EUFederation
Factoring & Commercial Finance

CC:PA:LPD:PR (REG-12647-10)
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Internal Revenue Service
PO Box 7604
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Washington D.C. 20044

Brussels, April 25, 2012

FATCA – REG-12647-10 Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities

Dear Mr. Sweeney,
dear Ms. Taylor,

The EUF is the Representative Body for the Factoring and Commercial Finance Industry in the European Union (EU). It comprises national and international industry associations that are active in the 27 member states of the EU. The EUF acts as a platform between the factoring and commercial finance industry and key legislative decision makers by providing a source of reference and expertise. Its aim is to provide legislators and policy makers with relevant information on the factoring and commercial finance industry to inform, influence and assist with the direction of existing and future legislation.

1. Factoring and Commercial Finance

Commercial finance is a generic term for a range of asset based finance services which include factoring, invoice discounting, international factoring, supplier finance/reverse factoring and asset based lending. There are many variations on each of these product sets and the precise nomenclature varies from market to market, but all exist to provide working capital funding solutions to businesses, particularly SMEs. The exact content of the services provided by the commercial financier will vary according to the clients' particular requirements, but all of these solutions have in common the idea that funding is offered based upon the accounts receivables created by the client company. With a factoring solution, the factor agrees to pay an agreed percentage of approved debts as soon as the receivables are assigned to him. If credit protection is part of the factoring agreement, it is referred to as "non-recourse" factoring, while a factoring agreement where the credit risk on the debtor remains with the seller is called "with-recourse" factoring. The factor will often also undertake all credit management and collections work. There will normally be a charge for the collections service and, if it is required, for bad debt protection as well as a discount charge for finance provided in advance of collections.

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2. The Implications of FATCA

The Foreign Account Tax Compliance Act (FATCA) requires foreign financial institutions (FFIs) to report directly to the IRS certain information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. In order to be able to take into account the implementation challenges of affected financial institutions, the U.S. Treasury Department and the IRS issued proposed regulations REG-12647-10 for implementing FATCA on February 8, 2012.

We would like to draw your attention to the most recently amended definition of FFIs contained in REG-12647-10: According to this definition, FFIs will in the future include entities that "accept deposits in the ordinary course of a banking or similar business", such business comprising inter alia the activity of purchasing, selling, discounting or negotiating accounts receivable (cf. REG-12647-10, p. 293 f.). As commercial finance is based on the sale/purchase of accounts receivables, there is the possibility that the significantly expanded scope of this new definition of FFIs will encompass factoring and other receivables financing companies, despite the fact that factoring and receivables financing companies do not accept deposits. Previous versions of the Regulations did not appear to include receivables financing within their scope. Such a widening of the definition of FFIs would therefore lead to a major administrative burden being introduced for the EU factoring and receivables financing industry with no obvious substantive benefit to the US tax authorities as far as the stated objectives of the FATCA legislation are concerned.

3. Potential impact

An extensive interpretation of the draft legislation as it currently stands could be that an organisation providing receivables finance in the EU will be considered to be an FFI even though it would not accept deposits, make investments or hold any financial assets for the account of others. The organisation would thus have nothing to report to either the IRS (or to its home authority in the case of the five member states which were party to the intergovernmental approach set out in February).

Nonetheless, in order to become a compliant FFI, in the case of every client (or prospect), the receivables financier would have to identify any US taxpayer with ownership of greater than 10 percent, including non-US nationals with US addresses or shareholders with dual nationality. The financier would also have to identify any client with ownership by another FFI and obtain confirmation that they are compliant.

With over 116,000 clients across the EU, this will be an extremely onerous burden on this industry which is unlikely to provide any useful information to the US authorities. In addition to the impacts on this industry, it will also provide a significant administrative burden for the US and the home authorities who will be receiving this information.

4. Proposal by EUF for Clarification

The previous definitions of FFIs did not encompass factoring and receivables financing companies and were thereby in line with rationale and reasons for introducing FATCA. These reasons behind FATCA are explained clearly in REG-12647-10: Due to the fact that "FFIs now provide a significant proportion of the investment opportunities for, and act as intermediaries with respect to the investments of, U.S. taxpayers", the FATCA's "third-party information reporting assists taxpayers in correctly computing and reporting their tax liabilities, increases compliance with tax obligations, reduces the incidence of and opportunities for tax evasion, and thus helps to maintain the fairness of the U.S. federal income tax system" (cf. REG-12647-10, p.4).

These are generally understandable and commendable reasons for introducing the FATCA requirements. However, they are not relevant to the factoring and receivables financing industry: Neither factoring nor any other form of commercial finance company would accept deposits or provide investment opportunities to their clients. Therefore, they do generate neither financial assets nor any form of proceeds for their clients. Rather, factoring clients use factoring and other forms of commercial or receivables financing as a means of funding their business, particularly during growth phases, but also during other stages of their company's existence. Hence, factoring cannot be compared or be considered equivalent to, for instance, banking deposits or investments in securities and partnership interests.

Furthermore, factoring companies process all payment transactions through supervised banks that already fall within the scope of the FATCA requirements. Therefore, the widening of the term "FFIs" to encompass factoring and other forms of commercial or receivables financing would not provide any added value for the US tax authorities.

For the sake of limiting the administrative burden introduced by FATCA and also in order to continue coinciding with the rationale behind FATCA, we therefore strongly request that a clarification is provided in the proposed regulations for the implementation of FATCA which unequivocally confirms that factoring and commercial finance companies are not considered FFIs as they do not accept deposits and that they therefore do not have to comply with the FATCA requirements.

Please do not hesitate to contact us should you have queries or require further information regarding our industry.

Kind Regards,

John Gielen
Chairman - EUF

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