

November 16, 2011

Ambassador Robert A. Mandell  
U.S. Embassy Luxembourg,  
22, blvd. Emmanuel Servais  
L-2535 Luxembourg

Dear Ambassador Mandell,

**Summary of Luxembourg Industry Comments on FATCA (Notice 2010-60)**

We are writing to you to express our concerns that the pending implementation of FATCA legislation beginning in 2012 will likely increase the cost of capital within US markets and make it more expensive and difficult for US citizens and companies to domicile and undertake business activities outside the US. We believe these consequences are contrary to US best interests and urge you to bring our concerns to the attention of appropriate decision makers within the US government, so that appropriate corrective actions can be taken. Our recommended and preferred action would be to halt to any implementation of this FATCA legislation or to modify it such that a workable solution acceptable to all parties is identified.

Our three principle arguments are the following:

1. The largest majority of countries only tax their citizens and companies based on income within their countries not income abroad. The US not only taxes global income but imposes ever increasing regulatory requirements ( Sarbanes/ Oxley, Dodd/Frank and soon, FATCA) that have uncompensated and increasingly intrusive reporting requirements. These reporting requirements and the associated uncompensated costs cause non-US companies to increasingly question whether access to US liquidity and doing business with US corporations and private US citizens are worth the costs. As a consequence and to ensure optimal return on investments, fund industry experts are beginning to undertake to develop fund structures that will be closed to US investments and US investors. Such actions, were they to become normative behaviour, would limit and raise the cost of US access to capital.
2. Financial industry specialists believe the implementation costs of FATCA for financial institutions will be out of proportion to the potential tax take. These specialists estimate that the biggest banks and funds will each suffer annual costs ranging from USD 60 to USD 100 million, or USD 40 to 45 per account holder, which may in total represent a few billion USD in annual uncompensated costs.
3. As a reaction to US imposed and ever increasing unfunded regulatory burdens, local banks and financial institutions are increasingly refusing to grant local bank accounts and make local loans to American companies, employees and entrepreneurs living/working in Luxembourg and other overseas locations. If America has no interest to sell goods and services abroad, this would not be a problem. However, as it is the stated objective of the

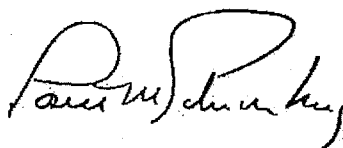
current administration to promote increased sales of American products overseas, it make no sense to undertake actions which create additional impediments and higher costs and which make it more difficult for Americans and American companies to domicile and work abroad. Clearly the US benefits from having more Americans and American companies working abroad ... to contribute their efforts and expertise to selling American goods and services... to learn first hand what foreign customers need and want so the American enterprises create the products that the foreign markets want to buy. Be assured FATCA, if implemented as planned, will further inhibit the successful implementation of the sell America abroad policy.

We have attached earlier letters sent on this subject by the American Chamber of Commerce (AMCHAM) and the Bankers Association of Luxembourg (ABBL) to your predecessors. We are at your disposal to answer any questions you may have or to engage with you to help in any way we can to help the U.S. find a workable solution which achieves the stated aims of the regulation, but at a vastly reduced cost and burden to the industry. We believe that this is in the best interests of all concerned.

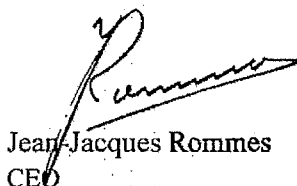
With respect and our best regards,



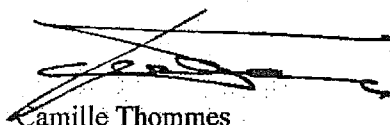
David Micallef  
President  
Association of American Banks in Luxembourg



Paul-Michael Schonenberg  
Chairman and CEO  
American Chamber of Commerce (AMCHAM)



Jean-Jacques Rommes  
CEO  
Luxembourg Banker's Association (ABBL)



Camille Thommes  
Director General  
Association of Luxembourg Funds Industry (ALFI)

Sent on 20101111



association of the  
luxembourg fund industry

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Washington, D.C. 20220

Ms. Manal Corwin  
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Mr. Michael Danilack  
Deputy Commissioner (International)  
Internal Revenue Service  
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Washington, D.C. 20224

Mr. Steven A. Musher  
Associate Chief Counsel  
(International)  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

13 January 2011

**RE: Comments of the Association of the Luxembourg Fund Industry in response to IRS Notice 2010-60**

Dear Ms. Corwin and Messrs. Shay, Danilack and Musher,

The Association of the Luxembourg Fund Industry (ALFI), created in 1988, is the official representative body for the Luxembourg investment fund industry. It brings together the interests of over a thousand Luxembourg-domiciled investment funds and over 200 companies active in the Luxembourg fund industry. These represent a wide variety of service providers, including depositary banks, fund administrators, transfer agents, distributors, law firms, consultants, tax advisers, auditors and accountants, specialist IT providers and communications agencies.

