



December 19, 2016

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U.S. Department of the Treasury

Dear Andrea,

The Florida International Bankers Association (“FIBA”), Inc., appreciates the opportunity to address with the Financial Crimes Enforcement Network (“FinCEN”) a significant point of concern for its members, whether a member institution (“Institution”) has an obligation to file a Suspicious Activity Report (“SAR”) upon becoming aware of a customer’s inquiry about or participation in a tax regularization program in their home country.

FIBA strongly supports FinCEN’s efforts to enhance member compliance with the Bank Secrecy Act of 1970 (“BSA”) and FinCEN’s overall Anti-Money Laundering (“AML”) efforts. To further that effort, FIBA wishes to provide uniform guidance to its members with this Best Practices Guidance and accordingly seeks to share its views with FinCEN on this recent development.

Argentina, Brazil and Colombia have recently launched tax regularization programs that waive civil and criminal penalties for historical tax non-disclosure and evasion. Many Latin American countries have enacted similar programs in the past and it is FIBA’s belief that more will occur as Latin America joins the growing global financial transparency fight. This emergence of tax regularization programs in Latin America—either as a precursor to a country joining the OECD Multi-Lateral Agreement on Automatic Exchange of Information or local tax reform—has created a significant amount of customer interest for FIBA’s members. With this interest, the corollary questions about an Institution’s reporting obligations upon customer inquiry about or participation in a regularization program have also arisen.

Importantly, the latest wave of regularization programs—unlike earlier regularization programs in the region—require specific documentation from the participants’ custodial institutions to corroborate the value of the disclosed assets.¹ This knowing involvement by the Institution has raised concerns in many members of customers’ engagement in historical local

¹ See Argentine Law No. 27260, Art. 38, July 22, 2016, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/263691/norma.htm> (Arg.). See also Lei. No. 13.254 de 13 de Janeiro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.1.2016 (Braz.).



tax non-compliance and, at the least, raised questions about heightened account scrutiny for account analysis consistent with a mandated review of “all available customer information.”²

This letter addresses whether a financial institution subject to the BSA and its Anti-Money Laundering provisions (the “Institution”) has an obligation under the suspicious activity reporting rules of the BSA to report to FinCEN a customer’s participation or inquiry about these tax regularization programs.³ FIBA believes that both as a matter of law and best practice an obligation does not exist, but consistent with current guidance the Institution should subsequently undertake review of the relevant customer’s accounts in light of the new information.

I. FOREIGN TAX EVASION IS NEITHER A MONEY LAUNDERING PREDICATE ACTIVITY NOR A VIOLATION OF FEDERAL LAW.

The BSA requires national banks and other financial institutions to file a SAR “when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or violation of the Bank Secrecy Act.”⁴ Section 1956(c)(7) in turn contains the Specified Unlawful Activities (“SUA”) that are predicate offenses to money laundering.⁵ Under section 1956, domestic tax evasion is a SUA, but the section is silent on foreign tax evasion. Given the statutory interpretation principle that when a “statute gives no clear indication of an extraterritorial application, it has none,”⁶ FIBA believes that foreign tax evasion is not a statutorily defined predicate offense to money laundering.

II. THE PARTICIPATION OR INQUIRY INTO TAX REGULARIZATION PROGRAMS IS NOT A “TRANSACTION.”

A SAR obligation is triggered when a financial institution detects a “suspicious transaction.”⁷ Pursuant to section 1956 and buttressed by Federal Financial Institutions Examination Council (“FFIEC”) Examination Manual guidance, “transactions” include deposits, withdrawals, transfers between accounts, exchanges of currency, extensions of credit, purchases or sales of securities or any other payments, transfers or deliveries by, through or to a bank, and

² FFIEC, *Bank Secrecy Act/Anti-Money Laundering Examination Manual* (2014), https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf [hereinafter “FFIEC Manual”]. *Id.* at 63.

