



Caribbean Confederation Of Credit Unions

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AFFILIATED TO THE WORLD COUNCIL OF CREDIT UNIONS

CARIBBEAN CREDIT UNIONS AND THE FOREIGN ACCOUNT COMPLIANCE ACT [FATCA]

1. INTRODUCTION.

The Regulation proposed by the Internal Revenue Service (IRS), United States Tax Authority that is a U.S. Treasury Department bureau, known as the Foreign Account Tax Compliance Act (FATCA) will affect both U.S. based Credit Unions and non-U.S. Credit Unions including those in the Caribbean.

The proposed regulation which is expected to be finalized by December 31, 2012 and if finalized as proposed, require non-U.S. credit unions to register with the IRS or be possibly blacklisted by major financial institutions and the U.S. Government as a “nonparticipating FFI” because the FATCA proposed regulations would not permit financial institutions that agree to be FATCA compliant, to hold accounts by “nonparticipating FFIs”. Internationally active non-US credit unions would also face additional requirements as detailed below:

- **In general,, FATCA Applies to “Withholdable Payments” Involving Untaxed Investment or Interest Income Earned by “Specified U.S. Persons” Who Do Not Live in a Non-US Credit Union’s Home Country:** FATCA only requires tax withholding from “withholdable payments” involving income that has not yet been subject to U.S. income tax “withholding: (In general, this means income from dividends or interest, or from the sale of U.S. investments or investment property) which was earned by “specified U.S. persons” who are not residents of an FFI’s home country. The FATCA withholding rules, as proposed, are not geared towards wage income.
- **U.S. Citizen and U.S. Residents:** In the context of credit unions, a “specified U.S. person” is usually “a citizen or resident of the United States,” as further defined below in Section 2 (“Definitions”) unless that person is a resident of the credit union’s home country if the credit union is a “Local FFI” as defined.
- **Most Non-U.S. Credit Unions Can Qualify as Partially Exempt “Local FFIs.”** Most non-U.S. credit unions would be partially exempt from the FATCA regulations as “Local FFIs” and would need to only comply with streamlined FATCA requirements that involve primarily registering with the IRS using an online registration form. (The “Local FFI” exemption is outlined in greater detail in Section 3 of this commentary. A non-U.S. credit union would meet the “Local FFI” definition if it:
 - a) Does not have physical offices outside of its home country;

- b) Has at least 98% of accounts held by residents of the home country – these local residents can also be U.S. citizens or U.S. residents so long as they have not ceased to be legal residents of the home country;
- c) Meet other requirements listed in section 3 of this Commentary, such as a set of streamlined “due diligence” requirements to determine whether it has large accounts (generally accounts larger than US\$50,000) that are held by “specified U.S. persons”, who are not residents of the credit union’s home country and being located in a country that meets international anti-money laundering (AML) minimum standards and;
- d) Registers with the IRS using the online form discussed in Section 3 below.

- **Non-U.S. Credit Unions That Do Not Meet the “Local FFI” Definition would Not Be Exempt and Would Need to Act as a “Withholding Agents”:** Non-U.S. credit unions that do not meet the “Local FFI” exemption or a similar exemption would be required to act as “withholding agents” as defined in section 2.
- **“Nonregistering Local Banks” Exemption:** The IRS has proposed to allow small non-U.S. banks to comply with FATCA even if they do not register with the IRS. Unfortunately, as proposed, non-U.S. credit unions would not likely meet the definition of “nonregistering local banks” because they are not banks. If, however, the IRS expands the definition of “nonregistering local banks” in its final version of this regulation to include non-U.S. credit unions, credit unions under US\$175 million in assets would likely be able to comply with FATCA without being required to register with the IRS pursuant to the “nonregistering local bank” rules.

Generally, credit unions in the Caribbean and elsewhere are extremely concerned that FATCA will place unreasonable regulatory burdens on them even when they meet the “local FFI” definition because many non-U.S. credit unions are unaware of the IRS FATCA rule making and/or do not have the technical capacity to meet the requirements to comply even with the proposal’s streamlined rules for “Local FFIs.”

Overall, FATCA has raised a number of issues, wherein not only credit unions but other financial institutions, may not be able to comply with certain aspects of FATCA due to domestic legal impediments. However, it is proposed that the most advantageous but less burdensome means by which Caribbean credit unions can comply with FATCA, should be pursued.

This Commentary outlines the conditions that credit unions would be required to meet under the proposed Rules from which the impact on these institutions can be deduced.

2. DEFINITIONS.

“Affiliated Groups” & “Expanded Affiliated Groups” means:

- (a) 1 or more chains of “includable corporations” connected through stock ownership with a common parent corporation, but only if:-
- (b) The following two conditions are met:

- (i) The Common parent owns directly stock representing at least 50 percent of the total voting power and 50 percent of the total equity value in at least 1 of the other “includable corporations” and
- (ii) Stock meeting the 50 percent of the total voting power and 50 percent of the total equity value requirements in each of the “includable corporations” (except the common parent) is owned directly by 1 or more of the other “includable corporations”.

