ASSOCIATION DES BANQUIERS CANADIENS / CANADIAN BANKERS ASSOCIATION

Canadian Life and Health Insurance Association Inc. / Association canadienne des compagnies d'assurances de personnes inc.

IFIC THE INVESTMENT FUNDS INSTITUTE OF CANADA

iiac INVESTMENT INDUSTRY ASSOCIATION OF CANADA / ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

October 21, 2011

Manal S. Corwin
Deputy Assistant Secretary (International Tax Affairs)
United States Department of the Treasury
1500 Pennsylvania Avenue
Washington, D.C.
20220

Michael Caballero
International Tax Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue
Washington, D.C.
20220

Dear Ms. Corwin and Mr. Caballero,

Since the passage of the Foreign Account Tax Compliance Act (FATCA) in March 2010, the financial industry worldwide has spent a great deal of time and effort analyzing its impacts and assessing changes to make FATCA feasible and implementable. To date, much of that work has been done along product lines, with separate commentary coming from deposit-takers, fund managers, broker-dealers and insurers. While there are some industry-specific issues, it is also the case that (1) many issues are common across the financial sector, and (2) many institutions offer products and services in all of these categories and must therefore comply across all product lines. With that in mind, the major financial services associations in Canada representing banking, life insurance, securities, and investment funds -- the Canadian Bankers Association, the Canadian Life and Health Insurance Association, the Investment Funds Institute of Canada, and the Investment Industry Association of Canada[1] -- have developed an alternative approach to FATCA compliance. Collectively, our members represent the largest source of foreign direct investment in the U.S. banking and finance sectors, having invested more than $86 billion as of 2009 according to the Congressional Research Service.[2]

Our proposal, which is described below, would produce better results for the U.S. Treasury and the Internal Revenue Service (IRS) while addressing the compliance burden and legal / operational issues created by FATCA. We strongly recommend that the U.S. adopt this alternative approach. In jurisdictions where this alternative approach is not made available, a number of key changes are required to address the many technical and legal challenges FATCA

[1]See Appendix B for descriptions of the participating associations.

[2] James K. Jackson, *Foreign Direct Investment in the United States: An Economic Analysis.* Congressional Research Service, February 1, 2011. p. 3.

creates for foreign financial institutions (FFIs) (see Appendix A – Note that this list is not exhaustive; additional changes will be required above and beyond those outlined in order to make FATCA workable across all jurisdictions).

Fundamentally, we continue to share the view of Canada's Finance Minister who said recently with respect to FATCA:

> *To be clear, Canada respects the sovereign right of the United States to determine its own tax legislation and its efforts to combat tax evasion – the underlying objective of FATCA. But put frankly, Canada is not a tax haven. People do not flock to Canada to avoid paying taxes. In addition, we have existing ways of addressing these issues with the United States through our Bilateral Tax Information Exchange Agreement. As I said, we share the same goal of fighting tax evasion and we already have a system that works. To rigidly impose FATCA on our citizens and financial institutions would not accomplish anything except waste resources on all sides.*[3]

We believe that in the case of Canada, a fundamentally different, more targeted and risk-based approach is appropriate given the strength of the relationship, the low-likelihood of U.S. tax evaders choosing Canada as their destination to hide assets, and the automatic reporting that already takes place between tax authorities.

Alternative FATCA Proposal: A Targeted Approach

As currently constructed, FATCA takes a risk-based approach in a few areas. We believe that Treasury should build on its existing risk-based exemptions to develop a much more targeted approach, with reporting done on a tax authority-to-tax authority basis. This would yield better information for the U.S. Treasury and the IRS while significantly reducing the compliance burden (which we are attempting to quantify) and associated legal challenges.

The Proposal

This proposal would be available to FFIs domiciled in jurisdictions such as Canada with comparable rates of personal taxation and automatic tax information sharing arrangements with the U.S. Under these arrangements, the IRS automatically receives income information on all U.S. residents from the local tax authority (Canada Revenue Agency (CRA) in the case of Canada).

Account holders at Canadian FFIs will be residents of:

1. Canada;
2. the U.S.; or
3. a third country.

From a risk-based perspective, the focus should be on large accounts of third country residents for the following reasons.

1. Payments made to accounts held by Canadian residents are already taxable in Canada at Canadian rates, therefore, there is no effective revenue loss to the U.S. government if

[3] Open letter from Finance Minister Flaherty on FATCA and FBAR, September 16, 2011.

U.S. citizens do not file with the IRS. Moreover, the cooperative information exchange relationship under the Canada-U.S. tax treaty allows the U.S. to request and receive information about any such Canadian resident accounts.

2. Accounts held by U.S. residents are already subject to CRA non-resident (NR) reporting, therefore, these accounts are low risk from a U.S. tax evasion perspective. U.S. tax authorities already receive information about income earned by U.S. residents through automatic information exchange. Where it is advantageous to expand the number of data fields that are reported through NR reporting, discussions to that effect could take place between the Governments of Canada and the United States if both view it as appropriate.

3. Accounts held by third country residents are not subject to Canadian tax (other than applicable non-resident withholding) and the holder could potentially be a U.S. person resident in a third country. For small accounts this is unlikely to be a material concern since the potential for lost tax revenue would be negligible; therefore, the focus should be on large accounts held by third country residents.

For existing large accounts of third country residents, assuming a reasonable definition of "private banking"[4] targeted at high net worth clients, participating FFIs could be required to:

- conduct a detailed search of private banking accounts held by third country residents for U.S. indicia and establish their U.S./non-U.S. status, or
- terminate the relationship if such status cannot be determined provided that legal or contractual provisions allow for such termination.

Where those third country residents are found to be U.S. persons, account information could be provided to the CRA if such a request is made by the CRA to the financial institutions. The information would then be accessible to the IRS either through channels available under the existing Canada-U.S. tax treaty or through any enhanced information exchange relationship that the tax authorities choose to enter into, subject to whatever protections that both parties feel are appropriate. In this situation, withholding (other than conventional non-resident withholding) is unnecessary. To facilitate tax reporting, FFIs would request U.S. taxpayer identification numbers (TINs) from account holders with confirmed U.S. status. Exemptions for low-risk registered savings and investment plans should be incorporated into this approach to guard against potential "false positives" that could occur in instances such as newly retired individuals with accumulated retirement savings.

