ICSA
INTERNATIONAL COUNCIL of SECURITIES ASSOCIATIONS

November 22, 2011

Timothy Geithner, Secretary
US Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Foreign Account Tax Compliance Act (FATCA)

Dear Secretary Geithner and Commissioner Shulman:

The International Council of Securities Associations (ICSA) is the global forum for trade associations and self-regulatory organizations that represent and/or regulate firms active in the securities industry.[1] We welcome the opportunity to provide the United States Treasury Department and the Internal Revenue Service with additional comments regarding the Foreign Account Tax Compliance Act ("FATCA"), which was enacted into law on March 18, 2010 as part of the Hiring Incentives to Restore Employment Act.

As we wrote previously, ICSA members strongly support FATCA's overarching goals of preventing tax evasion and promoting financial transparency. However, we are opposed to the actual legislation itself for a number of reasons.[2] Specifically, we are opposed to FATCA because it would:

[1] ICSA is composed of trade associations and self-regulatory organizations that collectively represent and/or regulate the vast majority of the world's financial services firms on both a national and international basis. ICSA's objectives are: (1) to encourage the sound growth of the international securities markets by promoting harmonization in the procedures and regulation of those markets; and (2) to promote mutual understanding and the exchange of information among ICSA members. More information about ICSA is available at: www.icsa.bz

[2] Many of the issues addressed here are discussed in greater detail in our earlier letter dated June 28, 2011.

1. Impose excessive and disproportionate compliance costs on both foreign financial institutions (FFIs) and U.S.-based financial institutions which in the aggregate will likely far exceed the potential revenue benefit for the U.S. Treasury.[3] These additional costs will accrue at the same time that financial institutions worldwide will be faced with steeply higher costs due to the new Basel capital standards, MIFID II, the requirement to establish legal entity identifiers and other measures arising from legislative and regulatory changes that have been put in place as a means to strengthen the global financial system;

2. Directly contravene, in a number of jurisdictions, local data protection/privacy laws and other legal requirements, thereby placing FFIs in those jurisdictions in the untenable position of having to either comply with FATCA or with their local laws, which would in turn make those FFIs subject to sanctions from their home government or from the IRS;

3. Set new, unilateral standards for identifying and verifying the beneficial owners of companies, thereby undercutting the multilateral negotiations that have been carried out for many years under the leadership of the Financial Action Task Force (FATF), the global standard setter for anti-money laundering regulations; and,

4. Lead to possible reductions in investment choices for U.S. investors and limit the ability of U.S. corporate borrowers to access external debt markets, both of which could reduce capital inflows to the U.S.

We are also concerned about the potential impact of FATCA on the global payments system as well as national and regional payments systems. In its recently issued White Paper dealing with FATCA, the Payment and Market Practice Group of the Society for Worldwide Interbank Financial Telecommunication (SWIFT) noted that:

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[3] Ernst & Young found in a recent survey of their European Tier I financial institutions clients, including banks, mutual fund managers and insurance companies, that each institution would spend an average of €179mn to satisfy the requirements of FATCA. See Ernst & Young (September 2011), “Making Sense of FATCA”, pdf.

> In all circumstances, the information, practices and processes utilized by the national and international payments value chain (from the customer payments instruction process to bank-to-bank settlement) do not have the capability to identify transactions and/or parties to a transaction as being subject to or exempt from FATCA requirements. This means that all the customer payment instructions and payments between FFIs would be affected worldwide [by FATCA].[4]

In effect, SWIFT's systems along with national and regional payment systems around the world will have to be modified in order to take into account the requirements of FATCA. At the very least, a complex system would need to be implemented across the global markets to enable identification of the transactions and participants to which FATCA should be applied and extensive passthru payment percentage information would need to be gathered by every participating FFI. In addition, imposition of the FATCA-related withholding tax could potentially invalidate the possibility of intra-day netting (due to the varied withholding tax rates that would potentially have to be applied), thereby creating significant settlement risk and liquidity concerns across the wider market, with the attendant risks for financial stability.

