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Mr. John Sweeney
Office of Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224

RE: Proposed Regulations Relating to the Foreign Account Tax Compliance Act (FATCA).

Dear Mr. Sweeney:

The American Bankers Association[1] ("ABA") appreciates the opportunity to provide supplementary comments on the Proposed FATCA Regulations.[2] In general, FATCA requires (i) foreign financial institutions ("FFIs") to report certain information to the Internal Revenue Service ("IRS") regarding their U.S. accounts[3] and (ii) non-financial foreign entities ("NFFEs") to provide information on their substantial United States owners to withholding agents. FFIs and NFFEs that fail to comply with these obligations and certain due diligence requirements will be subject to a withholding tax on certain withholdable payments.

This letter focuses on the question of what is included in the definition of a "financial account" for purposes of FATCA reporting and withholding. The IRS has received requests (in letters and meetings)[4] from other stakeholders requesting that the IRS provide clear guidance addressing this question. We respectfully request that the IRS issue guidance that clarifies that credit and charge cards ("Card Products") and prepaid cards and other similar products ("Prepaid Products") are not intended to be included in the definition of "financial account," and thus, are outside the scope of FATCA.

The Proposed Regulations (section 1.1471-5(b)(1)) define a "financial account" as: (i) any depository account maintained by a financial institution; (ii) any custodial account maintained by a financial institution; (iii) any equity or debt interest (other than interests regularly traded on an established securities market) in a financial institution; and (iv) any cash value insurance contract and any annuity contract issued or maintained by a financial institution. Clearly, Card Products and Prepaid Products do

[1] . The ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees
[2] These provisions were originally introduced as part of the Foreign Account Tax Compliance Act of 2009, and enacted as part of the Hiring Incentives to Restore Employment Act of 2010 ("HIRE Act").
[3] A "U.S. account" is defined in Prop. Treas. Reg. § 1.1471-5(a)(2), as "any financial account maintained by an FFI that is held by one or more specified U.S. persons or U.S. owned foreign entities." Individual depository accounts may generally qualify for an exception from the definition of U.S. account under Prop. Treas. Reg. § 1.1471-5(a)(4), where the aggregate balance or value of all the individual's depository accounts maintained by the FFI or members of its expanded affiliated group do not exceed $50,000.
[4] E.g., Visa letter to IRS (dated April 13, 2002), MasterCard letter to IRS (dated June 26, 2012) and IRS meetings with several groups on the issue.

not represent any interest in a financial institution and they are not insurance contracts. Therefore, these products whould not be included within the scope of (iii) and (iv). As discussed more fully below, these products also do not establish depository or custodial accounts, as those terms are defined by the Proposed Regulations, and thus, should be excluded from the scope of (i) and (ii).

I. Card and Prepaid Products Should Not Be Covered by FATCA

The ABA requests that sections 1.1471-5(b)(3)(i)[5] and 1.1471-5(b)(3)(ii)[6] of the final FATCA Regulations include language that explicitly excludes Card and Prepaid products from the definition of a financial account. These products are not bank deposit products and pay no interest - no income is earned and no withholdable amounts are paid. Indeed, the Explanation of Provisions contained in the *Preamble* to the Proposed Regulations confirms that "[t]he proposed regulations refine the definition of financial accounts to focus on traditional bank, brokerage, money market accounts, and interests in investment vehicles, and to exclude most debt and equity securities issued by banks and brokerage firms, subject to an anti-abuse rule."[7] The definitions of a depository account and a custodial account in the Proposed Regulation could not be read in any way to apply to Card and Prepaid Products.

Card and Prepaid products are very different from what the drafters intended to be covered within the scope of FATCA, and therefore, we strongly urge the IRS to provide the much-needed clarification that these products are specifically excluded from the rule. The legislative history of FATCA makes it clear that the law is intended to address and capture within its framework financial accounts that could be used as vehicles of tax evasion. As explained below, some features of these products that could be viewed as similar to FATCA financial accounts do not provide a framework of "vehicles of tax evasion," and therefore, Card and Prepaid Products should not be captured under the FATCA rules.

II. Refund Balances on Credit and Charge Cards Should Not Create a "Depository Account" or "Custodial Account" under FATCA

We are aware of IRS concerns relating to the character of some Card Products that provide the opportunity for consumers to have positive balances through advance payment and refund balances. These refund and advance payment balances on Card Products are not designed to be used as a substitute for depository or custodial accounts, and therefore, should not be treated as, or create a

[5] A depository account includes "a commercial, checking, savings, time, or thrift account, or an account which is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument," and "any amount held by an insurance company under an agreement to pay or credit interest thereon." Prop. Treas. Reg. § 1.1471-5(b)(3)(i).