According to the latest figures of the Luxembourg financial supervisory authority CSSF, on 30 November 2010, total net assets of undertakings for collective investment (UCI) were EUR 2'160'000 million (USD 2'804'102 million). There are 3'656 undertakings for collective investment in Luxembourg, of which 2'284 are multiple compartment structures containing 11'505 compartments. With the 1'372 single-compartment UCIs, there are 12'877 active compartments in Luxembourg.



**Appendix 1 and 2** provide an overview on the legal framework for setting up an investment fund in Luxembourg, the available legal structures and the main players<sup>1</sup>.

We thank the U.S. Department of Treasury ("Treasury") and the Internal Revenue Services ("IRS") for the opportunity to submit the following comments on Notice 2010-60 regarding implementation of information reporting and withholding under new Chapter 4 of the U.S. Tax Code, as introduced by the Foreign Account Tax Compliance subtitle of the Hiring Incentives to Restore Employment Act of 2010 (referred to herein as "FATCA").

We fully support the submissions and comments of the European Fund and Asset Management Association ("EFAMA"), which have been made since the publication of the new FATCA provisions<sup>2</sup>. In particular, we consider our response to be a continuation of EFAMA's comments to Notice 2010-60 dated 12 November 2010. The aim of our letter is to outline certain Luxembourg specifics linked to the proposed FATCA regime.

Luxembourg is not only the biggest fund domicile within Europe, it is also by far the worldwide leader in terms of cross-border fund distribution. However, it is important to note that only one Luxembourg fund is currently registered for distribution in the U.S. (**Appendix 3**)<sup>3</sup>.

1) Widely-held funds:

FATCA's legislative history includes the possibility for Treasury to provide rules that would permit certain classes of widely-held collective investment vehicles to be deemed to meet the requirements of new chapter 4 to the Tax Code<sup>4</sup>.

By its various submissions, EFAMA explained the reasons as to why widely-held funds regulated by European law should benefit from a deemed compliant status. The existing Luxembourg fund structures that meet the widely-held definition would readily comply with this status.

Widely-held funds domiciled in Luxembourg and supervised by the Luxembourg financial supervisory authority CSSF cannot be considered as adequate tool for tax evasion.

Those funds are governed by the UCITS Directive<sup>5</sup> providing for the 27 European Member States a common legislative framework for investment funds, which are mainly distributed to retail clients. By definition, the capital is raised from the public and the funds operate on the principle of risk-spreading. They are subject to both CSSF's regulation and financial supervision, and ensure a high level of investor protection.

It is worth to note that investors in UCITS do not have any influence on the management of such fund, even if the fund's assets are from a legal perspective jointly owned by all investors. Thus,

<sup>1</sup> Appendix 1: ALFI brochure "Setting up an investment fund in Luxembourg"

Appendix 2: ALFI presentation "The State of the Luxembourg Fund Industry"

<sup>2</sup> EFAMA position papers of 29 April 2010, 7 July 2010 and 10 August 2010

<sup>3</sup> Appendix 3: Global Fund Distribution 2010, Lipper Hindsight and PwC analysis (figure as at 31 December 2009)

<sup>4</sup> Technical Explanation of H.R. 4213, the "Tax Extenders Act of 2009", as introduced in the House of Representatives on December 7, 2009, page 130; Technical Explanation of the revenue provisions contained in Senate amendment 3310, the "Hiring Incentives to Restore Employment Act," under consideration by the Senate, page 41

<sup>5</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)



they cannot control the assets held by the UCITS and cannot claim rights linked to the underlying assets in the portfolio (e.g. voting rights linked to the stock portfolio, which are exclusively exercised by the fund's management company or the fund itself). Irrespective of the legal form of the UCITS<sup>6</sup>, the decisions and actions are performed in the name of the fund.

As a result, widely-held investment funds domiciled in Luxembourg represent a low risk of tax evasion with regard to the 1'851 Luxembourg based UCITS funds and the 629 widely-held non-UCITS funds<sup>7</sup>. Thus, these investment vehicles should benefit from a general carve-out from FATCA.

## 2) Selling restrictions for U.S. investors:

As mentioned above, only one Luxembourg fund is registered for distribution in the U.S.

Furthermore, the prospectuses of widely-held funds domiciled in Luxembourg commonly specify explicitly that U.S. persons are not accepted as investors of the respective fund. Should this be insufficient, a suitable wording for those selling restrictions could be cleared with the Treasury/IRS. A number of examples of such wordings has been submitted to you via EFAMA's response to Notice 2010-60, to which we contributed. However, the costs for such changes should not be underestimated with a view to proportionality. In such a scenario, an implementation period of at least 2 years from the availability of final regulations would be necessary.