Rather than the unilateral approach taken by FATCA we suggest that a more appropriate approach would be reliance on a global multilateral framework that would allow the U.S. and other governments to obtain information regarding income paid to citizens of their countries by foreign financial institutions. As you are aware, G20 leaders recently applauded the work being done by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, which has begun to carry out in-depth peer reviews of the implementation of the standards of transparency and exchange of information for tax purposes. As G20 leaders noted in the Declaration at the end of their November 2011 Summit:

> We underline in particular the importance of comprehensive tax information exchange and encourage competent authorities to continue their work in the Global Forum to assess and better define the means to improve it. We welcome the commitment made by all of

[4] SWIFT Payment and Market Practice Group, *White Paper on Foreign Account Tax Compliance Act* (September 2011), pg. 3.

> us to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and strongly encourage other jurisdictions to join this Convention. In this context, we will consider exchanging information automatically on a voluntary basis as appropriate and as provided for in the convention.[5]

We are aware that the U.S. may have found progress within the OECD Global Forum to be too slow and for that reason has turned to the unilateral approach that is embodied in FATCA. We note, however, that a multilateral approach toward the exchange of tax information, which would be developed through negotiations between governments and not through negotiations and agreements between the IRS and private entities, would be consistent with the G20's emphasis on building a coherent global framework for financial markets, a policy approach that has been strongly supported by the Obama administration.[6]

Alternatively, the Treasury and the IRS could leverage existing information sharing agreements and develop new information sharing agreements for other jurisdictions where they do not currently exist.[7] This would allow the U.S. to take a much more targeted and risk-based approach in the implementation of FATCA, as it could develop specific information sharing agreements with the low-risk jurisdictions (which are not considered to be tax havens) and

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[5] Cannes Summit Final Declaration (November 2011), Paragraph 35.

[6] The EU Savings Directive ("EUSD") could also serve as a model for a global tax information exchange agreement, albeit with certain modifications. Within the EU, relevant details of deposits owned by a resident of one Member State which are held at a bank in another Member State are reported back, as a matter of routine, to the tax authorities of the account holder's home Member State. Importantly, the EUSD also applies to third countries, which may be considered "high risk" in terms of facilitating tax evasion, such as Switzerland, Liechtenstein and the British Virgin Islands, all of which deduct a 35% withholding tax on deposits owed by EU nationals and which is forwarded to the relevant Member State on an anonymous basis. Some other third countries, which may be equally considered as "high risk" such as Anguilla, the Cayman Islands, Montserrat and Aruba supply relevant details of deposits held by EU nationals, as a matter of course, to the appropriate taxation authorities with the EU.

[7] According to a recent report by the U.S. General Accountability Office (GAO), the U.S. currently has treaties and other agreements authorizing tax information exchange with over 90 jurisdictions. The GAO found, however, that the IRS did not make extensive use of these tax treaties. Indeed, the report noted that, "Between 2006 and 2010, 5,111 requests for information to or from the United States and 75 foreign jurisdictions were completed; 4,217 were incoming requests for information…and 894 were outgoing requests from the United States." GAO Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate (September 2011), *IRS's Information Exchanges with Other Countries Could Be Improved through Better Performance Information* (Washington, DC).

different information sharing agreements for higher-risk jurisdictions.[8] Such agreements, with reporting done on a tax authority-to-tax authority basis, would provide the U.S. government with the information that it is seeking through FATCA without the excessive compliance costs and the legal challenges that would result from FATCA as it is currently designed.

In light of the issues addressed in this letter, and the fact that the final regulations for FATCA are not expected to be released until 2012, we urge the U.S. to delay implementation of FATCA. We recognize that Treasury and the IRS have already responded to industry concerns about the implementation timeline for FATCA with the general delays that were proposed in Notice 2011-53.[9] However, implementing FATCA compliance systems will require an extraordinary commitment of time and resources from the financial community which will include, but may not be limited to, the modification or design of relevant IT systems, recruitment of IT personnel and/or engagement of outside consulting firms, developing and implementing client communication strategies, enhancing electronic databases of static account data and developing search queries, preparation of procedures and manuals, and educating firms' sales forces as well as hiring numerous personnel in legal, compliance, operations and technology support functions. FATCA will require that the larger FFIs and U.S.-based financial institutions carry out these implementation tasks on a global basis, which will in turn involve transformations in systems and personnel on a massive scale.