For new accounts of third country residents, enhanced due diligence procedures could be required to verify the U.S. / non-U.S. status of the individual at the time of account opening.

With respect to FFIs, the prospect of a 30% withholding tax on all U.S.-source earnings and on the proceeds of the sale of U.S. securities should be sufficient incentive for most FFIs to comply. The U.S. Treasury has expressed concern that so-called "blocker" FFIs could enter into FFI agreements with the U.S. and act as a conduit for non-participating FFIs (NPFFIs) to invest in U.S. securities without being subject to FATCA. This is the reason for the withholding tax provisions. Rather than requiring all institutions to apply a 30% withholding tax on all payments to NPFFIs, a better alternative would be to (1) identify the characteristics of a blocker FFI and only require withholding by such institutions, but (2) refrain from requiring such withholding until such time as Treasury determines that blocker FFIs have started to develop. This would reduce the scope of withholding tax to better target it from a risk-based perspective, and it would be deferred

---

[4]See proposal 12 in Appendix A for recommendations on a reasonable application of private banking rules.

until it becomes necessary. The threat of such withholding should be sufficient to discourage the formation of blocker FFIs.

Requirements to Operationalize the Proposal

- Agreement by the U.S. Treasury to classify all FFIs domiciled in countries with an automatic tax information sharing arrangement and comparable personal tax rates as low-risk, and therefore subject to this alternative approach, provided that the domestic tax authority has agreed to require reporting of FATCA information on private banking accounts held by third country residents;
- An expansion of the fields required for non-resident reporting to include account information and, where applicable, TINs;
- A reasonable definition of "private banking" and "private banking accounts" that better targets high net worth accounts (see Proposal 12 in Appendix A);
- Exemption for registered products from the "financial account" definition (see Proposal 1 in Appendix A);
- A more flexible set of rules for categorizing entities to ensure that operating businesses are not inadvertently categorized as NPFFIs;
- Collection of information by the IRS during the FFI Agreement application process which would allow the IRS to identify and monitor potential "blocker" FFIs .

Conclusion

Canada and the United States have a unique relationship. We have a shared history, shared values and shared culture. The recent declaration by Prime Minister Harper and President Obama, *Beyond the Border: a shared vision for perimeter security and economic competitiveness*, summarized the depth of the economic relationship as follows:

> *Over $250 billion of direct investment by each country in the other, and bilateral trade of more than half-a-trillion dollars a year in goods and services create and sustain millions of jobs in both our countries. At the Canada-U.S. border, nearly one million dollars in goods and services cross every minute, as well as 300,000 people every day, who cross for business, pleasure, or to maintain family ties.*[5]

We believe that our proposal is consistent with this shared vision of building a regulatory system that addresses the public policy objectives of each government in a way that minimizes the negative effects that such measures can have on businesses and individuals on both sides of the border.

---

[5] *Beyond the Border: a shared vision for perimeter security and economic competitiveness – A declaration by the Prime Minister of Canada and the President of the United States of America.* February 4, 2011. Washington, D.C.

We would welcome the opportunity to speak with you further about this proposal or about any of the issues raised in this letter.

Sincerely,

Terry Campbell President and CEO Canadian Bankers Association	Frank Swedlove President and CEO Canadian Life and Health Insurance Association
Joanne DeLaurentiis President and CEO Investment Funds Institute of Canada	Ian Russell President and CEO Investment Industry Association of Canada

cc: Jeremy Rudin
Assistant Deputy Minister, Financial Sector Policy
Finance Canada

Jane Pearse
Director, Financial Institutions
Finance Canada

Brian Ernewein
General Director, Tax Policy
Finance Canada

François Beaudry
Policy Adviser
Office of the Minister of Finance

APPENDIX A

Proposals to Address Specific Technical Issues of FATCA

The legislation enacting FATCA creates a number of legal and operational challenges that must be addressed for financial institutions to be able to implement FATCA. While the entire approach is problematic, there are some core issues that are the most troublesome. Below are recommendations for some simple measures to reduce some of the most burdensome elements of FATCA. Even with these measures, we are still of the view that applying FATCA to a country such as Canada does not make sense from a cost-benefit perspective and that the alternative approach is far more practical and effective.

Note that there are additional industry-specific issues that have been raised by all sectors that are not captured in this document, so this document should be read in conjunction with each of the associations' industry-specific submissions.

Summary of Proposals

Reduce the Scope of FATCA:

1. Exempt all government registered savings and investment plans from the definition of "financial account".

2. Minimize the number of entity accounts classified as NPFFIs by permitting reliance on third party databases or officer attestation for verification.

3. Require documentation of owners of NFFEs where the individual owns more than 25% of the NFFE.

4. Exempt group savings and insurance products.

5. Require aggregation of accounts only where systems currently can do so.

6. Grandfather existing life insurance policies with cash values less than $1 million.

7. Exempt insurance contracts from withholding as grandfathered obligations.

Harmonize and Leverage Existing Documentation Requirements and Practices:

8. Clarify that the definition of "financial institution" does not include agents and other entities which originate transactions and/or provide advice but do not hold client assets.

9. Provide a mechanism for foreign life insurers to be deemed-compliant FFIs (DCFFIs).

10. Include Social Insurance Number (SIN) card, birth certificate, and Old Age Security (OAS) Card (with a SIN number on the card) as valid documentation.

11. Permit FFIs to use existing Know-Your-Client (KYC) processes designed for documenting clients opening accounts remotely.

12. Target "private banking" to non-registered accounts over $1 million.

13. Provide an alternative to the requirement for a manual search of private banking / high value accounts.

Leverage Existing Reporting Requirements and/or Government-to-Government Information Sharing Mechanisms:

14. Report through domestic tax authorities rather than directly to the IRS.

Reduce Compliance Risk When FFIs Make Status Assessments of Other FFIs/Entities:

15. Allow FFIs to rely on third party or IRS databases, or certification by other entities as is acceptable under the *USA PATRIOT Act, to determine FFI/NPFFI status.*

Require Withholding Only Where a Clear Case can be made that there is U.S. Income or Proceeds:

16. When dealing with an account holder who is recalcitrant or with an NPFFI, FFIs will only be required to withhold on distributions that are U.S.-source.

