address, phone number, standing instructions etc. The SBA suggests tying validity period of documentary evidence and W-8 series to change in circumstances.

10. Complexity of entity identification

The definition of active NFEEs which leads to what constitutes a passive investment entity is when it comes to define these entities not workable. The SBA suggests that the definition of a passive investment entity should be based either on known information from authorities what constitutes a “passive entity” or on the normal KYC/AML procedure within each country. There should be no obligation to investigate further if the entity is conducting active trade or business unless the institution knows otherwise.

The new process for identification of FFIs and entities is complicated as a result of the number of classifications contained in the proposed regulations and the fact that most classifications have different documentation requirements to evidence that the classification has been appropriately applied. Whilst the number of classifications required may be difficult to reduce without removing exceptions which are useful to entity clients, there is a wish for more uniform documentation requirements for entities which enable the institutions to more easily operate the process as a part of normal business.

It should be enough to refer to a valid EIN. No further investigations or certifications should be required by the participating FFI.

11. Grace period for countries entering into partner agreements

Given the current timeframe for implementing FATCA and domestic timeframes for entering into all agreements with the US government and implementing local law, there is a risk that FFIs would need to enter into an agreement with the IRS to be effective July 1, 2013 and then within a short timeframe, enter into a different agreement with the local government, potentially terminating the existing agreement with the IRS.

This seems unnecessarily burdensome for both FFI's and the IRS. It is suggested that a proceeding is established where an entity in a country which has entered into talks about a partnership agreement or signify it intends to enter into a partnership agreement can declare itself as *certified deemed compliant* during the transition period.

12. The status of Investment funds

In Sweden investment funds are not legal entities and therefore have no legal capacity. FATCA requires that all investment funds on the investors' behalf enter into FFI agreements with the US. There are tremendous risk for investment funds with assets in US securities if they are not classified as FATCA compliant. This would lead to 30% "FATCA" tax on "withholdable payments" to the investment fund. This will most certainly affect investors in such funds negatively.

Yours faithfully,

SWEDISH BANKERS' ASSOCIATION

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