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The Institute’s mission is to help resolve the many special legislative, regulatory and tax issues confronting **internationally headquartered** financial institutions that engage in banking, securities and/or insurance activities in the United States.

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INSTITUTE JOINS IN AMICUS BRIEF ADDRESSING TREATY AND COMITY ISSUES RAISED BY THE “JOHN DOE” SUMMONS SOUGHT BY THE IRS FOR THE RELEASE OF INFORMATION ON UBS U.S. CUSTOMERS WITH ACCOUNTS IN SWITZERLAND

The Institute joined in an *amicus* brief addressing the treaty and related comity principles presented by the “John Doe” summons sought by the Internal Revenue Service for the release of information on UBS customers in the United States that have accounts in Switzerland. The other participants in the brief are the European Banking Federation, the Swiss Bankers Association, the International Bankers Association of California, the Swiss-American Chamber of Commerce and Economiesuisse. (A link to the brief is provided below.)

The principal issue addressed in the brief is the importance of the United States honoring its treaty obligations and not taking measures, such as seeking enforcement of a summons in circumvention of the specific terms of a treaty. Here, the U.S.-Swiss Double Taxation Treaty (as well as virtually every other income tax treaty to which the United States is a party) requires that information requests be targeted and that there must be a particularized basis to reasonably suspect a type of wrongdoing by the subject of the request, whereas the John Doe summons at issue is broad-based and nonspecific, calling for the provision of information for over 50,000 unnamed U.S. persons maintaining accounts in Switzerland. The concern with adhering to treaty obligations is especially pronounced where, as in this case, complying with an information request would put the recipient internationally headquartered bank in the position of having to violate the laws of its home country in order to comply with the request. Such actions also run counter to the basic international law principle of comity, which counsels sovereigns to respect one another’s laws and to refrain from attempting to apply their own laws to affect conduct abroad in ways that conflict with the laws of another nation. **It is important to emphasize that the *amicus* brief focuses exclusively on the relevant legal principles of concern to internationally headquartered banks with U.S. operations. Although these issues arise in the context of the IRS action against UBS, the *amicus* brief does not in any way condone the conduct to which UBS has admitted as part of its recent settlement with the Department of Justice and does not take any position on any factual disputes between UBS and the IRS.**

On May 18th, the U.S. District Court for the Southern District of Florida approved the motion for *amici* to file the brief. In addition, the court copied the order and the *amicus* brief to United States Attorney General Eric Holder and in the order instructed that the merits of the *amicus* brief are to be addressed in a Statement of Interest which the court previously ordered the Attorney General to file.

Link to the *amicus* brief as filed:

<http://www.iib.org/associations/6316/files/20090515FinalBrief.pdf>

FEDERAL RESERVE REVISES TALF ELIGIBILITY CRITERIA TO ENABLE PARTICIPATION BY FOREIGN GOVERNMENT-CONTROLLED INSTITUTIONS

As previously reported, the Federal Reserve has initiated a program – the Term Asset-Backed Security Loan Facility (TALF) – intended to promote lending to consumers and small businesses by facilitating renewed issuance and trading of consumer and small business asset-backed securities (the Federal Reserve recently announced the expansion of TALF to include certain high-quality commercial mortgage-backed securities as well). The U.S. operations of internationally headquartered banks, including their U.S. subsidiaries and branches/agencies, are generally eligible borrowers under the program, but the program guidelines published by the Federal Reserve prior to the program’s commencement excluded from the program “any entity that is controlled by a foreign government.” Responding to concerns expressed by the Institute, the Federal

Reserve revised the eligibility criteria by permitting participation by the following entities regardless of whether they are “controlled by a foreign government”: (i) U.S. branches and agencies of international banks that maintain reserves with the Federal Reserve and (ii) U.S. FDIC-insured depository institutions. This significant narrowing of the foreign government-controlled exclusion provides important relief to foreign government-controlled institutions, although it continues to exclude their U.S. broker-dealer and other U.S. non-bank subsidiaries.