17. Allow FFIs to hold the withholding tax in escrow for a limited time so that the account can be documented before remittances are due to the IRS.

Provide Flexibility for Expanded Affiliated Groups (EAGs):

18. Allow an EAG to be in compliance where one or more members of the group are unable to comply with FATCA requirements due to local laws.

Guiding objectives

Broadly speaking, the compliance burden of FATCA results from the need to document clients and withhold on those which are recalcitrant / non-participating. The compliance burden and risk assumed by FFIs would be reduced by minimizing FATCA's scope and the potential for recalcitrant and NPFFI account holders by:

- Reducing the scope of FATCA to a more manageable level;
- Harmonizing and leveraging existing documentation requirements and practices to avoid inadvertent recalcitrant account holders because of different documentation requirements;
- Utilizing existing government information-sharing arrangements rather than creating new channels;
- Reducing the chance of an FFI being inadvertently mischaracterized and therefore withheld upon;
- Requiring withholding only where a clear case can be made that there is U.S. income or proceeds; and
- Providing flexibility for affiliated groups where local laws or other impediments make compliance in some jurisdictions problematic.

Each of these is discussed below.

Reduce the Scope of FATCA

The key step to minimizing the potential for recalcitrant and NPFFI account holders is to reduce the number / type of accounts and entities that are captured by FATCA. Chapter 4 provides several regulatory tools that the Secretary of the Treasury can use to exempt accounts including providing general exceptions from the definition of "financial account" or exempting payments made to a class of persons posing a low risk of tax evasion.

Proposal 1: Exempt all government registered savings and investment plans from the definition of "financial account".

Rationale: There are currently over 10 million registered financial accounts in Canada. The overwhelming majority of these accounts are small and none would ever be suitable for use as a tax evasion tool (see Appendix C for statistics on registered accounts). Appendix D includes a draft legislative definition of government registered savings and investment plans that would broadly capture the major federally registered plans in Canada (RRSPs, RRIFs, RDSPs, RESPs, TFSAs). From a risk-based perspective, these types of accounts pose virtually no risk of being used for tax evasion. They are all subject to various forms of annual government reporting and have contribution limits placed on them.[6] In addition, several have other special conditions placed on them with respect to account holder eligibility (see Appendix E for a summary of contribution limits and eligibility and other requirements). In short, they are mass market products designed to serve certain public policy objectives set out by the federal government.

Proposal 2: Minimize the number of entity accounts classified as NPFFIs by permitting reliance on third party databases or officer attestation for verification.

Rationale: IRS Notice 2010-60 (released August 29, 2010) proposed a complex series of steps to determine the status of an entity for the purposes of FATCA. However, the guidance provided on the due diligence standard to establish that an entity is engaged in an "active trade or business" is not harmonized with current KYC documentation requirements. The guidance focuses on business documents such as financial statements and employment records which are not currently retained, and in many cases not collected, by financial institutions. This places a new and onerous burden on financial institutions to request a document that is otherwise unnecessary. It may also increase the compliance burden on business clients, particularly small businesses, since they would need to provide documentation and paperwork as a condition of service that was often not required in the past and for no reason other than FATCA compliance. If the documentation cannot be obtained, the financial institution will be required to treat the entity as an NPFFI and subject it to passthru payment withholding.

If financial institutions could rely on existing third party databases (e.g. credit bureaus, corporate databases, etc.) and be assured that registration in those databases is sufficient to meet the "active trade or business" test, it would greatly reduce the number of entities that would be mistakenly classified as NPFFIs and therefore subject to passthru payment withholding. This would provide FFIs with another option to verify the status of excepted Non-Financial Foreign Entities (NFFEs) without having to solicit unnecessary documentation from them. Alternatively, FFIs should be able to rely on an attestation, signed by an officer of the NFFE, to the effect that the NFFE is engaged in an active trade or business.

---

[6] Note that registered retirement income funds (RRIFs) do not have an aggregate size cap since they are meant to be a payout vehicle for savings accumulated in registered retirement savings plans, which are subject to annual contribution limits.

Proposal 3: Require documentation of owners of NFFEs where the individual owns more than 25% of the NFFE.

Notice 2010-60 indicates that, in the case of NFFEs, FFIs must identify each person that has an interest in the entity and, if a U.S. person is found to hold an interest, treat the account as a U.S. account. Given the potentially large number of owners of some NFFEs, it is impossible to sift through every person with an interest in the entity. Rather, the search should be limited to individuals with a substantial ownership in the entity, where the threshold level of ownership is set at 25% to be consistent with existing international anti-money laundering (AML) and KYC norms.

Proposal 4: Exempt group savings and insurance products.

Rationale: Based on statements from Treasury and the IRS in Notice 2010-60, it is expected that all life insurance policies without cash value will be excluded from characterization as U.S. accounts. As a result, the vast majority of group life insurance policies will be exempt from FATCA since they do not have cash values. In addition, many group insurance policies, and the vast majority of group savings products, constitute registered products and would thus be exempted from FATCA under an exemption for registered products (assuming it is forthcoming).

However, there will be some group savings and insurance products that are not registered and/or have cash value. Given the low risk of tax evasion associated with such group products, we have proposed that all group savings and insurance products[7] be exempt from FATCA.

Proposal 5: Require aggregation of accounts only where systems currently can do so.

Rationale: We appreciate that Notice 2011-34 has relaxed somewhat the general requirement to aggregate accounts when assessing the $50,000 threshold. However, based on discussions with Treasury staff, there still appears to be the prospect that a system build will be necessary in instances where systems can establish a link between accounts but cannot aggregate those accounts to determine clients' aggregate financial position. This requirement is difficult to justify from a cost-benefit perspective. People do business with multiple institutions. The recent Global Consumer Banking Survey found that worldwide, 59% of banking customers did business with two or more banks and 21% – more than one in five – did business with three or more.[8] The figures in Canada were slightly lower (52% and 15%, respectively) but still show the same picture – the majority of consumers spread their business among multiple financial institutions.