Due to the fact that a vast majority of Luxembourg investment funds are being distributed cross-border<sup>8</sup>, and this mainly through very large networks of intermediaries and distributors, changing these distribution agreements to enforce FATCA compliance in such a short timeframe is a monumental task. We therefore suggest granting a transition period of at least 24 months from the availability of final regulations, to enable distribution agreements to comply with the new FATCA rules.

## 3) Practical implementation of FATCA and proportionality

For funds not benefitting from a carve-out, we assume that the procedural implementation and adaption of IT systems will at least require a timeframe of about 24 months or even more. In addition and in order to be able to comply with the new FATCA regime, we suggest granting a transition period of 2 years after the start of application of FATCA as at 1<sup>st</sup> January 2013.

We think that the burden put onto financial institutions needs to be proportionate to the level of risk of tax evasion, and we refer to EFAMA's remarks on FATCA's impact beyond the pure tax perspective<sup>9</sup>. There should be a balance between the costs linked to the procedural implementation and adaption of IT systems and the objectives under FATCA.

In our view, proportionality requires that the focus should not be on financial products and structures which are known for a low risk of tax evasion.

<sup>6</sup> UCITS can be set up either under the law of contract (as common funds managed by a management company) or under statute (as investment companies)

<sup>7</sup> Figure as at 30 November 2010, out of 3,656 investment funds in total

<sup>8</sup> 75.9% of all UCITS registered in at least 3 countries are Luxembourg funds (Source: PwC Global Fund Distribution Poster 2009)

<sup>9</sup> See page 4 of EFAMA's response to Notice 2010-60 dated 12 November 2010, bullet point "Balance"



association of the  
luxembourg fund industry


We thank you for considering our suggestions as well as for your continuous attention to the proposals of EFAMA.

We remain of course at your disposal for any questions you may have.

Yours sincerely,



Camille Thommes  
Director General



Claude Kremer  
ALFI Chairman

November 11, 2010

Internal Revenue Service,  
1111 Constitution Avenue NW  
Washington, DC 20224

Dear Sir or Madam:

**Comments on FATCA (Notice 2010-60)**

We would like to take the opportunity to provide you with our comments in connection with the HIRE Act, passed in March of this year, which contains the Foreign Account Tax Compliance provisions ("FATCA"). This letter sets out our initial view on the legislation, recognizing that much of the detail is still to be worked out by the Department of the Treasury and the Internal Revenue Service.

Firstly, we should stress that tackling tax evasion is and always has been a priority of the Luxembourg Government. Luxembourg and US have enhanced their cooperation in tackling tax evasion, primarily through the Double Tax Treaty (which, as you may know, has been recently amended to incorporate the OECD tax treaty standard on exchange of information for tax purposes).

However, we have some concerns relating to the provisions of FATCA, particularly the proportionality of the measures relative to the expected benefit.

As we understand the legislation, FATCA will create significant burdens for Luxembourg businesses. Financial institutions will have to make costly adjustments to their systems and processes for identifying their customers. We are concerned that, unless carefully targeted, the cost to firms and their customers will by far outweigh the benefit to the IRS.

**Fund industry**

Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross border distribution of funds. An administrable implementation of FATCA for the investment management industry is therefore crucial. The FATCA provisions have been thoroughly reviewed and debated by the Luxembourg investment management industry, which has, as a result, expressed the following concerns (the below list is not exhaustive):

- Under FATCA, Luxembourg funds will need to identify and report the identity of the US investors. Since fund distribution channels are heavily intermediated, this task may prove to be extremely difficult and in most cases not workable at all. Indeed, unlike in the US, Luxembourg funds are very often sold through various intermediaries (banks, insurance companies and other distributors) who act as nominees on behalf of the investors. In such cases, funds are simply not in possession of the information relating to the investors. The use of multiple layers of intermediaries makes it even more difficult for funds to identify the ultimate investors.
- It is highly unlikely that exchange-traded funds, whose investor base changes in a way similar to the shareholder base of a quoted company, will be able to track each and every ownership change of their shares. Given the extreme difficulty that this category of funds faces in identifying the investors, it is likely that exchange-traded funds will simply exit the US market and restrict future investments in US securities.

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- Given the complexity and relative novelty of the FATCA provisions for the fund industry (it is the first time that investment funds are confronted with such an extended scope of obligations), it can be reasonably expected that costs associated with updating the IT systems (or implementing new systems) will be extremely high.

On this basis, we believe that funds whose units are not intended for distribution in the USA or to US persons and for which subsequent transfers of units in or into the USA or to US persons are prohibited should be considered as presenting a low risk of tax evasion for US tax purposes and should therefore qualify as deemed compliant FFIs.

