Japanese Bankers Association (ZENGINKYO)

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CC:PA:LPD:PR (REG-121647-10)
Internal Revenue Service
Room 5205
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Washington, D.C. 20044

RE: Comments by the Japanese Bankers Association to REG-121647-10.

Outlines

I. Overall framework of FATCA and Intergovernmental agreement

・Our Support for Intergovernmental approaches to Implementation of FATCA and request for flexible approaches to increase a number of participating countries in intergovernmental agreement (I.5.(1))

・Requests for measures to prevent adverse effects of non-participating countries in intergovernmental agreement on FFIs in participating countries (I.5.(2))

・Request for repeal of withholding tax on passthru payments due to concerns over effects on international financial markets (I.5.(3))

・Request for additional transition period till the implementation of FATCA to allow sufficient lead time for FFIs (I.5.(4))

II. Specific Requests

・Exclusive reliance on local AML/KYC rules in identification procedures (II. 1)

・Simplifying required procedures on identification of entity accounts and individual accounts (II. 2、3), etc.

I. Overall framework of FATCA and Intergovernmental agreement

1. Introduction

The Japanese Bankers Association ("JBA") fully understands the background and progress of the enactment of FATCA in the United States is to prevent tax evasion. More countries have attempted to cope with this issue, and Japan is not an exception. The JBA also supports these efforts and concept.

The JBA also recognizes and appreciates that the IRS and the Treasury understand that the success of FATCA implementation would depend on FFIs' appropriate performance of various requirements. Therefore, the IRS and the Treasury sincerely accepted opinions from financial institutions /associations all over the world. The JBA truly appreciates that the IRS and the Treasury reflected their opinions on the proposed regulations released in February, 2012.

The Joint Statement from the U.S., France, Germany, Italy, Spain, and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA (the "Joint Statement"), which was issued at the same time with FATCA proposed regulations, has made great progress on FATCA implementation, including issues regarding a legal framework which the JBA had concerned, and intergovernmental approach which the JBA had suggested.

However, the JBA has some concerns over the proposed regulations and the joint statement.

First, as for the proposed regulations, the level of burdens imposed by FATCA is still far more than what is required under local KYC, AML, and other bank regulatory requirements, despite the fact that the obligations imposed on FFIs are greatly reduced. In addition, there still remain quite a few issues with uncertainties for which each FFI would likely face judgemental or practical difficulties such as uncertainties on documentary evidence and the nature and extent of identification procedures caused by differing KYC rules from jurisdiction to jurisdiction Details of our comments on the aforementioned issues are discussed in II below.

As for the joint statement, the success of this approach of a partner country would depend on how many countries would support this idea and become a FATCA partner. More countries are not a FATCA partner (hereafter "non-FATCA partner"), heavier burdens to deal with different cases will be imposed on FFIs whose headquarters are in FATCA partner countries and operate globally, as well as legal risks will be borne by the FFIs.

2. Joint Statement

(1) Remarkable progress

The JBA appreciates the progress described in the joint statement to develop a framework based on intergovernmental discussions as remarkable.

Legal risks which FATCA imposes on FFIs were explained in the comments submitted last October. The outline is as follows:

An FFI must implement FATCA requirements subject to domestic laws where the FFI is operating. At the moment, numerous domestic legal issues have been identified in many jurisdictions regarding the performance of obligations pursuant to the FFI agreement. Especially, it is extremely difficult to disclose personal information of recalcitrant account holders, impose a punitive 30% withholding tax on US source income or close accounts involuntarily.

While these legal risks exist, the joint statement issued at this time provides a legal basis to disclose personal information to the authority, and exempts a punitive withholding or involuntary closure of accounts; therefore, legal risks to FFIs are substantially mitigated. This is the great first step for FATCA implementation.

(2) Awareness of issues for expanding an intergovernmental framework

Our understanding is that the IRS and the Treasury aim at building legal risk-free environment without imposing withholding tax on passthru payment or involuntary closure of accounts all through the countries joining a framework based on an intergovernmental agreement, such as a FATCA partner, and achieve the original purpose to disclose information properly. However, we cannot deny a possibility that a considerable number of countries will not participate in such a framework since that is not necessarily easy for countries to reach an intergovernmental agreement and develop a required legal framework, and also there are some countries that have not entered into a tax treaty with the US.

