

# United States Senate

WASHINGTON, DC 20510

July 25, 2012

The Honorable Timothy Geithner  
Secretary  
United States Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Dear Secretary Geithner:

We are writing to you in reference to a “JOINT STATEMENT FROM THE UNITED STATES, FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM REGARDING AN INTERGOVERNMENTAL APPROACH TO IMPROVING INTERNATIONAL TAX COMPLIANCE AND IMPLEMENTING FATCA” (“the Joint Statement,” attached), released on February 8, 2012. As described in the Joint Statement, in common with the five member countries of the European Union (“EU”), the United States has assumed the following obligations, among others, with respect to FATCA (the “Foreign Account Tax Compliance Act,” referenced below as in the Joint Statement):

- “[T]he United States is willing to reciprocate in collecting and exchanging on an automatic basis information on accounts held in US financial institutions by residents of France, Germany, Italy, Spain and the United Kingdom” (A.5.);
- The United States would agree to “[c]ommit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner” (B.2.e.); and
- In common with the other five countries, the United States would “[c]ommit to working with other FATCA partners, the OECD, and where appropriate, the EU, on adapting FATCA in the medium term to a common model for automatic exchange of information, including the development of reporting and due diligence standards.” (B.4.b.)

Regarding these and other obligations described in the Joint Statement, we ask that you provide the information requested below no later than 30 days following receipt of this letter, except where otherwise indicated.

## A. Status of the Joint Statement

The Joint Statement, as released,<sup>1</sup> does not display your name or the name of any other American official, the name of any official of the five “FATCA partner” countries, or even a date.

Question:

What is the status of the Joint Statement as an agreement between the United States and the five other countries?

## B. Implementation Authority

Under the Joint Statement, the FATCA partner countries “would agree to . . . [p]ursue the necessary implementing legislation to require FFIs [foreign financial institutions] in its jurisdiction to collect and report to the authorities of the FATCA partner the required information” for subsequent “[t]ransfer to the United States, on an automatic basis.” (B.1.a. and c.) However, the Joint Statement makes no reference to the legislative or administrative authority by which the United States will require domestic U.S. financial institutions to collect and report information to the U.S. government for transfer to the FATCA partner countries.

Questions:

1. Does the Treasury Department anticipate that meeting the commitment in the Joint Statement to require U.S. financial institutions to collect and report information on the accounts of residents of FATCA partner countries would necessitate enactment of legislation to that end by Congress or amendments to existing tax treaties, or does the Department believe it already has sufficient statutory authority to issue regulations to that end without further action by Congress?
2. If the Department anticipates that Congressional action is needed for that purpose, when do you anticipate such legislation would be proposed or tax treaty amendments submitted for the Senate’s advice and consent; or, if you believe sufficient authority already exists, when do you anticipate draft regulations would be issued for public view, including draft regulations that would require domestic U.S. financial institutions to collect and report information on accounts of residents of partner countries?
3. If you believe the Department already has sufficient statutory authority to issue regulations requiring U.S. financial institutions to collect and report the information described in the Joint Statement, cite and provide relevant text of the statutes conferring such authority.

## C. Scope of Mandates on Domestic U.S. Financial Institutions

The Joint Statement does not specify or itemize the types of institutions that would be considered “U.S. financial institutions” for purposes of information exchange with FATCA partners. Because the Joint Statement commits the United States to “reciprocity” on collecting and reporting information, it is reasonable to infer that the definition of U.S. “financial institutions”

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<sup>1</sup> Found at <http://www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf>.



would be the same or similar to the broad definition of a foreign “financial institution” in the FATCA law (Chapter 4, Internal Revenue Code, Sec. 1471(d)(5)), as follows:

- “(5) Financial institution.--Except as otherwise provided by the Secretary, the term ‘financial institution’ means any entity that --
- “(A) accepts deposits in the ordinary course of a banking or similar business,
  - “(B) as a substantial portion of its business, holds financial assets for the account of others, or
  - “(C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