“Includable Corporation” means all corporations except for corporate entities that are exempt from U.S. federal taxation under [I.R.C 501](#) – such as credit unions that are tax-exempt under I.R.C. 501(c)(1), (14) or U.S. trade associations that are tax- exempt under I.R.C. 501(c)(6) and several other types of corporations that have specific tax treatment under U.S. law that are not relevant in the credit union context

“New accounts” means accounts held by “U.S. persons” created after January 1, 2013.

“Nonparticipating FFI” means an FFI other than a participating FFI, a deemed compliant FFI or an exempt beneficial owner.

Credit unions that Fail to Register with the IRS will be “Nonparticipating FFI”. A non-U.S. credit union will be a “nonparticipating FFI” unless it registers with the IRS as a “Local FFI” (if it meets the requirements for the “Local FFI” partial exemption) or enters into an “FFI Agreement” with the IRS or if the credit union is located in a country which has entered into a FATCA tax treaty with the U.S. under the local country’s FATCA-related regime that uses AML reporting.

- i **Payments to “Nonparticipating FFIs” subject to FATCA Withholding** - U.S. financial institutions, FFIs that are not exempt from FATCA and other FATCA “withholding agents” must “deduct and withhold tax with respect to passthru payments made to recalcitrant account holders and nonparticipating FFIs”
- ii **“Nonparticipating FFIs” May Not Be Entitled to Refunds of Withheld Taxes Even When No Tax is Due** - A “nonparticipating FFI” { determined as of the time of payment) that is the beneficial owner of an item of income or other payment that is subject to withholding under FATCA, shall not be entitled to any credit or refund pursuant to IRC section 1474(b)(2) and the FATCA refund rules unless it is entitled to a reduced rate of tax with respect to the income or other payment by reason of any treaty obligation of the United States. If the “nonparticipating FFI” is entitled to a reduced rate of tax with respect to an item of income or other payment by reason of an treaty obligation of the United States, the amount of any credit or refund with respect to such tax shall not exceed the amount of credit or refund attributable to such reduction in rate on the item of income or other payment, and no interest otherwise allowable under IRC section 6611 shall be allowed or paid with respect to such credit or refund.
- iii **“Nonparticipating FFI’s” May be Blacklisted by Internationally Active Commercial banks and other Financial Institutions:** Although FATCA does not require FFIs that have entered into “FFI Agreements” to close the accounts of “nonparticipating FFIs” or “recalcitrant accountholders” in most situations, many FFIs may choose to stop doing business with “nonparticipating FFIs” in order to reduce their compliance burden. In addition, “limited purpose branch” offices of

“expanded affiliated group” FFIs would not be allowed to have accounts held in the name of “nonparticipating FFIs” as explained below.

“Limited Purpose Branch” Rule: The FATCA regulations for FFI “limited purpose branches” (for FFIs that are part of an “expanded affiliated group”) require such branch offices to agree to close the accounts of “nonparticipating FFIs” and “recalcitrant account holders” and also agree not to do business in the future with people and organizations meetings these definitions.

“Participating FFI” means non-U.S. financial institutions that do not meet the “Local FFI” definition or other types of partially exempt “deemed compliant” FFIs, and have entered into the “FFI Agreement” required by proposed Treasury Regulations 1.1471-4.

“Pre-Existing accounts” means accounts which were in existence prior to January 1, 2013.

“Prima Facie” FFI means any payee if:

- 1). The withholding agent has available a part of its electronically searchable information a designation for the payee as a “qualified intermediary” or “non-qualified intermediary” or
- 2). For an account maintained in the United States, the payee is presumed to be a foreign entity for purposes of chapter 3 or 61 of IRS’s rules and regulations, and the withholding agent has recorded as part of its electronically searchable information a standardized industry code that indicates that the payee is a financial institution. The following North American Industry Classification System codes indicate that the payee is a financial institution:
 - i Commercial Bank (NAICS 522110)
 - ii Savings Institutions (NAICS 522120)
 - iii Credit Union (NAICS 522130)
 - iv Other Depository Credit Intermediation (NAICS 522190)
 - v Investment Banking and Securities Dealing (NAICS 523110)
 - vi Securities Brokerage (NAICS 523120)
 - vii Commodity Contracts Dealing (NAICS 523130)
 - viii Commodity Contracts Brokerage (NAICS 523140)
 - ix Miscellaneous Financial Investment Activities (NAICS 523999)
 - x Open-End Investment Funds (NAICS 525910)

In addition, the following Standard Industrial Classification Codes indicate that the payee is a financial institution:

- i Commercial Banks, NEC (SIC 6029)
- ii Branches and Agencies of Foreign Banks (branches (SIC 6081)
- iii Foreign Trade and International Banking Institutions (SIC 6082)
- iv Asset-Backed Securities (SIC 6189)
- v Security & Commodity Brokers, Dealers, Exchange & Services (SIC 6200)
- vi Security Brokers, Dealers and Flotation Companies (SIC 6211)
- vii Commodity Contracts Brokers & Dealers (SIC 6221)
- viii Unit Investment Trusts, Face-Amount Certificate Offices, and
- ix Closed-End Management Investment Offices (SIC 6726).