The US currently has a tax treaty with over 60 countries. There are more than just a few countries that have no tax treaty with the U.S., where internationally operating financial institutions have foreign branches or subsidiaries. As the countries around the world may be divided into two groups, FATCA partners and non-FATCA partners, FFIs, especially those with global network of operations, continue to face legal risks depending on the location of branches or subsidiaries. The JBA is also concerned that even a FATCA partner country may not fully take advantage of its status because of the reason

described above, and its incentive to join the inter-governmental framework such as FATCA partnership would not work.

3. Issues regarding a country that does not join an intergovernmental framework

(1) Issue
The issue here is a case where an overseas branch or a subsidiary of an FFI that is a member of an expanded affiliated group does not join a framework based on an intergovernmental framework such as FATCA partner, and such a branch or a subsidiary faces legal conflicts when performing obligations under FATCA.

This foreign branch or local subsidiary cannot perform obligations under FATCA, and penalties will be imposed on it.

(2) Unreasonable and unfair penalties

Recognizing that it is difficult to develop a universal framework to comply with FATCA only with an agreement with financial institutions, and the fundamental difficulties are caused by legal conflicts in those countries, the IRS and the Treasury have already issued an approach in the joint statement on the basis of an intergovernmental agreement to overcome these problems.

Even if a branch or local subsidiary is a member of a group that has an intention to comply with FATCA, it cannot comply with the FATCA if the country in which a branch or local subsidiary is located does not join an intergovernmental framework.

In that case, a punitive withholding tax still would be imposed on an FFI, as a limited FFI or a limited branch. It is extremely unreasonable and unfair that a punitive withholding is imposed on an FFI that cannot comply with FATCA because of its local laws, not of its intention. It should be solved between the IRS and the government of the country concerned since it is not a problem of an FFI.

An FFI will face excessive burdens since it has to deal with different cases depending on a branch or local subsidiary even though an FFI implements a policy to comply with FATCA as an FFI group.

4. Withholding on passthru payments and concern over effects on international financial markets

We would like to draw your attention that there is a possibility that a settlement system might be paralyzed if withholding tax is imposed on payments made to recalcitrant account holders or non-participating FFIs under FATCA. Especially, a global settlement system does not have any uniform standard for a settlement, and every country has a unique settlement system. Therefore, there is no capability of dealing with a withholding tax under FATCA or calculating passthru payments because many financial agents and intermediaries are involved in various settlements.

If withholding under FATCA is implemented without any solution to this problem, an FFI located in a non-FATCA partner country would be subject to withholding tax and a settlement related to such a FFI will be affected seriously.

On the other hand, there is concern that the financial market of a country that joins an intergovernmental framework such as a FATCA partner also would shrink. A country that does not join an intergovernmental framework, called a non-FATCA partner, would refrain from investing in a FATCA partner country for the reason that withholding tax would be imposed on the investments when such a country retrieves investment capital. That would affect the economy of FATCA partners negatively, caused by the flow of funds stagnated.

The problem of making the financial system confused explained above disturbs efficient flow of funds and international transactions globally, therefore, the international society itself has to bear burdens regardless whether an intergovernmental framework exists or not. With that point, the JBA has to raise deep concern.

5. Requests to the IRS and the Treasury

The JBA has already made comments about significant issues of FATCA. Furthermore, JBA hereby requests the following four points to the IRS and the Treasury.

(1) Flexible approach on expanding an intergovernmental framework

The JBA would like to request that the IRS and the Treasury relax the requirements of an intergovernmental framework so that all countries where international financial institutions are generally located can join an intergovernmental framework such as a FATCA partner.

(2) Appropriate treatment for a country that does not join an intergovernmental framework

It is extremely unreasonable and unfair that a punitive withholding tax would be imposed on a participating FFI or an overseas branch or a subsidiary (which has an intention to comply with FATCA) of a FFI that exists in a non-participating country in intergovernmental agreement. This issue should be resolved.