The revision to the TALF eligibility criteria for foreign government-controlled institutions reflects the collective efforts of the Institute and a working group of interested member banks, which included discussions with Federal Reserve staff and written submissions to Chairman Bernanke and senior staff (see the links below). We also appreciate the assistance provided by home country authorities and banking associations in addressing this issue.

Link to the Institute letter to Chairman Bernanke:

<http://www.iib.org/associations/6316/files/20090310FinalBernankeLetter.pdf>

Link to the Institute letter to Federal Reserve senior staff:

<http://www.iib.org/associations/6316/files/20090224FinalTALFLetter.pdf>

INSTITUTE SEEKS ELIGIBILITY OF U.S. OPERATIONS OF INTERNATIONAL BANKS UNDER LEGACY LOANS PROGRAM AND CLARIFICATION OF THEIR ELIGIBILITY UNDER THE LEGACY SECURITIES PROGRAM

In separate letters sent in early April to Treasury Secretary Geithner and FDIC Chairman Bair (see links below), the Institute expressed concerns regarding the outright exclusion of international banks’ FDIC-insured depository institutions from the Legacy Loans Program (LLP) under the Public-Private Investment Program. In the Institute’s view, permitting insured depository institution operations of internationally headquartered banks the choice to sell eligible assets into the LLP on the same terms as their domestic competitors is well within the authority of the FDIC under the “systemic risk” provisions of the Federal Deposit Insurance Act on which the LLP is based, is consistent with the longstanding U.S. policy of national treatment and related U.S. treaty obligations and will further enhance the effectiveness of the LLP. Moreover, it is fundamentally unfair to exclude such insured depository institutions from the LLP *ab initio* and yet require them to contribute to any special assessment that may be required in the event the FDIC suffers a loss under the Program. The Institute is continuing its discussions with Treasury and the FDIC on this issue.

In its letter to Secretary Geithner, the Institute also sought clarification of international banks’ eligibility to sell assets to Public-Private Investment Funds established under the Legacy Securities Program. Eligible sellers under the Legacy Securities Program are limited to entities that are “financial institutions” as defined in the Emergency Economic Stabilization Act of 2008. International banks’ U.S. operations (including their U.S. branches and agencies) are generally eligible under this standard; the key question – and one addressed by the Institute in its letter to Secretary Geithner – is how to interpret the exclusion of institutions that are “owned by a foreign government.” Discussions with Treasury on this issue also are continuing.

The Institute has prepared a chart on the eligibility of the U.S. operations of international banks under the PPIP as well as the various other financial stabilization/capital support programs established by the U.S. government (see link below).

Link to the Institute letter to Secretary Geithner:

<http://www.iib.org/associations/6316/files/20090406TreasuryLetter%28Final%29.pdf>

Link to the Institute letter to FDIC Chairman Bair:

<http://www.iib.org/associations/6316/files/20090403FDICLetter%28Final%29.pdf>

Link to eligibility chart:

<http://www.iib.org/associations/6316/files/20090420DraftChart.pdf>

INSTITUTE TO SUBMIT COMMENT LETTER ON SAR CONFIDENTIALITY

The Institute plans to submit a comment letter to the Treasury Department's Financial Crimes Enforcement Network (FinCEN) on proposed modifications to its rules regarding the confidentiality of Suspicious Activity Reports (SARs), the corresponding changes to their rules proposed by the OCC and OTS, and the proposed guidance issued by FinCEN regarding sharing SARs by depository institutions (including the U.S. branches and agencies of international banks), broker-dealers and certain other types of financial institutions with domestic affiliates that are themselves subject to a SAR regulation, provided that such sharing is subject to a written confidentiality agreement. (As to depository institutions and broker-dealers, current FinCEN guidance permits SARs to be shared only with head offices and controlling persons/parent companies, subject to a written confidentiality agreement.) The proposal would not expand existing guidance to permit sharing SARs with affiliates outside the United States. Comments on the proposals are due June 8th.