“Recalcitrant Accountholder” means any account holder of an account maintained by a participating FFI if such account holder is not an FFI (or presumed to be an FFI), the account does not meet the exception to U.S. account status or does not qualify for any of the exceptions from the documentation requirements described in 1.1471-4(c)(4)(ii), (iii) or (iv) (including if the participating FFI elects not to apply such exceptions, (c)(7), or (c)(9), and

- i The account holder fails to comply with requests by the participating FFI for the documentation or information that is required under 1.1471-4(c) for determining the status of such account as a U.S account or other than a U.S. account;
- ii The account holder fails to provide a valid Form W-9 upon request for the participating FFI or fails to provide a correct name and TIN combination upon request from the participating FFI when the participating FFI has received notice from the IRS indicating that the name and TIN combination reported by the participating FFI (or a branch thereof in the case in which the branch reports the account separately under 1.1471-4(d)(2)(ii)(c) for the account holder is incorrect; or
- iii If foreign law would prevent reporting by the participating FFI (or branch or division thereof) of the information described in 1.1471-4(d)(3) or (5) with respect to such account, the account holder (or substantial U.S. owner of an account holder that is a U.S. owned foreign entity) fails to provide a valid and effective waiver of such law to permit such reporting.

“Specified U.S. person” or “specified United States person” means any U.S. person as defined, other than:

- a) A corporation the stock of which is regularly traded on one or more established securities markets;
- b) Any corporation that is a member of the same “expanded affiliated group” as a publicly traded corporation;
- c) Any organization exempt from taxation under [I.R.C section 501\(1\)](#) (including U.S. credit unions) or an individual retirement plan as defined in [I.R.C section 7701\(a\)\(37\)](#);
- d) The United States or any wholly owned agency or instrumentality thereof;
- e) Any State, the District of Columbia, any possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;
- f) Any bank as defined in [I.R.C section 581](#);
- g) Any real estate investment trust as defined in [I.R.C. section 856](#);
- h) Any regulated investment company as defined in section 851 or any entity registered with the Securities Exchange Commission under the Investment Company Act of 1940 ([15 U.S.C 80a-64](#));
- i) Any common trust fund as defined in [I.R.C. section 584\(a\)](#);
- j) Any trust that is exempt from tax under [I.R.C. section 664\(c\)](#) or is described in [I.R.C. section 4947\(a\)\(1\)](#);
- k) A dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State; and
- l) A broker as defined in [I.R.C. section 6045\(c\)](#) and Treasury Regulations [1.6045-1\(a\)1](#).

“U.S. Account” means any financial account maintained by a financial institution that is held by one or more specified U.S. persons or U.S. owned foreign entities. However, accounts below US\$50,000 are typically exempt from the “U.S. account” definition and special rules for certain types of accounts.

- **Exception from the “U.S. Account” Definition for Individual Accounts Below US\$50,000:** Accounts held by “U.S. persons” are not considered “U.S. accounts – whether or not the account is a pre-existing or a new account- if the account:
 - i Depository account (i.e. “a commercial, checking, savings, time or thrift account, an account evidenced by a certificate of deposit or similar instruments, and any amount held with an insurance company under an agreement to pay interest”;
 - ii In the name of a natural, physical person;
 - iii That is below US\$50,000 in value (multiple accounts held by the same individual at one financial institution must be aggregated) at the end of the calendar year or the date it is closed. If the account is denominated in currency other than U.S. dollars, the accounts value for purposes of the US\$50,000 threshold will be determined based on the currency’s spot rate relative to the U.S. dollars on the last day of the calendar year.
- **IRS Form to be collected From Account Holder:** For “U.S. accounts” (i.e. accounts held by U.S. citizens or residents that are above US\$50,000 in value) “participating FFIs” must in general collect an IRS Form W-9 from the account holder.
- **Information that Must Be Reported about U.S. Accounts:** As proposed, information that must be reported to the IRS with respect to each U.S. account includes:
 - i The name, address and taxpayer identifying number (TIN) of each account holder who is a “specified U.S. person” as defined below, (or in the case of an account holder that is a U.S. owned foreign entity, the name, address and TIN of each specified U.S. person that is a substantial U.S. owner of such entity);
 - ii The account number;
 - iii The Account balance or value; and
 - iv The gross receipts and gross withdrawals or payments from the account over a specified time period to be set by the IRS.