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[8] A risk-based approach would be far more efficient than the approach under FATCA, which essentially treats all jurisdictions as if they were high risk for tax evasion. As the GAO report makes clear, U.S. tax authorities are well aware of which countries would be regarded as high risk and which would be regarded as low risk. For example, the GAO report found that in the five year period between 2006 and 2010, "…of the 900 outgoing requests [for information] and 4,200 incoming requests, 711 involved a single foreign jurisdiction, which was not named in the report due to IRS confidentiality rules." The GAO report also specifically discussed the problems that the IRS has had in obtaining needed information from Switzerland which, according to the report, "…has resisted allowing its banks to respond to U.S. requests for the names of U.S. persons with Swiss bank accounts that have not been disclosed to the IRS." In response,"…in January 2011, the United States changed its standard TIEA agreement to provide that an information request is adequate if it contains 'the identity of the person or [an] ascertainable group or category of persons under examination or investigation."

[9] Under Notice 2011-53, the first required information reporting under FATCA for new accounts, documented U.S. accounts and private banking accounts would be based on end-2013 balances and would generally be delayed until September 2014.

Completing all of these implementation tasks will take a significant amount of time and very few of the tasks can be undertaken in an efficient or meaningful way until after the final regulations are issued.[10] In particular, it will not be possible to start significant implementation until crucial holes in the guidance have been filled, including but not limited to: (1) clarification of who the relevant withholding and/or reporting agent is in multiple agent situations; (2) clarification of the definition of financial account, including relevant exceptions; (3) clarification of the definition of withholdable payments, including relevant exceptions; (4) clarification of the treatment of trusts; and (5) clarification of the reporting duties of U.S. based financial institutions.

In addition to the changes that will need to be implemented by individual FFIs and U.S.-based financial institutions, as noted above significant changes will need to be made to the global as well as national and regional payments systems and those changes cannot be discussed and agreed to until after the final regulations are in place. As the recent White Paper from SWIFT's Payment and Market Practice Group noted, "…a multi-year, worldwide effort (including instructing customers) will be required to support implementation [of FATCA]. Current timelines for agreement of change require a lead time of 18 months from final regulations to even commence assessment work."[11]

Consequently, we are extremely concerned that the current proposed implementation deadlines cannot be met. Therefore, we strongly suggest that the timeline for the implementation of FATCA should be further modified so that the first required information reporting under FATCA <u>for any account</u> would be due in March 2015 based on 2014 year-end account balances, and that the first required withholding under FATCA should occur in January 2015. We note that this delay should include appropriately extended deadlines for instruments that would be grandfathered under FATCA.

This suggested timeframe is based on the assumption that final FATCA regulations will be issued by June of 2012 or earlier. To the extent that the FATCA regulations are finalized later, it

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[10] Based on information from ICSA members, we understand that completion of these implementation tasks could take 18 months or longer, depending on the jurisdiction, once the final regulations are issued.

[11] SWIFT Payment and Market Practice Group, op. cit., pg. 5.

will be critical that all start dates be postponed by at least one full year for every year or portion of a year by which issuance of the final regulations is delayed.

Once again, we reiterate that ICSA members remain opposed to FATCA for all of the reasons outlined earlier in this letter. We suggest that the U.S. could obtain the information that it is seeking through other means, without imposing excessive compliance costs on foreign and U.S.-based financial firms and exposing FFIs in some jurisdictions to legal challenges. At the same time, we understand that Treasury and the IRS must comply with the legislation that was approved by Congress, including legislated effective dates.

We would be pleased to discuss the issues addressed in this letter with any representative from the U.S. Treasury and/or IRS. Please do not hesitate to contact us at your earliest convenience.

Regards,

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