For example, for an overseas branch or a subsidiary that is a member of an expanded affiliated group of an FFI and that cannot comply with FATCA due to legal system of a country where such a branch or subsidiary is located, it should be treated as a "temporary compliant FFI (or temporary compliant branch)" not as a "limited FFI (or limited branch)" suspending penalties for not performing full obligations under FATCA if registered with the IRS until the legal conflicts are settled by intergovernmental talks without setting a specific fixed period.

(3) Repeal of withholding on passthru payments

There is no need to impose withholding tax on passthru payments if all countries are becoming a FATCA partner. It would be a disincentive if heavy burdens are imposed on the countries or financial institutions that support FATCA to prevent tax evasion.

Considering effects on making the settlement system confused and the effects on international financial markets such as avoidance of increasing sovereign risks, we request that obligations of withholding tax on passthru payments not be imposed at all on FFIs or FFIs of its expanded affiliated group that operate in an intergovernmental framework.

(4) Request of additional transition period

We believe that at least one year will be required until intergovernmental talks reach an agreement and build a system in several countries. As for financial institutions that operate globally, it is required to build a system making confirmation of a status of an overseas branch or a subsidiary since each country has a different status about FATCA implementation.

FATCA will be effective in approximately 8 months, and will be practically enforced in 14 months. The JBA does not think that it would be efficient that an FFI has to prepare for FATCA implementation under such unstable circumstances.

Accordingly, the JBA requests that the actual FATCA effective date, which is now July 1, 2013, be postponed substantially.

II. Specific Requested matters

1. Application of local AML/KYC rules to identification

While FATCA allows identification procedures to rely on local AML/KYC rules, separate detailed rules are set forth. We would like you to clarify that identification procedures by AML/KYC rules, which is called the Act on Prevention of Transfer of Criminal Proceeds in Japan, shall govern if rules are inconsistent with each other.

At least, the effectiveness is guaranteed in countries, such as the U.S. and Japan, that are members of FATF (Financial Action Task Force) or FSRB (FATF-Style Regional Body), because AML/KYC rules are improved due to the revisions of recommendations and results of mutual evaluations. It is understood that rules may differ in each country to a certain extent based on the differences of social and legal system of that country. Therefore, it is not reasonable to apply the same standards across the board because such AML/KYC rules can be relied on for FATCA purpose. It is appropriate that local AML/KYC rules should be relied on extensively overall.

Types and scopes of documentary evidence

The proposed regulations of FATCA require documentary evidence which is different from the one set forth in the Act on Prevention of Transfer of Criminal Proceeds in Japan. Documentary evidence is determined in consideration of Japanese social and legal system. Accordingly, we would like to clarify that documentary evidence set forth by the Act on Prevention of Transfer of Criminal Proceeds in Japan shall govern to avoid serious problems in our financial transactions caused by identification procedures when the types or scopes of documentary evidence are inconsistent with the one set forth by FATCA.

FATCA regime affects on customers considerably more than QI system does. Therefore, it is required that all documentary evidence set forth by the Act on Prevention of Transfer of Criminal Proceeds in Japan to be admitted as well as the one approved by QI attachment. Otherwise, two inconsistent KYC rules would not only cause problems to financial institutions in Japan that impede FATCA compliance but also cause many complaints claimed by customers.

Expiration period of documentary evidence and procedures to identify again

The proposed regulations of FATCA provide that documentary evidence is valid until the last day of the third calendar year following the year in which the documentary evidence is provided or until the end of the expiration period.
It is not required for financial institutions in Japan to identify customers again by documentary evidence if no changes are made to the information reported. We would like to confirm that the provisions of the Act on Prevention of Transfer of Criminal Proceeds in Japan shall govern and no procedures to identify customers again by documentary evidence are required in this case.

We assume that no collection of withholding certificates such as W-9 or W-8BEN, etc. is required again since they are obtained as a part of documentary evidence. The revised Act on Prevention of Transfer of Criminal Proceeds which will take effect in April 2013 requires customers to notify the changes of information reported pursuant to standard terms of transactions. It is fully possible to identify US status by such required notification from customers at the time of changes.