Special Rules for Certain Types of Accounts:

- i Financial Accounts Held by Agents: When an agent (such as a real estate agent) holds an account on behalf of a client (i.e. the “principal) the principal and not the agent will be considered the holder of the account for FATCA purposes.
- ii Jointly-Held Accounts: Accounts that are held jointly by more than one account holder are “U.S. accounts” if any of the holders are “U.S. persons.” Unless the account meets the exception for accounts below US\$50,000.

“U.S. person” or “United States person” means (1) a citizen or resident of the United States; (2) a partnership formed under U.S. law; (3) a corporation formed under U.S. law; or (4) an estate or trust formed under U.S. law.

“U.S. Resident” means a person who:

- 1) Was or is a lawful permanent U.S. resident (i.e. has or had a “green card” during the relevant time period); or
- 2) Meets the following two requirements:
 - a) Was physically present in the U.S for at least 31 days during the prior calendar year; and
 - b) Was physically present in the U.S. for at least 183 days during the preceding 3-year period (i.e. during, the three prior calendar years).

“Withholding Agent” means any person including credit unions U.S. or foreign, in whatever capacity acting, that has the control, receipt, custody, disposal, or payment of a withholdable payment.

“Withholdable Payment” means income from Investments or Deposits that is not yet subject to U.S. Income tax “withholding” that is being transferred out of the U.S.

3. CREDIT UNIONS COMPLIANCE WITH FATCA.

Most Caribbean and other non-U.S. credit unions are likely to be able to comply with FATCA as one of two types of “deemed compliant” institutions:

- (A) “Local FFIs” that must register with the IRS; or
- (B) possibly as “non-registering local banks” that are not required to register with the IRS.

However, the latter can only apply if the IRS amends the proposed definition of “non-registering local bank” to include credit unions in the final version of the regulation. The proposed definition makes specific reference to banks as defined under a particular section of the Internal Revenue Code(IRC) while credit unions are defined under a different section of the IRC.

A. “Deemed Compliant” “Local FFIs” That must Register with the IRS.

Under the proposed “Local FFI” rules – which are in proposed Treasury Regulation 1.1471-5(f) – accounts held by “U.S. persons who are residents of the credit union’s home country would be permitted (unless the U.S. person ceases to reside in the home country) and accounts below US\$50,000 would not be considered “U.S. accounts” even if held by a non-resident U.S. person. As proposed most non-U.S. credit unions would be eligible to comply with FATCA under the “deemed compliant” FFI requirements as a “Local FFI” if the non-U.S. credit union:

1. Does not have a fixed place of business outside of its home country;

2. does not solicit account holders outside its home country; (a website would not be considered “soliciting” account holders outside the home country, as long as the website does not specifically state that non-residents may open accounts, does not advertise deposits in U.S. dollars or other U.S. dollar denominated investments, and does not target U.S. customers);
 3. has at least 98% of its accounts held by residents of the home country – these local residents can also be U.S. citizens or U.S. residents so long as they have not ceased to be legal residents of the home country.
 4. is licensed or regulated “under the laws of” a home country that is Financial Action Task Force (FATF) compliant with respect to AML regulation “as a bank or similar organization authorized to accept deposits in the ordinary course of its business, a securities broker or dealer or a financial planner or investment advisor.....”.
- **Due Diligence Required by “Local FFIs”** According to the text of the proposed FATCA Regulation, “Local FFIs” would be required to follow these due diligence procedures:
 - i As part of this process, the credit union’s chief compliance officer or a similar executive would need to provide the IRS with a certification that the credit union meets all of the “Local FFI” requirements and would need to renew this certification every three years.
 - ii On or before the date it registers as a deemed-compliant FFI, the FFI must implement policies and procedures to ensure that it does not open or maintain accounts for any specified U.S. person who is not a resident of the country in which the FFI is organized (including a U.S. person that was a resident when the account was opened but subsequently ceases to be a resident), a non-participating FFI, or any entity controlled or beneficially owned (as determined under the FFI’s AML due diligence) by a specified U.S. person.
 - iii With respect to each account that is held by an individual who is not a resident of the country in which the FFI is organized or by an entity, and that is opened after December 31, 2011, and prior to the date that the FFI implements the policies and procedures described (under Roman number “ii” immediately above) the FFI must review those accounts in accordance with the procedures described in the “FFI agreement” rules proposed to be codified at Treasury Regulation 1.1471-4(c)... as would be required if it were a participating FFI”.
 - **Registered “Local FFIs’ are Partially Exempt:** “Deemed compliant” FFIs meeting the “Local FFI” qualification, would need to register with the IRS and file a due diligence certification every three years, but would not likely have to engage in other periodic reporting to the IRS or home country Government agencies, tax collection, or “due diligence” internal reviews and audits otherwise required by the proposed rule (except for the due diligence requirements for “Local FFIs” summarized immediately above).
 - **“FFI EIN” Number:** “Local FFIs” would receive a “foreign financial institution Employer Identification Number” (FFI EIN) for FATCA compliance purposes, and this unique identifier would be placed on an IRS list of institutions that are FATCA compliant (i.e. a “whitelist”) that participating FFI’s would be required to check at least annually.