³ This analysis is limited to reporting obligations arising from customers’ participation in or inquiry into local tax regularization programs. It does not address whether a reporting obligation arises under theories of aiding and abetting by the Bank or mail or wire fraud under *Pasquantino v. United States*, 544 U.S. 349 (2005).

⁴ 12 C.F.R. § 21.11(a). *See also*, 12 C.F.R. 208.6212 C.F.R. 211.24 (f), 12 C.F.R. 211.5 (k), 12 C.F.R. 225.4(f), 12 C.F.R. 353, and 31 C.F.R. 103.18.

⁵ 18 U.S.C. § 1956(c)(7) (2016).

⁶ *Morrison v. National Australia Bank*, 561 U.S. 255 (2010).

⁷ 12 C.F.R. § 21.11(a) (emphasis added).



other similar affirmative conduct. Participation or inquiry into a tax regularization program does not fall within this definition; rather, it is more accurately a status of the customer.⁸

Compellingly, the FFIEC manual cites a similar receipt of a status-based inquiry—a law enforcement inquiry or grand jury subpoena—as being not reportable per se.⁹ Instead, the manual instructs that financial institutions should conduct an additional review of the account based on the new data, i.e., with “all available customer information.”¹⁰ This is also our recommendation as best practice.

III. FFIEC GUIDANCE DOES NOT INCLUDE FOREIGN TAX EVASION AS AN “UNDERLYING CRIME.”

The FFIEC manual provides that, when facing reporting obligations, financial institutions are not obligated to investigate or confirm the underlying crime as this is the responsibility of law enforcement.¹¹ Unfortunately, FFIEC has spawned uncertainty in the international private banking sector by citing “tax evasion” as an example of an underlying crime while failing to specify whether “tax evasion” encompasses both domestic and foreign evasion.¹²

FIBA believes that as there is no explicit regulation or statute defining foreign tax evasion as a SAR reportable activity and in accord with the *Morrison* presumption against statutory extraterritoriality, it should not be insinuated as a predicate into an expansive definition of “Federal law...or money laundering activity.”¹³ Illustratively, the Financial Action Task Force (“FATF”) has recommended that governments treat foreign tax evasion as a money-laundering predicate offense (i.e., criminal activity which generates illicit funds).¹⁴ Despite FATF’s efforts, the U.S. has not followed its recommendation.

IV. FINCEN DOES NOT OFFER SPECIFIC GUIDANCE FOR INCLUSION OF FOREIGN TAX EVASION.

FinCEN’s website provides guidance on activities that trigger SAR reporting obligations in its Frequently Asked Questions section¹⁵ and in its SAR statistics section.¹⁶ Neither section contains any references to foreign tax evasion as a possible SAR reportable activity. Though

⁸ 18 U.S.C. § 1956(c)(3). FFIEC Manual, at 60.

⁹ FFIEC Manual, at 62-63.

¹⁰ *Id.* at 63.

¹¹ *Id.* at 68.

¹² *Id.*

¹³ 12 C.F.R. § 21.11(a).

¹⁴ FATF, *Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Feb. 2012), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

¹⁵ FinCEN, *Suspicious Activity Report Statistics*, <https://www.fincen.gov/reports/sar-stats> (last visited Nov. 30, 2016).

¹⁶ FinCEN, *Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (SAR) Suspicious Activity Report Statistics*, <https://www.fincen.gov/frequently-asked-questions-regarding-fincen-suspicious-activity-report-sar> (last visited Nov. 30, 2016).



these references are not exhaustive or dispositive, they strongly indicate that foreign tax evasion is not under the purview of SAR reporting and is consistent with the analysis above.

V. APPLICATION OF SAR OBLIGATIONS TO TAX REGULARIZATION IN LATIN AMERICA

The unique attributes of current and recent tax regularization programs in Latin America provide further support for non-reporting. In Argentina, participation in the regularization program does not trigger suspicious activity reporting obligations, while in Brazil, participation is limited to funds of licit origin. Notably, tax evasion is not categorized as a crime in Colombia.