Timing of identification

The proposed regulations of FATCA provide that identification procedures are required for preexisting customers when they open a bank account after the effective date of an FFI agreement while the Act on Prevention of Transfer of Criminal Proceeds in Japan allows less burdensome identification procedures (i.e., confirming that identification has been already made). We would like to confirm the provisions of the Act on Prevention of Transfer of Criminal Proceeds shall govern.

Transactions subject to identification procedures (financial accounts)

The proposed regulations of FATCA require FFI to perform identification procedures for accountholders of "financial accounts" defined by FATCA while the Act on Prevention of Transfer of Criminal Proceeds in Japan requires different products that are subject to identification procedures. We would like to know that provisions of the Act on Prevention of Transfer of Criminal Proceeds in Japan shall govern in this case. Employee savings plan is an example that identification procedures are not required for by the Act on Prevention of Transfer of Criminal Proceeds. Identification procedures are not required since it is a savings plan that a prefixed-certain amount is deducted from an employee's wage with the employer's identification under the requirements of Worker's Long-term

Savings Promotion Act. It is considered as a transaction which poses an extremely low risk of money laundering because the employee cannot instruct a deposit each time, therefore, there is no need for identification under FATCA.

Obligation to retain a copy of documentary evidence

The proposed regulations of FATCA require that a copy of original documentary evidence should be retained while it is not required to obtain a copy of the original document under the Act on Prevention of Transfer of Criminal Proceeds in Japan, instead, making and retaining a record of identification is required. The record shall provide information of the date of identification, procedures, a type and ID number of documentary evidence. It also carries special notes for identification and it can be sufficiently a substitute of a copy of the original document. We would like to clarify that the AML/KYC rules in Japan shall govern.

Standard for identification of US substantial owners

The proposed regulations of FATCA stipulate that owners who have exceeding 10% ownership are subject to identification procedures while owners who have ownership by 25% or more will be treated as a substantial owner under the revised Act on Prevention of Transfer of Criminal Proceeds which will take effect in April 2013 in Japan. We request your clarification whether we should identify only owners who have ownership by 25% or more based on the AML/KYC rules. Otherwise it is extremely difficult to apply a different standard other than that of the Act on Prevention of Transfer of Criminal Proceeds in Japan. Before the revised Act on Prevention of Transfer of Criminal Proceeds coming into effect in April 2013, identification for substantial owners is not required at all. Accordingly, it is permitted to perform identification procedures on specific transactions that occur after the effective date as a transition relief. We would like to request that this transition relief be also permitted as a part of local AML/KYC rules.

2. Requests for reducing burdens regarding entity accounts

(1) Repeal of obligation to verify the eligibility of certified deemed-compliant FFIs by participating FFIs

If a participating FFI is to perform verification procedures (such as checking whether quantitative standards are satisfied) for certified deemed-compliant FFIs, the burdens placed on the participating

FFI appear to be excessive. Also, it is not economical especially if all FFIs that have a transaction with the FFI at issue have to perform the same verification procedures. We request that the application for certified deemed-compliant FFIs be simplified and certified by the authority (such as the IRS or the local authority in a FATCA partner country). The results of certification should be announced, for instance, on the website of the IRS.

(2) Simplification of determination of active NFFE

We request that the determination of active NFFE (calculating passive income rate out of gross income) upon obtaining withholding certificates etc. after the transition relief be simplified. It is easily assumed that many NFFEs are not so cooperative to provide required information, and it is not practically possible for FFIs to bear heavy administrative burdens such as calculating ratio upon obtaining information and make a determination. Therefore, we request burdens be reduced by making some of procedures allowed in a transitional relief (use of SIC codes, etc.) permanent.

(3) Limitation of substantial U.S. owners of passive NFFE subject to identification procedures

The total number of passive NFFEs would be still massive for ordinary financial institutions. We request that US indicia (a record that indicates remittance to the U.S.) be a criterion and substantially reduce the burdens on identification procedures.