---

[7] Practically speaking, the proposal of the Canadian Life and Health Insurance Association (CLHIA) with respect to group life insurance would exempt virtually all group life insurance. However, there would be a small number of group policies that would not be exempted under the CLHIA's proposal. The CLHIA has recommended to the IRS and Treasury that "any group insurance policy that has a cash value be excluded from characterization as a United States Account if the policy does not permit or provide for the cash value to be paid to, or otherwise benefit, the individual group members, provided that the group sponsor/policyholder is not itself a United States person."

[8] Ernst and Young, *A New Era of Customer Expectation: Global Consumer Banking Survey 2011*. p. 16.

Proposal 6: **Grandfather existing life insurance policies with cash values less than $1 million.**

Rationale: An exemption from FATCA is required for existing life insurance policies with cash values less than $1 million since it is virtually impossible to comply with FATCA for these contracts due to the following unique features:

1. They are very long-term contracts which can extend 50 years or more.
2. Life insurers cannot unilaterally modify the contract terms nor can they cancel the contracts. This protects the rights of policyholders to long-term coverage at an agreed upon price. If the insurer could cancel the contract, the insured may not be able to purchase insurance at a later date due to uninsurability (due to disease) or, the price may be significantly higher (since life insurance premiums increase with the age of the insured). Accordingly, once a contract is issued, life insurers have no legal ability to compel policyholders to provide additional information or to terminate the policy or reduce the benefits payable thereunder as a means of compelling such information.
3. Life insurers frequently do not have accurate mailing addresses for their account holders. In many cases, life insurers have infrequent contact with their customers. This reflects the fact that a life insurance contract is not an ongoing transaction. Instead, life insurance involves two distinct events, acquisition and payout, which may be decades apart. Even if periodic premiums or policy amounts are paid, they are often made electronically. The high percentage of incorrect policyholder addresses will make it very difficult for insurers to contact their policyholders to request information required to comply with FATCA.

As a result of these unique features, it will be impossible for insurers to obtain information required by FATCA from their existing policyholders. The rules for recalcitrant account holders will not be effective in forcing existing[9] policyholders to provide required information to their FFI since insurers have no ability to force them to i) provide this information or ii) waive their privacy rights[10]. In addition, because insurance policies are contracts which cannot unilaterally be modified or cancelled, life insurers have no legal right to terminate the policies of recalcitrant policyholders or to withhold any amount from the payments due to them under the terms of their policies. Accordingly, any "withholding" tax on "passthru" payments to recalcitrant policyholders will be borne by the insurers themselves, not the policyholders, resulting in a totally ineffective withholding tax "stick".

The broad regulatory authority provided by sections 1471(d)(2) and 1474(f) would permit a grandfathering rule for existing life insurance.

---

[9] For new business, subject to the resolution of privacy and regulatory concerns, life insurers are hoping that they will be able to comply with FATCA by modifying new contracts to provide for privacy consents and to allow for cancellation of the contract or withholding in the case of recalcitrant policyholders.

[10] Canadian businesses are subject to Canada's *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and similar provincial laws which prohibit Canadian companies from disclosing personal data except as permitted by Canadian law or pursuant to a consent or waiver granted by the customer. It is not clear that providing data to the IRS under FATCA would fall under the "required by law" exemption under PIPEDA. To the extent waivers would be required for life insurers to provide information to the IRS, existing policies do not contain such waivers and, practically speaking, the only way such waivers could be obtained is in connection with the policy application process for new policies.

<u>Proposal 7:</u> Exempt insurance contracts from withholding as grandfathered obligations.

In the event that all existing life insurance policies are not grandfathered, a withholding tax should not apply with respect to payments made pursuant to existing life policies and annuities. Section 501(d)(2) of the HIRE Act provides that no amount is "to be deducted or withheld from any payment under any obligation outstanding on March 18, 2012 or from the gross proceeds from any disposition of such an obligation." Notice 2010-60 provides further guidance as to the application of this "grandfather" provision, stating that the term "obligation" means "any legal agreement that produces or could produce withholdable payments,"[11] other than equity instruments or any agreement that lacks a definitive expiration or term. Although neither the HIRE Act, its legislative history, nor Notice 2010-60 addresses the application of the grandfather provision to life policies or annuities, it is clear that such contracts are legal agreements that could produce withholdable payments (i.e., "passthru" payments) and that all life policies and annuities have definitive terms, even if the precise termination date of some contracts may not be known when they are issued. Accordingly, withholding should not be required with respect to payments made by life insurers to recalcitrant policyholders under existing contracts, and future guidance from Treasury or the IRS should explicitly acknowledge the application of the grandfather provision to insurance contracts entered into on or before March 18, 2012.

In Summary *– By reducing the scope, FATCA would capture:*

- *for <u>individuals</u>, new and pre-existing non-registered accounts (other than those held by life insurers)*[12] *over $50,000 (for pre-existing clients and, in the case of deposit-taking institutions, for new clients) assessed on an aggregate basis only where aggregation can already be accomplished by existing systems.*
- *for <u>entities</u>, new and pre-existing accounts of entities that are not engaged in "active trade or business" based either on information reviewed directly by the FFI or reports from reputable third party private or government databases.*

Harmonize and Leverage Existing Documentation Requirements and Practices

Aligning FATCA and domestic account opening documentation requirements to the greatest extent possible would reduce the compliance burden and risk, thereby maximizing FFI participation and minimizing the number of recalcitrant account holders. Where these differ, there are instances where FFIs do not have legal authority to compel clients to provide documentation to meet the FATCA standard for confirming their U.S. or non-U.S. status.

<u>Proposal 8:</u> Clarify that the definition of "financial institution" does not include agents and other entities which originate transactions and/or provide advice but do not hold client assets.

Rationale: It is commonplace for financial institutions to contract with independent third parties to distribute financial products. These entities can take the form of agents/brokers (e.g. insurance

[11] Section 1471(d)(7) indicates that the term "passthru payment" is synonymous with the term "withholdable payment."

[12] Technically, it still remains unclear as to how exactly FATCA will apply to life insurers since life insurance products are technically not captured in the definition of "United States account" or "financial account" and life insurers are not included in the definition of "financial institution" or "foreign financial institution". The CLHIA has made detailed proposals as to how FATCA should apply to life insurers, which are attached to this document in Appendix G.

brokers, deposit brokers) or independent financial planners and advisers (collectively, “Agents”). Agents are not typically considered to be financial institutions and do not hold or have custody of client funds.