- **Effect of Failing to Register with the IRS:** If an otherwise “deemed compliant” credit union does not register with the IRS, it would likely be subject to a 30% “withholding” tax on certain “withholdable payments” as defined below – i.e on funds that are generally attributable to U.S. income sources when the transaction involves (1) a U.S. based financial institution; and/or (2) a non-U.S. FFI that has either 9a) an individual agreement with the IRS for FATCA compliance purposes; or (b) is located in a country that has entered into a FATCA-related tax treaty with the United States. In addition, a credit union that fails to register with the IRS could be blacklisted by major financial institutions and the U.S. Government as the equivalent of a “tax haven” financial institution.
- **Online Registration Process:** The IRS registration process will be an online, electronic form that is proposed to be available starting on January 1, 2013.

B. “Deemed Compliant” “Non-registering Local Banks” and That Do Not Have to Register with the IRS.

The proposed IRS definition of “non-registering local bank” would not include credit unions because credit unions are not defined as “banks” under U.S. tax law. As proposed, Treasury Regulation 1.1471-5(f)(2) would define “non-registering local bank” as follows:

1. “The FFI must operate and be licensed solely as a bank (within the meaning of section 581, determined as if the FFI were incorporated in the United States) in its country of incorporation or organization and engage primarily in the business of making loans and taking deposits from unrelated retail customers.”
2. “The FFI must be licensed to conduct business in its country of incorporation or organization and must have no fixed place of business outside such country.”
3. “The FFI must not solicit account holders outside its country of organization. For this purpose, an FFI will not be considered to have solicited account holders outside of its country of organization merely because it operates a Web site, provided that the Web site does not specifically state that non-residents may hold deposit accounts with the FFI, advertise the availability of U.S. dollars denominated deposit b8accounts or other investments or target U.S. customers.”
4. “The FFI must have no more than [US] \$175 million in assets on its balance sheet and, if the FFI is a member of an expanded affiliated group, the group may have no more than \$500 million in total assets on its consolidated or combined balance sheets.”
5. “The FFI must be required under the tax laws of the country in which the FFI is organized to perform either information reporting or withholding of tax with respect to resident accounts. An FFI that is not subject to such information reporting or withholding requirements will be considered to meet this requirement if all of the accounts maintained by the FFI have a value or account balance of \$50,000 or less, taking into account the aggregation rules set forth in 1.1471.4(c)(4).”
6. “With respect to an FFI that is part of an expanded affiliated group, each FFI in the expanded affiliated group must be incorporated or organized in the same country and must meet the requirements set forth in paragraph (f)(2)(1).”

What would “Non-registering Local Banks” Need to do to Comply with FATCA? “Non-registering local banks) – [under which credit unions should be included] would not be required to register with the IRS. Instead, the “non-registering local bank” would be required to provide “withholding agents” such as U.S. banks and internationally active non-U.S. commercial banks with:

- a. A valid withholding certificate; and
- b. An audited financial statement, if the institution does not have an audited financial statement, an unaudited financial statement.

“Non-registering Local Bank” Certification Requirements as Stated by the IRS in Proposed Treasury Regulation 1.174-3(d)(6)(i): “A withholding agent may treat a payee as a nonregistering local bank if the withholding agent can reliably associate the payment with a valid withholding certificate that identifies the payee as a foreign entity that is a nonregistering local bank, the withholding certificate contains a certification by that payee that it meets the requirements to qualify as a nonregistering local bank under 1.1471-5(f)(2)(i), and the withholding agent has either a current audited financial statement, or if the payee does not have an audited financial statement, an unaudited financial statement or similar financial document for the payee that supports the payee’s claim that is an FFI that operates solely as a bank (within the meaning of section 581, determined as if the FFI were incorporated in the United States) and does not contradict the payee’s claim that it is eligible for certified deemed compliant status as a nonregistering local bank. A withholding agent will have reason to know that a payee is not a nonregistering local bank if the withholding agent has knowledge that the payee operates in more than one country or the withholding agent can determine that the payee has assets in excess of \$175 million.”

C. Group FATCA Compliance Option for Non-U.S. “Expanded Affiliated Groups Involving Joint-Stock Company Subsidiaries.

Members of “Expanded Affiliated Groups” that are “Participating FFI Groups”:
Groups of joint-stock companies owned by a non-U.S. credit union or non-U.S. credit union association that can meet the IRS definition of “expanded affiliated group” have the option to agree to be a “participating FFI group” that reports to the IRS on a consolidated basis. In this situation, one member of the group (such as the credit union or credit union association that “owns” the other companies in the group under the IRS definition) would provide FATCA-related information to the IRS on behalf of the group and the other members of the group would be exempted from most FATCA requirements as “nonreporting members of participating FFI groups.”