In addition, FATCA (Sec. 1472) provides for withholding of payments under certain circumstances from a “non-financial foreign entity,” defined as “any foreign entity which is not a financial institution (as defined in section 1471(d)(5)).” (Sec. 1472(d)) Questions:

1. Describe the types of domestic U.S. financial institutions, comparable to the foreign institutions defined in Sec. 1471(d)(5), such as banks, credit unions, insurance companies, stock, pension and investment funds, or any others, that would be the subject of legislation or regulations for the purpose of the reciprocal information exchange with FATCA partners pursuant to the commitments made in the Joint Statement.
2. Describe any domestic U.S. non-financial entities, comparable to the foreign entities defined in Sec. 1472(d), that may be the subject of legislation or regulations for the purpose of the reciprocal information exchange with FATCA partners pursuant to the commitments made in the Joint Statement.

#### D. Cost of Mandates on Domestic U.S. Financial Institutions

As you know, the anticipated cost of FFIs’ compliance with FATCA will be substantial. For example, one source<sup>2</sup> has estimated that the top 30 non-U.S. banks will spend \$7.5 billion just to report on American assets. Another report citing an unnamed U.S. government source projects approximately \$30 million<sup>3</sup> per foreign institution. We are not aware of any estimated costs for domestic U.S. institutions to comply with collecting and reporting the information on the five initial FATCA partners pursuant to the commitments made in the Joint Statement. Questions:

1. Has the Department conducted, or is the Department otherwise aware of, a study of the potential costs and benefits of FATCA from a revenue standpoint, either with or without

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<sup>2</sup> See “FATCA Creating A Compliance Gold Rush,” by C.M. Matthews, *The Wall Street Journal*, May 1, 2012, citing the Banking Federation and the Institute of International Bankers, “in what they call conservative figures,” at <http://blogs.wsj.com/corruption-currents/2012/05/01/fatca-creating-a-compliance-gold-rush/> .

<sup>3</sup> See “FATCA readiness to cost billions,” the *Jamaica Gleaner*, June 15, 2012, at <http://jamaica-gleaner.com/gleaner/20120615/business/business3.html> .



- the reciprocal arrangement under the Joint Statement? If so, provide such study with your response.
2. Has the Department conducted, or is the Department otherwise aware of, a study of the potential costs and benefits of FATCA from a broader economic standpoint (possible withdrawal of foreign investment from the United States, foreign institutions' reluctance or refusal to do business with Americans, etc.), either with or without the reciprocal arrangement under the Joint Statement? If so, provide such study with your response.
  3. Bearing in mind estimates of likely compliance costs for FFIs, what does the Department estimate to be the high and low range of probable costs, on both an aggregate and per-institution basis, for domestic U.S. institutions (including non-banks and, if applicable, non-financial entities) to collect and report on the residents of the five FATCA partner countries relevant to the Joint Statement?
  4. Describe the extent to which the Department took such probable compliance costs for domestic U.S. institutions into account in agreeing to the commitments described in the Joint Statement.

#### E. Compromise of Personal Financial Data

As you are aware, Members of both the Senate and the House of Representatives have serious concerns regarding regulatory mandates for reporting personal financial data. For example, on September 27, 2011, and May 11, 2012, Congressman Charles W. Boustany, Jr., Chairman of the Subcommittee on Oversight of the House Committee on Ways and Means, wrote to you requesting information on IRS Notice of Proposed Rulemaking REG-146097-09 regarding the requirement that U.S. banks collect and report information on interest paid to non-resident aliens. (We understand you have not yet provided the information requested by Chairman Boustany.) The requirements of the Joint Statement with respect to domestic U.S. financial institutions would appear to be—if applied on a basis reciprocal to those applicable to FFIs—broad with respect to the assets and persons covered. Questions:

1. What types of assets (such as bank account interest and principle, stocks, hedge funds, private equity funds, insurance equity, trusts, etc.) would be subject to collection and reporting by U.S. financial institutions pursuant to the commitments made in the Joint Statement?
2. What type of personal data (name, date and place of birth, address, identity of dependents, employment and income information, etc.) would be required as part of the collection and reporting by U.S. financial institutions pursuant to the commitments made in the Joint Statement?
3. What categories of persons (non-resident aliens, resident aliens, U.S. citizens who are dual nationals of partner countries, U.S. citizens who are spouses of residents of partner countries, U.S. citizens who are holders of joint accounts or assets with residents of partner countries, U.S. citizens who are beneficiaries or grantors of assets on behalf of residents of partner countries, etc.) would have their asset information or personal data collected and reported by U.S. financial institutions pursuant to the commitments made in the Joint Statement?
4. What safeguards, both legal and technical, would the Department plan to apply for the protection of asset information and personal data in the course of collection and reporting



by U.S. financial institutions, and subsequent transfer to partner governments pursuant to the commitments made in the Joint Statement?

F. Role of OECD, the EU, and other organizations

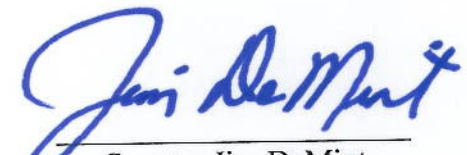
As noted above, under the Joint Statement (B.4.b.) the United States would “[c]ommit to working with other FATCA partners, the OECD, and where appropriate the EU, on adapting FATCA in the medium term to a common model for automatic exchange of information, including the development of reporting and due diligence standards.” According to media reports, the Treasury Office of Tax Policy is currently working on a “single model agreement under the Foreign Account Tax Compliance Act in consultation with partner countries,”<sup>4</sup> and the Department, working with foreign governments, expects to have something that “will be widely adopted”<sup>5</sup> by other countries in the near future. Questions:

1. Provide immediately, before the 30-day deadline specified with respect to the other questions submitted herein, the text and explanations of any “model agreement” in the Department’s possession to which any official of a foreign government has or has had access.
2. What does the Department anticipate would be the role of the OECD (Organization for Economic Co-operation and Development), the EU (European Union), or any other intergovernmental or international organization pursuant to the commitments made by the United States in the Joint Statement?
3. Does the Department anticipate that financial information and personal data collected and reported by domestic U.S. financial institutions pursuant to the commitments made by the United States in the Joint Statement for transfer to partner governments would also be transferred to the OECD, the EU or any of its structures, or to any other intergovernmental or international organization?

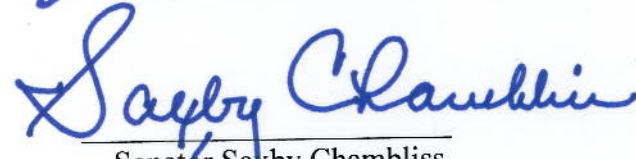
Thank you for your prompt attention to these matters.

Sincerely,

  
\_\_\_\_\_  
Senator Rand Paul

  
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Senator Jim DeMint

  
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Senator Mike Lee

  
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Senator Saxby Chambliss

<sup>4</sup> See “IRS, Treasury Working on Single Model FATCA Agreement,” *Daily Tax Report*, May 14, 2012, citing OTP’s Michael Plowgian, at <http://www.bna.com/irs-treasury-working-n12884909354/>.

<sup>5</sup> See “U.S. aims at five EU tax evasion deals this month” by Patrick Temple-West, *Reuters*, June 4, 2012, citing Deputy Assistant Secretary for International Tax Affairs Manal Corwin, at <http://www.reuters.com/article/2012/06/05/us-usa-tax-fatca-idUSBRE85400620120605>.