The Agent is in many cases closer to the client than the FI that provides the underlying financial product and typically the FI will enlist the Agent to meet the FI's responsibilities for KYC/AML and other compliance requirements.

We would expect that Agents would not be classified as FFIs under FATCA, but that participating FFIs who engage Agents would, through contract, ensure that the Agents with which they do business assist the FFI in meeting its FATCA obligations.

<u>Proposal 9:</u> Provide a mechanism for foreign life insurers to be deemed-compliant FFIs (DCFFIs).

Rationale: Given the unique discretion provided under the legislative history of Chapter 4 with respect to the application of sections 1471-1474 to life insurers and their products, Treasury should allow certain life insurers to be DCFFIs under section 1471(b)(2). Depending on the requirements imposed on DCFFI life insurers, such treatment could significantly reduce the burden on insurers that can adopt procedures that effectively would eliminate the possibility that they could sell policies or annuities to U.S. residents.

Notice 2011-34 provides that certain FFIs that are members of an EAG will be considered DCFFIs if specific listed conditions are met. (Sections III.A. and III.B. of Notice 2011-34 refer to “Certain Local Banks” and “Local FFI Members of Participating FFI Groups,” respectively.) The apparent basis for the treatment described in that notice is that such entities are unlikely to have a significant number of U.S. residents who can acquire accounts in those entities.

Although life insurers could not satisfy the requirements applicable to “Certain Local Banks” and would be unlikely to satisfy the requirements applicable to “Local FFI Members of Participating FFI Groups”, comparable treatment should be extended to life insurers that are able to satisfy requirements that are analogous to those described in Notice 2011-34. Because of governmental licensing and regulatory restrictions (including KYC and AML) and the economic need to apply relevant actuarial data by geographic location, most life insurers already rarely, if ever, sell policies to policyholders unless the policyholder (or at least the insured) is a resident of the same jurisdiction in which the insurer is located. Also, life policies and annuities cannot simply be moved from one life insurer to another.[13] Accordingly, deemed-compliant status should be accorded life insurers that are able to satisfy certain restricted-sales criteria, because such status will not result in any material U.S. tax evasion risk. Such status would permit qualifying life insurers to be compliant with Chapter 4 with a minimum of disruption to their businesses.

Because of the unique nature of insurance, modifications would need to be made to the requirements in Notice 2011-34 with respect to Local FFI Members of Participating FFI Groups to apply to DCFFI life insurers as follows:

---

[13] Life policies and annuities are contracts that are subject to insurance statutes and regulations in effect in the jurisdictions in which they are issued. Although policies and annuities issued by one life insurer in a jurisdiction can be surrendered, and new “replacement” contracts can be issued by other insurers licensed in that jurisdiction, there is no capability under either insurance contract law or relevant statutes or regulations merely to transfer an insurance contract from one life insurer to another. Even in the case of a surrender of one contract and a purchase of a new contract, the second insurer always would have to go through its usual underwriting and other contract issuance procedures.

(i) Delete the requirement that one member of the EAG must be a participating FFI. It is unclear why any EAG with deemed-compliant members should be required to have a participating FFI, as each DCFFI could independently report any required information and provide any required certification directly to the IRS.

(ii) Given the licensing and regulatory rules applicable to life insurers, in lieu of the "operations" and "non-solicitation" rules, DCFFI life insurers should be required to adopt procedures prohibiting them from:

(1) selling policies or annuities to persons who are not resident in the jurisdictions in which they are licensed to operate or

(2) marketing policies or annuities to U.S. residents.

(iii) Because life policies and annuities are contracts subject to significant regulatory restrictions, a DCFFI could not transfer a life policy or annuity to a participating FFI in the EAG (or indeed to any other life insurer) if it identified that policy or annuity as a noncompliant account. Similarly, it could not terminate any such policy or annuity contract unless the contract specifically permitted such action. Accordingly, in lieu of the reactive measures described in Notice 2011-34 with respect to noncompliant accounts, life insurance DCFFIs simply should be required to report any noncompliant account to the IRS (subject to resolution of the privacy and data protection law issues).

(iv) Any such reporting obligation should be limited to policies and annuities issued prior to the establishment of deemed-compliant status. Reporting should not be required if a policy or annuity is sold to a resident of a foreign jurisdiction under the proposed sales- and solicitation-restriction rules described above and that person later becomes a U.S. resident. The acquisition of any such policy obviously would not have been motivated by a desire to evade U.S. taxation, and a DCFFI's retention of deemed-compliant status should not require continuous monitoring of its policyholder base, as long as the DCFFI continues to comply with the relevant sales- and solicitation-restriction procedures.

Substituting a reporting requirement (subject to the resolution of any privacy or data protection law issues) for the requirement of closing or transferring an account should satisfy the tax avoidance concerns of Treasury, while also being feasible under the contractual, legal, and regulatory restraints that would prevent life insurers from terminating or transferring existing insurance contracts. Compliance with the proposed deemed-compliant requirements could be demonstrated by a signed statement from the chief compliance officer or other senior officer of the DCFFI, attesting to the fact that all of those requirements had been met. The statement could be similar to those that apparently will be required of the chief compliance officer with respect to customer identification procedures for purposes of Chapter 4.

Proposal 10: Include Social Insurance Number (SIN) card, birth certificate, and Old Age Security (OAS) Card (with a SIN number on the card) as valid documentation.