D. Non-US Credit Unions That Do Not Meet the “Local FFI” Exemptions.

Non-U.S. Credit Unions That Are Not “Deemed Compliant” FFIs Would be Required To Become “Participating FFIs:” As proposed, non-U.S. credit unions that do not meet the “deemed compliant nonregistering local bank” or the “Local FFI” definition, would be required to become “participating FFIs” and meet the following requirements:

- 1. IRS Registration and Reporting.** – Be required to register with the IRS and also;
 - a. **FATCA-Related Tax Treaties:** if a country enters into a FATCA-related tax treaty with the United States, that country’s non-exempt credit unions (i.e “participating FFIs”) could report their U.S. taxpayer account information to a home country

supervisory authority instead of the IRS, likely by using existing AML reporting procedures; or

- b. **Direct Agreement with the IRS:** The non-exempt credit union would be required to enter into an “FFI Agreement” with the IRS as a “participating FFI”- the requirements of the “FFI Agreement” are set forth in Proposed Treasury Regulation 1.1471-4(“FFI Agreement.”) – that would involve promising to report periodically to the IRS information about U.S. taxpayer accounts (unless the accounts meet the “grandfather” exemption detailed below.

2. “Grandfathered” Accounts Exemption: As proposed, existing accounts as of January 1,2013 at non-exempt credit unions i.e. (“participating FFIs”) with balances below US\$50,000 would not need to be reviewed or reported and some other types of accounts would also be “grandfathered” and not be subject to periodic reporting unless those accounts were to eventually exceed US\$1 million in value at the end of any calendar year.

3. Additional Non-Exempt Credit Union Compliance Procedure: In addition, non-exempt credit unions i.e. (“participating FFIs”) would need to:

- a). Review Existing Individual Accounts: Most existing accounts with balances above US\$50,000 (as proposed, FFIs do not need to review accounts below US\$50,000 and can assume that these are not “U.S. accounts”) would need to be reviewed to determine whether the account holder has indicia of U.S. residency or citizenship, such as:
 - i The person has identified him or herself as a U.S. resident;
 - ii The person has a place of birth in the United States;
 - iii The person has a U.S. address;
 - iv The person has a U.S. telephone number;
 - v There are standing instructions to transfer funds to an account located in the United States;
 - vi A power of attorney or other signatory authority granted to a person with a U.S. address; or
 - vii A U.S. “in care of” or “hold mail” address if that is the only address that the credit union has for the account holder.
- b) **Can the Review be Electronic?** A “participating FFI’s” review of accounts between US\$50,000 and US\$1 million can be based on its electronic records. No further search of records or contact with the account holder is required unless U.S. indicia are found through the electronic search, or the account holder exceeds US\$1 million in value;
- c) **Due Diligence:** Engage in “due diligence” concerning U.S. taxpayers’ accounts, such as by conducting internal reviews, audits, etc., of certain types of accounts on a regular basis;

- d) **Closing Accounts:** Close the accounts of “recalcitrant” U.S. taxpayers (i.e those who are attempting to avoid compliance with U.S. tax laws; and
 - e) **Acting as a Withholding Agent and Collecting Tax for the IRS:** “Withhold” and render to the IRS 30% of certain “withholdable payments” that the credit union transfers to U.S. taxpayers’ accounts and to FFIs that have no registered with the IRS and/or FFIs that have (i) failed to enter into a required FATCA related agreement with the IRS; and (ii) are not located in a country that has entered into a FATCA related tax treaty with the United States.
3. **FFI EIN Number.** “Participating FFIs) would receive a “foreign financial institution Employer Identification Number” (FFI EIN) for FATCA compliance purposes, and the unique identifier would be placed on an IRS list of institutions that are FATCA compliant (i.e. a “whitelist”).
4. **Failure to Comply Means “Non-participating FFI” Status:** As proposed like for “deemed compliant” FFIs that fail to register with the IRS, discussed above – a non-exempt credit union that fails to comply with any of the above-referenced requirements would likely be considered a “non-participating FFI” and be subject to restrictions including the 30% “withholding” tax on “withholdable payments” that involve (1) a U.S. based financial institution; and/or (2) a non-U.S. FFI that has either: (a) an individual agreement with the IRS for FATCA compliance purposes; or (b) is located in a country that has entered into a FATCA-related tax treaty with the United States.