The Institute's comments will focus principally on (i) the proposed "rules of construction" enabling financial institutions to disclose the "underlying facts, transactions and documents upon which a SAR is based" (as opposed to a SAR itself or "information that would reveal the existence of a SAR," neither of which may be disclosed) and (ii) the rationale for sharing SARs with affiliates outside the United States in ways that adequately protect their confidentiality. A draft of the Institute's letter has been distributed to member institutions for their review and comment.

INSTITUTE HOLDS TALKS WITH OCC ON ISSUES RELATED TO CAPITAL EQUIVALENCY DEPOSIT REQUIREMENTS

The Institute is holding discussions with the Office of the Comptroller of the Currency on various issues regarding the OCC's capital equivalency deposit (CED) requirements, including whether liabilities to the Federal Reserve arising from discount window borrowings should be included among the third party liabilities with respect to which OCC-licensed branches and agencies must deposit assets to satisfy the CED requirement. OCC staff informed us they are reviewing this question and have not yet reached a conclusion. The Institute has proposed the exclusion of such liabilities from CED requirements, but recognizes that the OCC may consider taking a case-by-case approach to the question, similar to what it did when deciding a similar question regarding the treatment for CED purposes of liabilities arising from repurchase agreements.

The Institute has also contacted the New York State Banking Department regarding the treatment of discount window borrowings for purposes of the Banking Law's asset pledge requirements, an issue which the Department has under consideration.

INSTITUTE COMMENTS ON PROPOSED CHANGES TO QUALIFIED INTERMEDIARY (QI) RULES AND CONSIDERS OBAMA ADMINISTRATION PROPOSALS REGARDING WITHHOLDING AND REPORTING COMPLIANCE

The Institute submitted comments to the IRS regarding proposed changes to the QI rules that were contained in Announcement 2008-98 (see link below), and has organized discussions with the European Banking Federation and other interested parties regarding possible alternative approaches that might be proposed to the IRS. The Institute met with the IRS on June 1st to explore possible refinements and reasonable alternatives to the IRS' proposed amendments.

Several aspects of the IRS' proposals are of concern to QIs, including the requirements that (i) the QI must notify the IRS within 60 days after the QI becomes aware of "a material failure of internal controls" relating to its performance under the QI agreement; (ii) the external auditor must associate a U.S. auditor with the audit and the U.S. auditor must accept joint responsibility for performance of the procedures under the audit guidance; (iii) the external audit must test certain accounts for characteristics that suggest that a U.S. person has authority over the account; and (iv) the external auditor must add procedures for fact gathering relating to the IRS' evaluation of the risk of a material failure of internal controls.

The Institute will also be organizing discussions and coordinating efforts regarding the Obama Administration's legislative proposals that will affect withholding tax compliance, and their implications for internationally headquartered financial institutions and their clients. Among the most significant proposals of relevance to internationally headquartered financial institutions are the following:

- A QI would be required to report all account holders that are U.S. persons; the Treasury Department would be given authority to require disclosure of accounts held in financial institutions that are under common control with a QI.
- U.S. source interest, dividends, etc. paid to a non-qualified intermediary would be subject to 30% reporting, with refunds to eligible holders; exceptions may apply for foreign governments, central banks, pension funds, insurance companies and similar investors, and there is an intention to design the rules so as not to disrupt ordinary and customary market transactions.
- A refundable 20% withholding tax would be imposed on gross proceeds paid to non-qualified intermediaries located in jurisdictions that do not have a comprehensive income tax treaty with satisfactory exchange of information provisions; exceptions may apply for foreign governments, central banks, pension funds, insurance companies and similar investors, as well as for non-treaty jurisdictions with satisfactory tax information exchange agreements, and there is an intention to design the rules so as not to disrupt ordinary and customary market transactions.
- Enhanced tax return disclosure of transfers to, and existence of, foreign accounts (including FBAR filings).
- Reporting by any U.S. financial intermediary and any QI of transfers of more than \$10,000 to or from a foreign bank, brokerage or other financial account on behalf of a U.S. person (or an entity in which a U.S. person owns, actually or constructively, more than 50% of the ownership interest), as well as openings of any such accounts and the formation or acquisition of a foreign entity on behalf of such persons, subject to certain exceptions.