[6] A custodial account means "an account for the benefit of another person that holds any financial instrument or contract held for investment (including, but not limited to, a depository account, a share or stock in a corporation, a note, a bond, debenture, or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a nonfinancial index, a notional principal contract as defined in § 1.446-3(c), an insurance or annuity contract, and any option or other derivative instrument). Prop. Treas. Reg. § 1.1471-5(b)(3)(ii).

[7] Preamble, Explanation of Provisions, I. Executive Summary, 6. Refinement of the Definition of Financial Account, (p. 9025 of FR version)

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depository or custodial account for purposes of FATCA. These balances generally arise from the ordinary use of credit and charge cards. Refund balances arise when a cardholder uses the card to make purchases of goods or services and these purchases are subsequently either refunded, charged back or otherwise credited to the cardholder. Advance payment balances arise when a cardholder decides (as a matter of convenience) to make advance down payments on their charge accounts to cover intended future purchases. The advance balances would then be spent down over ensuing billing cycles. These advance payment and refund balances are important components of the functioning of the Card Product. They neither create an opportunity for tax abuse nor represent abusive tax situations and thus, should not be swept into the general definition of a financial account under the FATCA rules.

Moreover, pursuant to the strict requirements under international anti-money laundering ("AML") rules and regulations, issuers monitor accounts for suspicious activity and are required to report such activity to appropriate authorities. Thus, an unusual pattern of credit balances or any other activity that is inconsistent with ordinary use will generally cause the issuer to generate a suspicious activity report. This scrutiny mitigates any remote risk that credit and charge cards could be used as a means of evading taxation. Additionally, in polling ABA members, we do not believe this to be a prevailing practice among cardholders.

Furthermore, the IRS should clarify that refunds and other credits to cardholder accounts generated in the ordinary course of credit and charge card use should be excluded from the definition of deposit, regardless of the size of the credit generated. These transactions are not abusive and must be excluded in order to permit the cards to be used for their intended purpose.

III. Prepaid Products Should Not Create a "Depository Account" or "Custodial Account" under FATCA

Prepaid Products can be funded by a business, consumer, or the government. The typical consumer funded Prepaid Products are generally purchased by customer in small-dollar denominations and are used at retailers in lieu of cash to purchase products. Generally,, these products are sold in denominations under $500 and are typically sold by third parties, such as retailers and financial institutions. These products are a convenience to purchasers and pose no risk for tax evasion. Thus, these products should be outside the scope of FATCA.

If Card Products or Prepaid Products are Covered Under FATCA Certain Exceptions are Crucial to the Continued Viability of these Products

If the IRS determines that these products are to be treated as "financial accounts" under FATCA, then we strongly urge the IRS to provide a de minimis threshold exclusion for balances of $50,000 or less on individual cardholder accounts and $250,000 or less on entity cardholder accounts without aggregation with other true depository accounts owned by the cardholder. Under this exception, Card Products and

Prepaid Products that are within the threshold amounts would be completely excluded from the scope of FATCA. In effect, the same rationale under the Proposed Regulations that excludes certain deposit accounts from scrutiny for individual and entity accounts (sections 1.1471-4(c)(4)(iii) and 1.1471-4(c)(3)(ii))[8] should apply to these products. A de minimis exclusion is crucial to the continued viability of these products and these thresholds would help balance the considerable burden to the issuer against the low-risk of tax evasion associated with the products.

We recommend that the IRS take into consideration the overwhelming burden and complexity that would result from monitoring and tracking balances in these accounts (because of the de minimis thresholds exclusion), and clarify that de minimis balances should be excluded from aggregation requirements.

Thank you for your consideration of these views. Please feel to contact me at 202.663.5317 or fmordi@aba.com to discuss these issues in greater details.

Sincerely,

Fran Mordi

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[8] For pre-existing individual accounts, if the aggregate balance is $50,000 or less on the effective date of the FFI Agreement, the account is exempt from review until the account balance exceeds $1 million at the end of any subsequent calendar year. If the balance exceeds $1 million, then there is a change in circumstance that must be documented under the enhanced review for high value account procedures within 90 days of year end. For pre-existing entity accounts, if the aggregate balance is $250,000 or less on effective date of the FFI Agreement, the account is exempt from review until account balance exceeds $1 million at the end of any subsequent calendar year. Then, there is a change in circumstance that must be documented within 90 days of year end.

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