We also kindly ask you to consider the comments submitted by the Association of the Luxembourg Fund Industry (ALFI) through the European Fund and Asset Management Association (EFAMA).

## **Banking industry**

For the banking industry, already subject to the "qualified intermediary" regime (a similar, but somewhat less burdensome US withholding and tax reporting regime), the following issues are of importance:

- The provisions of FATCA require that in any case in which any foreign law would prevent the reporting of required information (in this instance, the fact that a particular account held at a Luxembourg bank is US-owned), a bank must attempt to obtain a waiver. If a waiver is not obtained, FATCA requires the bank to close the account. Accordingly, in order to comply with the disclosure requirements under FATCA, a Luxembourg bank would be required to seek consent from all customers believed to have US-owned accounts in order to report this fact to the IRS. If Luxembourg banks failed to obtain such consent, they would be required under FATCA to deny those customers account facilities (i.e. they would be required to close the accounts).

However, having accepted the customer's mandate on the basis of whatever information, undertakings or documentation was provided at the time, the bank has a fiduciary duty to hold the customer's deposit and provide banking facilities and services as set out in the contract between the parties.

This leaves the Luxembourg banks in an impossible position to the extent that Luxembourg law will prevent them complying with the requirements of FATCA (by denying them account facilities) unless they can obtain consent to disclose personal data. The corollary is that Luxembourg banks may have no alternative but to disinvest in US securities and disassociate themselves from relevant counterparties.

- It is unfortunate that the documentation requirements for purposes of chapter 4 of the US tax code (i.e. FATCA) do not always comport with the current requirements for purposes of chapter 3 (i.e. qualified intermediary) documentation. For example, where an account is documented with documentary evidence for purposes of chapter 3 withholding and the account has a US address, the chapter 3 cure would require the withholding agent to obtain an additional piece of documentary evidence (that does not contain a US address) and a reasonable explanation in writing supporting the account holder's non-US status. In addition, where there is a US birthplace on a non-US passport, the withholding agent would obtain a copy of the account holder's Oath of Renunciation (which is the document issued by the US State Department establishing that the individual has renounced his/her US citizenship).

Under chapter 4, the same withholding agent (that now has documentary evidence and a reasonable explanation from the account holder supporting his/her non-US status) must also go back to the account holder to obtain a Form W-8BEN.

This seems to place an unreasonable burden on the foreign financial institution that already

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has obtained sufficient documentation to establish the individual as non-US for purposes of chapter 3 withholding.

- The treatment of any pass-through payments made to non participating foreign financial institutions or recalcitrant account holders needs to be further clarified to ensure that US withholding tax is not applied on non-US source income payments.

We also kindly ask you to consider the comments submitted by the Luxembourg Bankers' Association (ABBL) through the European Banking Federation (EBF) and the Institute of International Bankers.

## **Financial Sector Professionals (*Professionnels du Secteur Financier - PSFs*)**

The definition of PSF covers a broad range of investment professionals, such as investment advisers, brokers in financial instruments, wealth managers, professionals acting for their own account, market makers, underwriters of financial instruments, financial intermediation firms, registrar agents, professional custodians of financial instruments, etc. Most of these entities will qualify as foreign financial institutions under FATCA, and will therefore be subject to the provisions of the new law. Specifically, they would be required to identify the account holders and to withhold tax.

Generally speaking, Luxembourg PSFs should be confronted to the same problems as Luxembourg banks, especially as concerns the conflicting obligations under Luxembourg law and FATCA. The additional difficulty for PSFs derives from the fact that they are generally limited in size and that they might not have the technical capacity to conform to FATCA.

We would appreciate that the IRS details the options under which these entities could provide assurance that their products are not sold to US persons and would therefore qualify as deemed compliant FFIs.

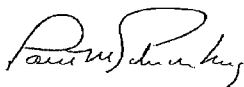
## **Insurance companies**

Life insurance contracts (other than term life insurance contracts without cash value) sold in Luxembourg typically combine insurance protection with an investment component. As a result, according to Notice 2010-60, these contracts do pose a risk of US tax evasion with respect to which the FATCA provisions were enacted. Insurance companies that market such products will qualify as foreign financial institutions under FATCA, and will therefore be subject to the provisions of the new law.

The additional difficulty for Insurance companies derives from the fact that they are generally limited in size and that they might not have the technical capacity to conform to FATCA. We would welcome a possibility for insurance companies to opt for a deemed compliant FFI status if they provide sufficient assurance that their products are not sold to US persons.

We hope that these comments will be of assistance and will result in the implementation of FATCA in the best conditions possible for the financial industry.

Yours sincerely,



Paul Schonenberg  
Chairman & CEO