4. SUBMISSIONS TO IRS ON BEHALF ON NON-U.S. CREDIT UNIONS

The proposed Regulation by the Internal Revenue Service (IRS) which is the United States tax authority was issued on February 8, 2012. This Rule would implement the Foreign Account Tax Compliance Act (FATCA) which was enacted by the U.S. Congress in March 2010 and to come into force on July 1, 2013.

Public Comments were requested by the IRS for submission by April 30, 2012 and representation was made to the IRS on behalf of Credit Unions, on some of the critical provisions that could negatively impact the sector and impose regulatory burdens.

A summary of some of the issues represented on behalf of Credit Unions, is as follows:

Credit Unions are not-for-profit, co-operative financial institutions that are democratically governed by their members. Like banks, credit unions primarily engage in retail lending and deposit taking activities but –unlike banks—credit unions face “common bond” restrictions that limit who can become a credit union member to a subset of local residents and/or workers (such as persons who live or work in a specific area) meaning that a credit union is less likely to have U.S. persons as customers than nonregistering local banks. Non-U.S. credit unions therefore generally have members who are local residents and/or locally employed because people who do not meet the credit union’s common bond requirements are not eligible to join the credit union or otherwise do business with it.

The proposed definition of “nonregistering local bank” is not supported because it does not apply to similarly small and localized credit unions. We urge a revision of the definition so that small, localized non-U.S. credit unions which provide their members with retail lending, deposit and other financial services in the same manner as banks and which meet

the other requirements of the proposed definition, can utilize the streamlined compliance procedures applicable to small, localized non-U.S. banks.

An institution that meets the “non-registering local bank” definition would not be required to register with the IRS and instead would only be required to certify to financial institutions that act as “withholding agents” that it is FATCA compliant. This approach is deemed preferable for small, localized non-U.S. credit unions.

It is recommended that the proposed Regulation 1.1471-(5)(f)(2)(i) be amended to read as follows:

“The FFI must operate and be licensed solely as a bank (within the meaning of section 581, determined as if the FFI were incorporated in the United States) or as a credit union (within the meaning of section 501(c)(14)(A) determined as if the FFI were incorporated in the United States) or similar co-operative credit organization in its country of incorporation or organization and engage primarily in the business of making loans and taking deposits from unrelated retail customers.”

It is recommended that non-U.S. credit unions meeting the “nonregistering local bank” and “local FFI” definitions should be allowed to offer U.S. dollar denominated financial products to their members on their websites.

It is recommended that the maximum asset threshold for meeting the “nonregistering local bank” definition should be increased from \$175 million to \$1 billion.

It is recommended that the proposed rule should be modified to permit institutions to receive refunds of money withheld erroneously under FATCA even in the case of a “nonparticipating FFI”.

It is recommended that international workers’ remittances should be exempted from FATCA Coverage in order to permit migrants to continue to support their families in developing countries.

The IRS is urged to remove the proposed prohibition on “nonregistering local banks” advertising U.S. dollar denominated deposits and other U.S. dollar denominated financial products on their website. The requirement is overly broad; would make many non-U.S. credit unions ineligible for the “local FFI” definition, even when their membership is composed primarily or exclusively of local residents.

The requirement for each local FFI to register with the IRS individually and obtain a unique FFI EIN number, is not supported because the registration process will be unduly burdensome especially on small credit unions

5. MAJOR CHALLENGES ANTICIPATED

In relation to credit unions preparedness for the implementation of FATCA, the major challenges anticipated are as follows:

FATCA Readiness

The level of effort required to allocate people and resources across the organization to ensure readiness.

Legal Entity Analysis

Determining the status of each institution for FATCA purposes.

Existing Account Information

The extent to which existing Know Your Client/Member (KYC) information is readily available or could be leveraged. It is anticipated that most systems do not facilitate the identification of U.S. persons for FATCA purposes and therefore may need to be enhanced.

Timing

The short time frame for implementation which requires an immediate focus on key start up tasks.

Technology

Determination as to whether existing technology needs to be modified to enable new required information and reporting.

Education

Generally, there is not a full awareness of FATCA, its requirements and the resulting impact on the institution, which requires early senior level commitment and communication.

6. CONCLUSION

There are approximately three hundred and fifty three (353) Credit Unions operating in the Caribbean with Bermuda, Cayman Islands and Montserrat having one (1) each while other countries range from a low of six (6) to a high of one hundred and fifty three (153). However, whereas most credit unions are organized through National Associations, it is unlikely that these will qualify under the "Group FATCA Compliance Option for Non-U.S. "Expanded Affiliated Groups" under the proposed definition.

It would seem that for the purpose of compliance with FATCA, the most viable option for credit unions is to be registered as "Deemed compliant Local FFIs". However, Caribbean Governments are required to negotiate either reciprocal or nonreciprocal intergovernmental agreements to improve tax compliance and to implement FATCA with the United States. Credit Unions should therefore lobby National Governments, to ensure that the impact and cost of these regulatory requirements is minimized.