Rationale: IRS Notice 2011-34 (released April 8, 2011) made substantial strides in aligning documentation requirements under FATCA with domestic identification requirements for account opening. In particular, Notice 2011-34 included any of the documents referenced in a local jurisdiction's Qualified Intermediary (QI) Attachment as "documentary evidence" sufficient for the purposes of verifying non-U.S. status under FATCA. However, the scope of the QI regime was not intended to extend to areas such as banking, and as such, the Canadian QI Attachment (Appendix F) has three significant omissions that are especially problematic for the banking industry:

- ***SIN card*** – When the QI regime was implemented, accounts opened with a SIN card were grandfathered (provided the SIN does not indicate non-residence – i.e. SIN does not begin with a "9"); however, Social Insurance Number (SIN) cards were not approved as acceptable documentation in the QI Attachment on a going-forward basis despite the fact that they are widely accepted as ID by FIs. This is particularly problematic for banking where the SIN card is included as valid identification for the purposes of regulation related to account opening. Exclusion of the SIN card would not only render many existing accounts as undocumented for the purposes of FATCA (and therefore potentially recalcitrant) but would also place FFIs in the challenging position of having to ask for ID in excess of that required by domestic law, in order to avoid FATCA withholding. While it is acknowledged that the SIN card conveys limited information about current residency, the SIN is included on tax slips submitted by FIs to the CRA and, CRA typically informs the FI if the individual is a non-resident (primarily so that proper Canadian withholding can be applied). Therefore, as a practical matter, the SIN does help to determine the residency of the individual on a going-forward basis.

- ***Birth Certificate*** – The QI Attachment permits the use of a birth certificate only for accounts opened by individuals under the age of 21. As with the SIN card, the birth certificate is referenced in account opening law for banking and, more generally, is widely used as identification by Canadians.

- ***OAS Card*** – The Government of Canada issues Canadians 65 and older an old age security (OAS) card that is used to access seniors' benefits. Until recently, the OAS Card also included the cardholder's SIN number on it, which made it a widely used piece of ID. While newer cards no longer have the SIN number on them, and are therefore less frequently relied upon for ID purposes, there are still a large number of the older cards in circulation. Several Canadian laws (for example, *Access to Basic Banking Services Regulations*) list OAS cards with a SIN number as acceptable for client identification.

While it is acknowledged that these forms of identification do not include photographs and do not provide significant information about the current address of the individual, they do establish that an individual has a clear and current relationship with Canada. They are typically used in conjunction with another piece of identification for KYC purposes rather than in isolation, so the risk of allowing them as acceptable documentation is limited. Moreover, in instances where the holder is a U.S. resident, that individual would already be subject to non-resident reporting. On balance, therefore, the risk of a person using such ID to avoid being identified as U.S. is very low; however, the omission of these documents creates significant compliance challenges for Canadian financial institutions, particularly in cases where domestic law, such as the *Access to Basic Banking Services Regulations*, makes specific reference to them as valid identification.

<u>Proposal 11:</u> Permit FFIs to use existing KYC processes designed for documenting clients opening accounts remotely.

Rationale: FATCA guidance is written from the perspective of an in-person account opening process where physical documents are presented for inspection by staff of the financial institution. While that process is still commonplace, remote openings over the internet have become increasingly common, with some FIs relying almost exclusively on that channel for opening accounts and servicing clients. As of 2010, virtual banks held over two million accounts in Canada, so there are at least that many bank accounts that have been opened remotely. In addition, non-banks open and service accounts remotely. In order to accommodate remote account openings, the Government of Canada has developed specific KYC techniques that are acceptable for remote account opening (Appendix H). Incorporating local AML and anti-terrorist financing KYC requirements (which must conform to international standards) into FATCA would ensure that entities operating fully or partially through virtual means are not disadvantaged by

FATCA and, more generally, that FATCA does not become an impediment to innovation in the delivery of financial services.

Note that the QI Attachment for Canada also contemplates the remote opening of accounts with procedures for confirming the identity of account holders that open accounts remotely or provide new documentation for existing accounts remotely (Section 5). While incorporating this language would provide some relief, it does not extend as far as current AML guidelines in Canada for remote openings since it does not permit the use of approved third party databases in combination with other techniques.

<u>Proposal 12:</u> Target "private banking" to non-registered accounts over $1 million.

Rationale: The private banking definition in Notice 2011-34 is sweeping, and could potentially capture the entire wealth and financial planning practice since it captures any financial account in any part of an FFI providing "wealth management" and "personalized service". In addition, a "private banking relationship manager" is deemed to be any employee who is assigned responsibility for specific clients and provides them advice and referrals related to specific financial products or services. Absent additional refinement, what this definition captures is not private banking but rather a broad array of services including retail financial planning, discount and full-service brokerage, mutual fund sales, insurance sales, and potentially other services as well. This encompasses a large number and variety of clients.

One example arises in the area of retail financial planning. According to the Financial Planning Standards Council of Canada, which is the licensing body for the Certified Financial Planner (CFP) designation in Canada, as of December 2009 there were 17,304 CFP-certified financial planners in Canada representing over 3 million clients across the country. The overwhelming majority of these clients are typical middle-class Canadians; however, under Notice 2011-34, they could be private banking clients subject to enhanced scrutiny. Clearly, that is not the intent of Chapter 4; however, given the broad definition in the Notice, it is the effect. That is not a desirable outcome for financial institutions in Canada or for Treasury/IRS officials.

The simplest solution to better target the enhanced due diligence measures is to include a size threshold in the private banking definition. A size threshold of $1 million has been suggested by numerous observers, consistent with the *USA PATRIOT Act* definition of private banking. As a practical matter, intentional tax evaders will be high net worth individuals and Notice 2011-34 implicitly acknowledges that. Assuming that Treasury / IRS provides relief for registered products as suggested in Notice 2011-34, the account size threshold should only be applied to unregistered funds to guard against potential "false positives" that could occur in instances such as newly retired individuals with accumulated retirement savings living outside of Canada for part of the year.

With respect to the application of private banking-type rules to life insurance products, to the extent such rules apply, they should be limited to "insurance wrappers" defined as contracts that:

- maintain the underlying assets in a personalized segregated fund (ie. separate from the other assets held by the insurer), and
- allow the policyholder unrestricted investment control over the assets supporting the wrapped contract.

<u>Proposal 13:</u> Provide an alternative to the requirement for a manual search of private banking / high value accounts.

Rationale: As an alternative to the requirement that a manual search of all paper files and other records be conducted with respect to each client, we believe that an electronic search of account information for U.S. indicia, combined with a certification by the account manager that he/she has no actual knowledge that the account holder is a U.S. person, should be sufficient. This could require a one-time attestation by the relevant account manager with respect to each pre-existing account. The account manager could be required to attest to whether they do or do not have knowledge that the client may be a U.S. person. Knowledge of a client's possible U.S. status would be treated as U.S. indicia and would require additional documentation, such as the completion of a Form W-9 or W-8BEN, pursuant to the requirements in Notice 2011-34.

