

Foreign Account Tax Compliance Act 2009: An APCIMS note for Congressional staff

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Background to APCIMS

1. The UK Association of Private Client Investment Managers and Stockbrokers (APCIMS) represents firms acting on behalf of investors¹. Member firms deal primarily in stocks and shares as well as other financial instruments for individuals, trusts and charities and offer a range of services from execution only trading (no advice) through to full portfolio management.

2. Our member firms operate on more than 500 sites in the UK, Ireland, Isle of Man and Channel Islands, employing 25,000 regulated staff. At the end of 2008, around £335 billion (\$557 billion) of the country's wealth was under the management of our members. Our aim is to ensure that the regulatory, tax and other changes across Europe and more globally are appropriate and proportionate for the investment community. A list of our member firms is attached for information.

Introduction

3. The Qualified Intermediary (QI) regime was introduced in 2001 with the primary aim of ensuring that US taxpayers were paying the right amount of tax wherever they were domiciled in the world. It also sought to ensure that non-US taxpayers were not benefiting from more favourable withholding tax rates in other jurisdictions.

4. The APCIMS community fully recognises the importance of citizens of various jurisdictions paying the appropriate taxation due to the relevant authorities. It is also quite right that the US tax authorities need to ensure that US taxpayers in particular are paying the right amount of tax due. However, the QI regime is deemed to be particularly burdensome and costly for the majority of APCIMS member firms because virtually all their clients are UK taxpayers resident in the UK.

5. We believe that the proposals in the Foreign Account Tax Compliance Act (FATCA) will only increase the administrative burden and cost on non-US financial intermediaries. Currently most UK private client stockbrokers and investment managers absorb the costs of the QI regime internally but the draft proposals will no doubt lead to many firms having to consider whether to pass the costs on and only further deter investment in US securities. This in turn could have an impact on US tax revenues.

6. APCIMS recognises that the US QI regime is a global tax reporting and withholding regime and for simplicity of administration a “one size fits all” approach best suits the IRS. We also recognise that there have recently been clear examples where details of US taxpayers have been kept from the IRS. However, given that 500 QIs out of the 5,000 QIs worldwide account for around 95 per cent of the reportable income in the QI programme, APCIMS believes that there is a danger that the additional burdens imposed by the FATCA will result in many smaller UK Qualified Intermediaries rescinding their QI status and therefore depriving their clients of access to US securities and the investment opportunities that brings for UK investors and tax revenues for the US tax authorities.

7. We would like to highlight the following issues regarding the draft FATCA legislation.

Consultation and Implementation

8. We understand the desire of the US authorities to plug any perceived gaps in the QI regime but we are concerned that the speed at which this is being implemented – publication of a draft Bill on 27 October 2009 and enactment into US law before the end of 2009 and implementation by the end of 2010 – without, as far as we are aware from an international perspective, any formal consultation process. In view of the international nature of these changes we believe that the US authorities should at very least consult both nationally and internationally, recognising the different business models in the different constituencies and publishing feedback statements to support the changes that are proposed as a result.

9. We agree with the European Banking Federation’s view that the Treasury Department should adopt implementation dates that allow for an orderly transition by the financial services industry and by the IRS to the proposed new regime and enable financial institutions sufficient time to determine what the potential costs and risks of signing any agreement are.

10. We also believe that the US Treasury and/or IRS are given powers to be able to easily amend the requirements within certain parameters without the need for primary legislation.

Determination of Account Status

11. We very much share the EBF’s concern about the burden of having to determine which (if any) accounts are United States accounts. The UK private client investment management and stockbroking client base is such that the vast majority of clients are clearly identifiable UK account holders, the majority of which are investing in UK securities. It would be far more acceptable for the legislation simply to require the financial institution to determine the account status and, as is current practice, the checks undertaken or evidence provided show that the account is a non-US account (in this case predominantly UK) there should be no additional requirement in terms of information gathering. We hope that the regulations will be suitably flexible in this regard.

12. In the UK there is an accepted principle in the UK Anti-Money Laundering regime that any new regulations are not deemed to be retrospective. The same principle applies to the EU Savings Tax Directive. We believe that the proposals in the FATCA would be far more acceptable if the legislation could be amended to read (Section (b)(1)(A), Page 4), “to obtain such information from each **new** holder of each account maintained by such institution as is necessary to determine which (if any) of such accounts are United States accounts. “New holder” could be defined as any holder opening an account on or after the date of the implementation date of the FATCA.

13. Under UK Anti-Money Laundering Guidance there is a requirement to monitor customers’ activities including ensuring that the documents, data or information held by the firm are kept up to date. We therefore believe that there is already an obligation for financial institutions to monitor any change of circumstances and that this should be reflected in the requirements in the FATCA, particularly for UK-based account holders.

Foreign Financial Agreements with the IRS

14. APCIMS shares the concerns that have been highlighted by the European Banking Federation in terms of potentially creating a two-tier regime: those firms that comply with the new requirements and those that deem it to be too onerous and expensive. Those in the latter category may well choose to disinvest in US securities, to the potential detriment of their client base. History would also suggest that those determined to evade paying tax will go to considerable lengths to do so and that a more burdensome and expensive regime will only serve to capture those firms already complying with existing requirements.

Complexities surrounding Funds and Trusts

15. The draft wording of the act appears to be particularly broad and, in places, vague. The following are some examples of areas of drafting that would cause concern:

- All UK institutions (QI or not) will have 30% tax deducted from all “Withholdable Payments” unless they agree to make certain disclosures to the IRS in respect of all US persons who have accounts with them (either directly or through ownership of an investment vehicle or part of a trust). These disclosures cover all assets, not just US assets. The definition of a Withholdable Payment covers not just US sourced income but also the proceeds of sales of any asset that can distribute income from the US. This could be interpreted as including a wide variety of collectives, not just direct US holdings as per the current QI regime. Thus the legislation could require every UK Private Client investment manager to suffer a 30% tax on the sales in collectives with any US exposure, or sign an agreement to disclose to the IRS the identity, assets and transactions of every account held by a US person.
- There is a requirement for all shareholders in Passive Foreign Investment Companies to file annual reports to the IRS (whether or not they are US persons!). The definition of a Passive Foreign Investment Company would cover most UK cash funds. Thus, as drafted, every UK person who has a holding in UK cash fund could be required to file a return to the IRS.

- Within the QI regime, there is now a presumption that a trust has a US beneficiary, if any person has the discretion to make a US person a beneficiary. Thus many complex trusts, which have never had and never will have a US beneficiary, will, in future, need to be reported to the IRS, unless the Trust Deeds were amended to explicitly exclude US persons as beneficiaries.

Tax rebates

16. Concerns have been expressed in the past about the IRS' administration and, in view of the likelihood that financial institutions will have to make significant numbers of tax reclaims (given that the default will be 30 per cent withholding) we question whether there will be an effective and efficient tax reclaim service in place to handle what are likely to be a significant number of requests for reclaims.

17. We would hope that before implementation of the new rules, the US Treasury and IRS will ensure that an appropriate and timely reclaim facility is in place. Otherwise this will further disincentivise financial institutions complying with the new regime.

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ⁱⁱ APCIMS has around 180 members, over 125 are private client investment managers and stockbrokers and the rest are associate members providing related services to our firms.