APPENDIX 1

Summary of Key FATCA Provisions (Taken from US Treasury Website un abridged)

The Foreign Account Tax Compliance Act (FATCA), enacted in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act, is an important development in U.S. efforts to combat tax evasion by U.S. persons holding investments in offshore accounts.

Under FATCA, certain U.S. taxpayers holding financial assets outside the United States must report those assets to the IRS. In addition, FATCA will require foreign financial institutions 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.

Reporting by U.S. Taxpayers Holding Foreign Financial Assets

FATCA requires certain U.S. taxpayers holding foreign financial assets with an aggregate value exceeding \$50,000 to report certain information about those assets on a new form (Form 8938) that must be attached to the taxpayer's annual tax return. Reporting applies for assets held in taxable years beginning after **18 March 2010**. For most taxpayers this will be the 2011 tax return they file during the 2012 tax filing season. Failure to report foreign financial assets on Form 8938 will result in a penalty of \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification). Further, underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an additional substantial under-statement penalty of 40 percent.

Reporting by Foreign Financial Institutions

FATCA will also require 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. To properly comply with these new reporting requirements, an FFI will have to enter into a special agreement with the IRS by **30 June 2013**. Under this agreement a "participating" FFI will be obligated to –

- (i) undertake certain identification and due diligence procedures with respect to its account-holders;
- (ii) report annually to the IRS on its accountholders who are U.S. persons or foreign entities with substantial U.S. ownership; and
- (iii) withhold and pay over to the IRS 30-percent of any payments of U.S. source income, as well as gross proceeds from the sale of securities that generate U.S. source income, made to (a) non-participating FFIs, (b) individual accountholders failing to provide sufficient information to determine whether or not they are a U.S. person, or (c) foreign entity accountholders failing to provide sufficient information about the identity of its substantial U.S. owners.

Details on the FATCA Registration Process for Foreign Financial Institutions (FFIs)

In building an online system for foreign financial institutions (FFIs) to register as participating FFIs, the IRS has developed a flexible system that has the ability for the FFI to create accounts, choose login and passwords, create challenge questions and maintain the account once formed. The automated system aims to make the registration process as quick and easy as possible, facilitates communication electronically and provides e-mail alerts to keep the registration process moving forward.

Key Points:

- (i) FFIs will register and enter an agreement (a certification, if a Registering Deemed-Compliant FFI) through an online registration system.
- (ii) Each FFI must select a FATCA Responsible Officer (RO)-
 - (a) This individual will be identified in the FATCA registration system; and
 - (b) In a typical case, the RO will be the individual who will sign the FFI agreement.
- (iii) The RO may select Points of Contact (POCs) to help complete all aspects of the registration process except signing -
 - (a) Up to five POCs may be selected;
 - (b) There must be at least one in-house POC (may be the RO); and
 - (c) It is anticipated POCs may include certain third-party individuals, both local and US (e.g., employee of an affiliate, a service provider).
- (iv) It is anticipated that there will be power of attorney procedures allowing the RO to delegate full FATCA registration duties (including signing) to another in-house individual-
 - (a) This in-house individual with the power of attorney from the RO will be identified in the registration system as the FFI's Authorized Third Party (ATP).
- (v) If it proves unworkable for the Responsible Officer (RO) or another in-house individual to register the FFI, it is anticipated there will be power of attorney procedures allowing the RO to delegate full FATCA registration duties (including signing) to certain U.S.-licensed tax professionals that are subject to our regulatory jurisdiction -
 - (a) The U.S.-licensed tax professional with the power of attorney from the RO will be identified in the registration system as the FFI's Authorized Third Party (ATP).
- (vi) FATCA registration is a user maintained account – it can be edited or modified by the user.

- (vii) The person signing the FFI agreement (or certification) must make an affirmative statement during the registration process that he or she has the authority to act for the FFI.
- (viii) Positive ID verification will be required for the individual who will sign the agreement/certification on behalf of the FFI (i.e. the RO or ATP).
- (ix) The person who will sign the agreement/certification will be issued a FATCA Individual identification Number (FIIN) following ID verification -
 - (a) If this individual already has an SSN or ITIN, he/she may choose to use it to obtain his/her FIIN electronically through the registration system. If this individual does not have an SSN or ITIN, or does not want to provide his/her SSN or ITIN electronically to obtain a FIIN, he/she must obtain his/her FIIN by filing a short paper form along with a copy of specified ID documentation; and
 - (b) The FIIN is the only identification number necessary for the individual to complete the registration process.
- (x) IRS will closely monitor the account creation and FATCA registration process
- (xi) Comments on the proposed regulations and other FATCA implementation issues have been and continue to be received. All comments will be considered as we work toward finalizing the Notice of Proposed Rule-Making and the FFI registration process. Given this ongoing work, all information/guidance on the FFI registration system provided at this stage is subject to change.