3. Requests to reduce burdens regarding individual accounts

(1) Clarification of the definition of standing instruction

We request that the definition of standing instruction be clarified that it means automatic remittance by a financial institution on the basis of a contract of periodical remittance without instruction by customers to a financial institution. Also, we request that a criterion of threshold of transactions by purpose of remittance, amount of remittance one time (e.g., 10,000 U.S. dollars) and frequency of remittance (e.g., 6 or more annually or once in two months or more) be added to the definition. It is fully possible to identify that a customer is not a US taxpayer by documentary evidence issued by a government, and therefore, we request that Form W-8 BEN not be required.

(2) Narrowing the definition of a relationship manager
The definition of a relationship manager (hereafter "RM") differs in each country, depending on

financial circumstances in each country. For example, Japan or other Asian countries has a custom to provide any customers with good services regardless whether a customer has a high value account or not, and there is a RM that takes care of a customer who does not have a high-value account. Therefore, we request that the definition of RM be clarified, such as "a sales person who is in charge of a customer who has an account in excess of one million U.S. dollars". Also, identification procedures of identification of material changes or consolidation of accounts should be limited to those RMs.

(3) Repeal of procedures for dormant accounts

The systems in Japan usually do not maintain the balance of dormant accounts due to the system capacity. We request that procedures for dormant accounts be abolished since it is impossible to be in compliance of.

4. Repeal of provisions that require written statements

We request that the provisions requiring written statements be curved out. The proposed regulations provide the IRS and the Treasury with sufficient means, such as obtaining documentary evidence through account due diligence procedures, to ensure that an FFI is compliant with FATCA.
Requiring an account holder to sign on a written statement under penalties of perjury to the U.S. government would exert undue mental pressure on the account holder. FFIs should not be in a position to enforce such provisions, especially when the account holder, who is likely to be a non-US person and unfamiliar with the FATCA provisions, has already submitted proper documentary evidence to establish the Chapter 4 status.
Accordingly, we respectfully request that a written statement be not required when an FFI obtains proper documentary evidence under the current AML/KYC rules.

5. Annual reporting

We request that the definition of "transferring accounts" and "closing accounts" be clarified, and items to be reported be simplified.

(1)We would like to make sure that we have to report the accounts that became not subject to consolidation as a result of transferring or closing accounts and the balance of a financial account becomes zero. We think that it is not necessary to report such accounts in a case where accounts

are not excluded from consolidation of accounts because they are still included in a calculation of the balance of financial accounts even after transferring or closing the accounts.

(2)With regard to reporting items for individuals, they are generally items that should be reported in a form. Such items are not clear at this point. We request you to announce such items at your earliest convenience, and to have an opportunity to submit an opinion depending on a necessity.

6. Requests for relaxing requirements of local FFI and clarification of the definition

We would like you to clarify the following matters:

(1)A representative office (an office that is not authorized to perform a banking business or not subject to corporate income tax under a local law, or does not constitute a permanent establishment as defined under applicable tax treaty) does not fall into a definition of "fixed place of business" under the requirement of local FFI, which is "An FFI must have no fixed place of business outside its country of incorporation or organization."

(2)It is allowed to open and maintain an account for a U.S. person who is a resident of a country under a local tax law where an FFI is located.

(3)Financial products denominated in US dollars may be posted on financial institution's website since identification procedures are performed when selling those products.

(4)It is stipulated that each member of an expanded affiliated group needs to satisfy the requirements of a local FFI. Our understanding is that an NFFE in an expanded affiliated group does not need to satisfy this requirement.

(5)Obligation to implement a policy not to open or maintain nonresident accounts should be removed. If it is impossible, as an alternative solution, FFIs should be prohibited from maintaining an account that is over the 50,000 U.S. dollar threshold s for individuals and the 250,000 U.S. dollar threshold for entities instead. Furthermore, the requirements to close an account or withhold if FFIs have such an account be revised so that such requirements only apply to the accounts opened on or after January 1, 2013, rather than January 1, 2012, up to the date the FFI implements the policy not to open and maintain individual and entity accounts over the applicable threshold amounts..