Link to Institute's QI submission:

<http://www.iib.org/associations/6316/files/Comment%20on%20Announcement%202008-98.pdf>

INSTITUTE CONTINUES EFFORTS TO OBTAIN RELIEF FROM LOSS LIMITATION RULES FOR FOREIGN GOVERNMENT STABILIZATION INVESTMENTS IN NON-U.S. FINANCIAL INSTITUTIONS

The Institute is continuing in its efforts to persuade the Treasury Department to extend to non-U.S. headquartered financial institutions that receive financial assistance from governmental authorities in their home country pursuant to their sovereign financial stabilization programs the same relief from the application of the section 382 loss limitation rules that it made available to U.S. financial institutions that received assistance from the U.S. Treasury. The Institute submitted a letter to Secretary Geithner in this regard (see link below), and has had discussions with other Treasury officials. In addition, several European governments and organizations have raised the issue with the U.S. Treasury. It will be very important for additional European governments to exert political pressure on this issue if relief is to be achieved.

Link to Institute letter to Secretary Geithner:

<http://www.iib.org/associations/6316/files/20090323LetterSecGeithner-Sect.382.pdf>

INSTITUTE IN DIALOGUE WITH TREASURY DEPARTMENT AND IRS CONCERNING FINALIZING CHANGES TO REGULATION SECTION 1.882-5

The Treasury Department and the Internal Revenue Service will be finalizing Temporary Regulation section 1.882-5, dealing with the calculation of an international bank's interest expense, before the Temporary Regulation expires on August 15th. This Regulation contains several important provisions, including an increase of the "fixed ratio" to 95% and an election to use a 30-day LIBOR rate to compute excess interest.

The Institute has been discussing with the Treasury Department and IRS the feasibility of addressing several other important aspects of this Regulation, and has made informal suggestions as to approaches that might be taken, specifically with respect to:

- Foreign currency gain or loss on interbranch loans;
- Glitches in the definition of U.S. booked liability that, *inter alia*, could result in unanticipated withholding tax exposures on registered form Euro-MTN structured notes (such as ELNs) that are traceable to U.S. dealing or global dealing books;
- Direct tracing of interest expense on repos and securities loans of government securities; and
- Netting of derivatives.

The discussions have been positive thus far, but it remains to be seen whether and to what extent these issues will be addressed in the final Regulations, given the limited time frame for completing the Regulations before the August 15th expiration of the Temporary Regulations.

INSTITUTE COMMENTS ON IRS GUIDANCE UNDER SECTION 457A REGARDING CERTAIN DEFERRED COMPENSATION PLANS OF INTERNATIONALLY HEADQUARTERED BANKS

U.S. Internal Revenue Code Section 457A, which was enacted in 2008 primarily in response to certain deferred compensation arrangements of offshore hedge funds, has a much broader sweep, and potentially covers many deferred compensation arrangements of non-U.S. headquartered banks with respect to “expat” U.S. employees of non-U.S. branches and subsidiaries. Under the interim guidance (Notice 2009-8) issued by the IRS, many member banks and their U.S. expat employees may unexpectedly find themselves subject to these onerous rules.

In April, the Institute submitted a comment letter to the IRS on Notice 2009-8 and the potential application of Section 457A to internationally headquartered banks (see link below).

Link to Institute submission:

http://www.iib.org/associations/6316/files/20090420-457A_CL.pdf