In Summary – *FFIs would be required to:*

- *review documentation collected at account opening (through electronic means for pre-existing accounts as per Notice 2010-60 modified by 2011-34) to assess whether an individual is a U.S. person;*
- *where an individual is identified as a possible U.S. person (by virtue of the existence of U.S. indicia), request that the individual / owner provide a W-9 if U.S,* or *W-8BEN or other documentary evidence supporting non-U.S. status if non-U.S, Alternatively, if the FFI already has such documentation on file, it can rely on it.*
- *in the case of a private banking client, conduct a detailed search as per Notice 2011-34*[14] *to assess whether the client is a U.S. person, or carry out an electronic search coupled with an account manager attestation, where private banking is defined as accounts in excess of $1 million.*

Leverage Existing Reporting Requirements and/or Government-to-Government Information Sharing Mechanisms

Another way to minimize the number of recalcitrant account holders is to leverage existing reporting requirements and government-to-government information sharing agreements.

Proposal 14: Report through domestic tax authorities rather than directly to the IRS.

Rationale: Rather than having FFIs report account information on U.S. persons and aggregate information on recalcitrant account holders directly to the IRS, the U.S. should make use of existing tax information sharing arrangements. The information would include all data fields specified in Notice 2011-34, both for individuals and entities with substantial U.S. owners, as well as an annual report on the number of recalcitrant account holders and aggregate balances.

Tax reporting is built around the concept of reporting information to the domestic tax authority. Systems are designed to do that and legislation is enacted to provide for it. Moreover, it would be far more consistent with the overall design of international tax information sharing, which is built around a tax authority-to-tax authority model. It would also make it far simpler to comply with any FATCA-like requirements imposed by other countries in the future since systems would already be in place to provide such information to CRA. It would also ensure that domestic tax authorities have the same information that is being provided to the IRS on domestic taxpayers. This would facilitate dialogue and cross-border coordination on tax compliance issues and therefore promote greater tax transparency internationally, which is a shared public policy objective.

---

[14] For life insurance, the additional information contemplated by Notice 2011-34 would be required for i) "non-wrapper" contracts with a cash value over $1 million or ii) insurance wrapper contracts.

In Summary **–** *FFIs would be required to:*

- *report to their domestic tax authority under domestic law providing account information on U.S. persons with accounts at the FFI as required under Notice 2011-34 and an aggregate report of recalcitrant account holders and associated balances. The IRS could then either request that information from the tax authority or enter into an agreement to have it transferred automatically.*

Reduce Compliance Risk When FFIs Make Status Assessments of Other FFIs/Entities

<u>Proposal 15:</u> Allow FFIs to rely on third party or IRS databases, or on certification by other entities as is acceptable under the *USA PATRIOT Act*, to determine FFI/NPFFI status.

Rationale: The IRS should make available a database of participating and deemed compliant FFIs that could be relied upon or explicitly allow FFIs to rely on third party databases that might be developed for such a purpose. In the case of other entities, participating FFIs should be able to rely on third party databases for verification (see Proposal 2). Alternatively, where database information is not available or is inconclusive, participating FFIs should be able to rely on a certification from the entity as to its status. Instead of FFIs conducting independent due diligence or making assumptions about FFI/NPFFI status, these measures would reduce the compliance burden and risk to FFIs and thereby increase participation in the FFI regime.

In Summary **–** *FFIs would be required to:*

- *in the case of an NFFE, either review documentation to establish whether an entity is an exempted NFFE by virtue of being engaged in "active trade or business" or rely on acceptable third party databases or certification to that effect from the entity;*
- *in the case of an FFI, review an IRS database (or IRS-approved database) of PFFIs and DCFFIs to assess whether the entity is compliant.*

Require Withholding Only Where a Clear Case can be made that there is U.S. Income or Proceeds

<u>Proposal 16:</u> When dealing with an account holder who is recalcitrant or an NPFFI, FFIs will only be required to withhold on distributions that are U.S.-source.

Rationale: In the case of U.S.-source distributions, the U.S. has the right to determine the withholding tax that applies to non-residents.

<u>Proposal 17:</u> Allow FFIs to hold the withholding tax in escrow for a limited time so that the account can be documented before remittances are due to the IRS.

Rationale: There will be instances where account holders are unwilling or unable to meet the documentation requirements when initially requested to do so, but subsequently will provide the required information. If withheld funds are remitted immediately to the IRS, the only recourse for the client is to seek a refund from the IRS, which is a long and difficult process for individuals – and will add additional administration costs for the IRS. It would greatly improve the client experience and provide clients with more incentive to provide the documentation if FFIs had the ability to refund the withholding tax quickly and efficiently. We strongly recommend that FFIs be allowed to hold these funds in escrow until the end of the calendar year. If a client provides the appropriate documentation within that time frame, the FFI would refund the client directly. For any clients whose accounts remain undocumented, the FFI would remit the withholding tax by the first remittance date of the following year. This would improve the client experience without changing the withholding structure that FATCA is built around. Also, allowing FFIs to escrow and return the tax upon receiving the necessary account documentation would be consistent with the purpose of the tax, which is to provide clients with the incentive to provide the necessary documentation to demonstrate whether they are or are not U.S. persons for FATCA purposes.

Provide Flexibility for Expanded Affiliated Groups (EAGs)

<u>Proposal 18:</u> Allow an EAG to be in compliance where one or more members of the group are unable to comply with FATCA requirements due to local laws.

Rationale: Senior officials at Treasury and the IRS have acknowledged that there are instances where local laws conflict with FATCA, placing institutions in those jurisdictions in a position where they would be unable to comply with FATCA without violating domestic law. Large multi-national financial groups could be in a position whereby the entire EAG could be considered to be non-compliant because of an inability to comply in a very small number of jurisdictions in which they operate. To address this, it is recommended that Treasury and the IRS provide latitude in instances where the broader EAG is compliant notwithstanding the inability of a small number of affiliates to comply. The U.S. government can then work with the local government(s) to resolve the legal conflict(s). In some jurisdictions, privacy and related legislation may make the transfer of information to U.S. authorities impossible. For example, in some jurisdictions, absent government consent, life insurers providing policyholder information without policyholder consent could cause the insurers to lose their licenses or even subject their employees to criminal penalties.