(6) Obligation to close an account or withholding procedures are not required for specified U.S .persons' accounts that were opened on or before the end of December 2011.

7. Others (Requests for clarifying definitions and unclear matters and announcing them earlier)

We would like to request further clarification with regard to the following matters:

(1) Intergovernmental framework such as a FATCA partner

① Clarification of the status of an intergovernmental framework in the FATCA regulations is required. For example, roles of a lead FFI or compliance FFI located in a country which joins an intergovernmental framework and the treatment of an expanded affiliated group should be clarified.

② Withholding tax will not be imposed on passthru payments in a case where an FFI in a country which has entered into an intergovernmental agreement has transactions with an overseas branch or a subsidiary in that country and the parent company or headquarter of which have not entered into the agreement because it is located in a country without such a governmental agreement, as long as such an overseas branch or a subsidiary is located in a country with an intergovernmental agreement.

(2) The definition of financial accounts

① As for "interests of a financial institution's equity or obligation", it should be excluded from reporting by an issuer if such an obligation is transferred many times without identification by an issuer, regardless whether it is regularly traded on an established market.

② Finance lease in a lease transaction does not consist of a financial account.

(3) The definition of an expanded affiliated group

① Clarification of the definition of partnership should be required. (i.e., Clarification of type of an entity which is included in a "corporation" of "a partnership or any entity other than a corporation")

For example, suppose that a Cayman SPC whose owners are charitable trusts and all loans

are contributed by FFIs. If the SPC is classified as a non-financial foreign entity, it would be a non-member of an expanded affiliated group, but if it is classified as a partnership etc., it would be a member of an expanded affiliated group of FFI.

② Clarification of entity classification of a joint venture that has just 50% voting rights is required.

③ Establishment of a new category of an excepted FFI should be proposed, in a case where a parent company cannot govern a FFI member because it does not have substantial control, but technically, such an FFI is included in an expanded affiliated group since it possesses ownership exceeding 50%

(4) Procedures to conduct a research electronically
As for identification procedures of U.S. indicia in electronically searchable information required for preexisting individual accounts less than 1 million U.S. dollars in balance, the research can be conducted only with the data maintained and data which is not supposed to be retained, such as “place of birth in the U.S.” or “a telephone number in the U.S.”, may be treated as if data do not exist.

(5) Identification of preexisting individual accounts over one million U.S. dollars
As for identification procedures of U.S. indicia for preexisting individual accounts whose balance exceeds one million U.S. dollars, the manual review of the most updated customer master file is required when an electronic search cannot be performed because one of data fields out of six is not appropriate for electronic search.

(6) Announcement of refund procedures at an early stage
Clarification of forms, procedures, and schedule for refund claim should be clarified and announced at an early stage.

(7) Treatment of an account whose value exceeds one million U.S. dollars during a year

Identification is not required if a balance of an account exceeds one million U.S. dollars during a year, but decreases below one million U.S. dollars at the end of the year. Accordingly, it will not be subject to reporting.

(8) The definition of deposits

The term “other similar instrument” used in the definition of “depository account” should be clarified.

(9) The method to certify to be in compliance of FFI Agreement

Clarification of “to the best of the responsible officer’s knowledge, conducting a reasonable inquiry” is required by illustrating by using some examples presupposing that a responsible officer should certify.

(10)Announcement of timeline of the enactment of FATCA

Timing of release, contents, and schedule for the final regulations, an FFI agreement, and guidelines should be announced in advance.

(11)Requests with respect to matters other than the proposed regulations of FATCA

① Details of FATCA should be notified to U.S. persons in order for FFIs to implement FATCA smoothly.

② A multilingual customer service, including Japanese language capability, should be established within the IRS to provide compliance support for FFIs, and the compliance support services should include the interpretation and application of the regulations and various procedural requirements under FATCA.

We look forward to providing assistance to you when you consider our comments described in this letter, as well as throughout the implementation of the FATCA provisions. We would also be willing to meet with the Treasury and the IRS with pleasure to discuss any alternative solutions on this matter.

Sincerely,

Japanese Bankers Association

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