Moreover, any debate about a SAR obligation in this context is necessarily premised on a presumption that inquiry or participation is indicia of underlying non-compliance. Quite to the contrary, FIBA does not believe either inquiry about or participation in a regularization program is presumptively indicative of local tax non-compliance.¹⁷

A. Argentina

Argentina promulgated Law No. 27260 permitting those who voluntarily declare unreported assets by March 31, 2017 to regularize their tax status and extinguish tax related civil and criminal penalties.¹⁸ Eligibility for the program is limited to assets not maintained in FATF high risk jurisdictions or Non-Cooperating Countries and Territories (“NCCT”).¹⁹

Tellingly, Argentine authorities have addressed the SAR reporting obligations of local financial institutions with respect to the filing obligations involving local participants. The Argentine Financial Information Unit (“UIF”) recently published guidelines providing that the UIF will not require SAR filings related to participation in a voluntary declaration under Law 27260.²⁰

B. Brazil

Brazil has enacted a Special Tax Regime and Foreign Currency Market Regulation (“RERCT”), Law No. 13,254/2016, establishing a voluntary disclosure program aimed at encouraging complete disclosure of assets held offshore.²¹ The RERCT has two significant features: (i) tax regularization for those who disclose unreported funds of licit origin; and (ii)

¹⁷ Clients may participate for a myriad of reasons, including the sheer attractiveness of the regularization program in contrast to the uncertainty created by the complexity of offshore structures when viewed against lesser sophisticated local tax codes.

¹⁸ Law No. 27260, Art. 46(b), July 22, 2016, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/263691/norma.htm> (Arg.).

¹⁹ *Id.* at Art. 37.

²⁰ Resolution No. 895/2016, Art. 25, July 27, 2016, <https://www.boletinoficial.gob.ar/#!DetalleNorma/148624/20160728> (Arg.).

²¹ Lei No. 13.254 de 13 de Janeiro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.1.2016 (Braz.).



criminal regularization providing an exemption for crimes incurred by failing to declare offshore assets to the Brazilian Central Bank.²²

Criminal proceeds are statutorily *excluded* from participation as the RERCT limits its reach to funds of licit origin (*origem lícita*).²³ Under the RERCT, participants must affirmatively declare the licit origin of the funds regularized and may be held to a standard of documentary proof of licit origin by the Brazilian Receita Federal.²⁴

Under Brazilian law, documentary tax fraud is needed to incur criminal liability and a taxpayer's mere failure or omission to pay taxes is not deemed criminal.²⁵ This distinction between tax evasion by mere omission and tax fraud further weakens the equating of participation in the RERCT with an underlying local crime and in turn, further weakens the appropriateness of a SAR.

Like Argentina, Brazil requires the custodial institution to communicate the amount of funds deposited by individual taxpayers.²⁶ The yellow flag awareness created by the Bank's communication does not change our analysis.²⁷

C. Colombia

Colombia's tax regularization program amends the Colombian Tax Statute and creates a new normalization tax imposed from 2015 through 2017.²⁸ A tax and not an amnesty, the reform consists of an additional complementary tax, available to those willing to voluntarily report omitted assets. Participation in the regularization program relieves the taxpayer of the high penalty of the omitted assets tax and includes foreign exchange regularization.²⁹

Colombia does not criminalize tax evasion, and rather solely classifies it as an administrative offense.³⁰ While a current legislative initiative seeks to criminalize evasion, its reach is not retroactive. Accordingly, the lack of home country criminal liability argues forcefully that no underlying crime exists to be reported as unusual or suspicious.

VI. POLICY CONSIDERATIONS

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Art. 1, Lei No. 4.729 de 14 Julho de 1965, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.14.1965 (Braz.).

²⁶ Lei No. 13.254 de 13 de Janeiro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.1.2016 (Braz.).