## **U.S. TREASURY DEPARTMENT**

### **JOINT STATEMENT FROM THE UNITED STATES, FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM REGARDING AN INTERGOVERNMENTAL APPROACH TO IMPROVING INTERNATIONAL TAX COMPLIANCE AND IMPLEMENTING FATCA**

#### **A. General Considerations**

1. Building on their longstanding and close relationship with respect to mutual assistance in tax matters, the United States, France, Germany, Italy, Spain and the United Kingdom wish to intensify their co-operation in combating international tax evasion.
2. On 18 March 2010 the United States enacted provisions commonly referred to as the Foreign Account Tax Compliance Act (FATCA), which introduce reporting requirements for foreign financial institutions (FFIs) with respect to certain accounts. France, Germany, Italy, Spain and the United Kingdom are supportive of the underlying goals of FATCA. FATCA, however, has raised a number of issues, including that FFIs established in these countries may not be able to comply with the reporting, withholding and account closure requirements because of legal restrictions.
3. An intergovernmental approach to FATCA implementation would address these legal impediments to compliance, simplify practical implementation, and reduce FFI costs.
4. Because the policy objective of FATCA is to achieve reporting, not to collect withholding tax, the United States is open to adopting an intergovernmental approach to implement FATCA and improve international tax compliance.
5. In this regard the United States is willing to reciprocate in collecting and exchanging on an automatic basis information on accounts held in US financial institutions by residents of France, Germany, Italy, Spain and the United Kingdom. The approach under discussion, therefore, would enhance compliance and facilitate enforcement to the benefit of all parties.



6. The United States, France, Germany, Italy, Spain and the United Kingdom are cognizant of the need to keep compliance costs as low as possible for financial institutions and other stakeholders and are committed to working together over the longer term towards achieving common reporting and due diligence standards.
7. In light of these considerations, the United States, France, Germany, Italy, Spain and the United Kingdom have agreed to explore a common approach to FATCA implementation through domestic reporting and reciprocal automatic exchange and based on existing bilateral tax treaties.

## **B. Possible Framework for Intergovernmental Approach**

1. The United States and a partner country (FATCA partner) would enter into an agreement pursuant to which, subject to certain terms and conditions, the FATCA partner would agree to:
  - a. *Pursue the necessary implementing legislation to require FFIs in its jurisdiction to collect and report to the authorities of the FATCA partner the required information;*
  - b. *Enable FFIs established in the FATCA partner (other than FFIs that are excepted pursuant to the agreement or in U.S. guidance) to apply the necessary diligence to identify US accounts; and*
  - c. *Transfer to the United States, on an automatic basis, the information reported by the FFIs.*
2. In consideration of the foregoing, the United States would agree to:
  - a. *Eliminate the obligation of each FFI established in the FATCA partner to enter into a separate comprehensive FFI agreement directly with the IRS, provided that each FFI is registered with the IRS or is excepted from registration pursuant to the agreement or IRS guidance;*
  - b. *Allow FFIs established in the FATCA partner to comply with their reporting obligations under FATCA by reporting information to the FATCA partner rather than reporting it directly to the IRS;*
  - c. *Eliminate U.S. withholding under FATCA on payments to FFIs established in the FATCA partner (i.e., by identifying all FFIs in the FATCA partner as participating FFIs or deemed-compliant FFIs, as appropriate);*
  - d. *Identify in the agreement specific categories of FFIs established in the FATCA partner that would be treated, consistent with IRS guidelines, as deemed compliant or presenting a low risk of tax evasion;*

- e. Commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner.*
- 3. In addition, as a result of the agreement with the FATCA partner described above, FFIs established in the FATCA partner would not be required to:
  - a. Terminate the account of a recalcitrant account holder;*
  - b. Impose passthru payment withholding on payments to recalcitrant account holders;*
  - c. Impose passthru payment withholding on payments to other FFIs organized in the FATCA treaty partner or in another jurisdiction with which the United States has a FATCA implementation agreement.*
- 4. The United States, France, Germany, Italy, Spain and the United Kingdom would:
  - a. Commit to develop a practical and effective alternative approach to achieve the policy objectives of passthru payment withholding that minimizes burden.*
  - b. Commit to working with other FATCA partners, the OECD, and where appropriate the EU, on adapting FATCA in the medium term to a common model for automatic exchange of information, including the development of reporting and due diligence standards.*

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