²⁷ *See pp. 2-3.*

²⁸ L. 1739/2014, Diciembre 23, 2014, DIARIO OFICIAL [D.O.] (Colom.).

²⁹ In 2015, the Constitutional Court held that Colombia's normalization tax complies with the country's Constitution, thus creating incentives for the disclosure of assets, as opposed to tax amnesties. *Decision C-551/2015 Constitutional Court of Colombia.*

³⁰ *See C.P.C. art. 402.*



A. FinCEN’s Mandate and the U.S.’s Tax Transparency Framework Support Exclusion of Foreign Tax Non-Compliance as SAR reportable.

The BSA is explicit in its directive that the Secretary of the Treasury require financial institutions to keep records and file reports that “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”³¹ As the FFIEC Manual practically guides: “[o]ne purpose of a SAR is to identify violations or potential violations of law to the appropriate law enforcement authorities for criminal investigation.”³² FIBA believes neither goal is met by the filing of a SAR premised on non-SUA activity outside the territorial scope of the BSA, which may not be criminal in the home country and which activity is evidence of a legal forgiveness in that home country. In short, FIBA cannot see the “high degree of usefulness” of reports for investigations of pardoned crimes—if criminal—or the investigative utility of the data when local authorities are encouraging participation and publicly eschewing investigations as to the pardoned acts.

U.S. financial institutions already participate in an elaborate regulatory scheme and make requisite filings with the I.R.S. under the Foreign Account Tax Compliance Act (“FATCA”). To the extent the compilation of U.S. account information of international clients is a legitimate end of financial institution reporting, FATCA and its IGA network is a more precise and developed mechanism to exchange relevant tax information with foreign signatory jurisdictions. FIBA believes the misuse of criminal investigatory mechanisms for home country revenue collection reporting would diminish the legitimacy and usefulness of the SAR reporting regime.

B. FinCEN’s Role

FinCEN’s mission is to “safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”³³ If U.S. financial institutions were to submit a SAR for each customer participating in an International Amnesty, the result could be the filing of thousands of redundant or useless SARs, all relating to potential non-U.S. legal violations, thereby overburdening FinCEN and skewing statistical analysis, all without advancing FinCEN’s mission. Much like the court in *Pasquantino* wondered as to the use of the Federal Government’s resources to prosecute a U.S. Citizen for smuggling liquor into Canada,³⁴ one might wonder why FinCEN would expend federal resources to prosecute Institutions for failure to report customers who have identified themselves to their home countries. Secondly, there is no public policy interest for United States’ agencies, authorities or the judicial system to expend time and resources to enforce a violation of the laws of a foreign jurisdiction. Further, even if the U.S. believed it proper to assist home countries in

³¹ 31 U.S.C. § 5311.

³² FFIEC Manual, at 65.

³³ FinCEN, *Mission*, <https://www.fincen.gov/about/mission> (last visited Dec. 9, 2016).

³⁴ *Pasquantino v. United States*, 544 U.S. 349, 372 (2005) (“It may seem an odd use of the Federal Government’s resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada.”).



enforcing violations of foreign tax laws, the home countries themselves are encouraging participation in the tax regularization program, resulting in a nullity.

VII. CONCLUSION

FIBA has been a strong and steady voice in the global fight against money laundering and is proud of its advocacy and leadership in those efforts. While FIBA considers itself a partner of FinCEN in the Anti-Money Laundering effort, FIBA is not convinced that requiring a SAR for a customer participating in a tax regularization program is the best way to promote FinCEN's AML efforts. FIBA believes that a financial institution subject to the BSA and its Anti-Money Laundering provisions does not have an obligation under the SAR reporting rules of the BSA to report to FinCEN a customer's participation or inquiry in a tax regularization program. Rather, the better way to combat money laundering is for the Institution to subsequently conduct a review of the customer's accounts in light of the new information and only submit a SAR if a qualified suspicious transaction is uncovered.

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Sincerely,

David Schwartz
President & CEO
FIBA