We appreciate that U.S. authorities are concerned that providing such latitude would create a loophole allowing FFIs to transfer all their U.S. accounts into an affiliate that does not hold U.S. assets and therefore would not be subject to Chapter 4 withholding. However, as a practical matter, we believe this risk to be very small. For example, life insurers have no ability to sell policies or annuities outside of the jurisdictions in which they are licensed to do business. Likewise, many deposit-taking institutions do not allow non-residents to open accounts. Any concerns about risk could be addressed by putting conditions around the size or activities of the non-compliant EAG member.

Our understanding is that other commentators have made similar proposals.

APPENDIX B

Participating Associations

Canadian Bankers Association

The Canadian Bankers Association (CBA) works on behalf of 52 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 267,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The Association also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

Canadian Life and Health Insurance Association

Established in 1894, the Canadian Life and Health Insurance Association (CLHIA) is a voluntary trade association that represents the collective interests of its member life and health insurers. The Association's membership accounts for 99% of the life and health insurance in force in Canada and administers more than two-thirds of Canada's private pension plans. The industry helps 26 million Canadians protect themselves and their families against the financial risks that can come with life situations such as illness, retirement and premature death. Canadian life insurers have extensive international operations – about 45% of the industry's total premiums are generated abroad and three of our member companies rank among the top 20 largest life insurers in the world.

Investment Funds Institute of Canada

The Investment Funds Institute of Canada (IFIC) is the voice of Canada's investment funds industry, including fund managers, distributors and industry service organizations. IFIC proactively advances the industry's issues and interests with all sectors of Canada's public policy framework, while keeping our members well-informed on new and emerging regulatory and legislative requirements. IFIC provides a consistently high level of service to enable dealer and manager members to work together in a cooperative forum to enhance the integrity and growth of the industry and strengthen investor confidence.

Investment Industry Association of Canada

The Investment Industry Association of Canada (IIAC) is a member-based professional association with 189 members representing 95% of IIROC registered organizations (IIROC is the national self regulatory organization which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada). IIAC advances the growth and development of the Canadian investment industry, acting as a strong, proactive voice to represent the interests of our members and the investing public.

APPENDIX C

Key Statistics on Registered Accounts

Registered Disability Savings Plans (RDSPs):

Total number of RDSPs = 37,413

Registered Education Savings Plans (RESPs):

Total number of RESPs = 4.5 million

Total RESP assets = CDN$29.5 billion

Average assets per plan = CDN$6,556

Average age of new beneficiaries = 3.6 years old

Registered Retirement Savings Plans (RRSPs):

Total number of RRSP Contributors = 6.2 million

Total Annual Contributions = CDN$33.3 billion

Average Annual Contribution = CDN$5,371

Median cumulative RRSP value = CDN$25,000

Registered Retirement Income Funds (RRIFs):

Average assets per plan = CDN$37,809

APPENDIX D

Legislative Description of Government Registered Savings and Investment Plans

The following is suggested wording to describe government registered savings and investment plans that can be used for the purpose of drafting regulations exempting them from FATCA. Please refer to Proposal 1.

Pursuant to the authority provided by paragraph 1471(d)(2), the following will be excepted from the definition of “financial account”:

a. A trust, annuity, plan or other arrangement (referred to herein as “the retirement plan”) that is accepted for registration under the tax law of the country in which it is established and which has all of the following attributes under such tax law:
   i. The terms and conditions of the retirement plan must be approved or registered with the government of the country in which it is established;
   ii. The contributions to the retirement plan are limited to such amount as the government of the particular country defines;
   iii. A contributor must have or have had income from employment, or from carrying on business, in the particular country in which the retirement plan is registered in order to be permitted to make contributions to the retirement plan;
   iv. The assets of the retirement plan are to be held for the purpose of providing retirement income; and
   v. Income and gains realized in respect of assets retained within the retirement plan are taxable on a current or deferred basis and reported to the local tax authority.

b. A trust, annuity, plan or other arrangement (referred to herein as “the plan”) that qualifies as a government-sponsored savings plan under the tax law of the country in which it is established, for the purpose of fulfilling a public policy objective of the particular government, and which has all of the following attributes under such tax law:
   i. The terms and conditions of the plan must be approved or registered with the government of the country in which it is established;
   ii. The contributions to the plan are limited to such amount as the government of the particular country defines; and
   iii. Income and gains realized in respect of assets retained within the plan are taxable on a current or deferred basis and reported to the local tax authority.

c. A trust, annuity, plan or other arrangement (referred to herein as “the savings plan”) that qualifies as a government-sponsored savings plan under the tax law of the country in which it is established, and which has all of the following attributes under such tax law:
   i. The terms and conditions of the plan must be approved or registered with the government of the country in which it is established;
   ii. The contributions to the plan are limited annually to such amount as the government of the particular country defines; and
   iii. Contributions are restricted to residents of the country in which the plan is established.

d. A trust, annuity, plan or other arrangement that is exempt from withholding tax on interest and dividends under an income tax treaty with the United States.

APPENDIX E

Registered Plans Under Canadian Law

A. Registered Pension Plan (RPP)

Product description:

Employer-sponsored pension plan. Generally a group plan, but an employer can sponsor an individual pension plan. An RPP must be registered with the CRA.

Contributions/deposits:

- Limits on allowable contributions, based on employment income and comprehensive retirement savings system limits. Contributions are limited either by need based on actuarial certification (defined benefit plans) or by annual contribution limits (defined contribution/money purchase plan). Contributions must be made by employer; employee contributions may also be allowed, depending on the plan.
- Maximum contribution to a money purchase RPP is $22,450 for 2010; contribution to a defined benefit RPP is the amount required to fund a maximum annual benefit of $2,494 per year of service.
- In addition, there is a comprehensive limit on amounts contributed to registered retirement plans by or on behalf of an individual, so a contribution to an RPP will reduce or eliminate available contribution "room" under those other plans.
- Additional restrictions are imposed on individual pension plans.
- Contributions are tax deductible.
- All contributions must be reported to CRA.

Growth in plan:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- Amount of withdrawals limited by pension legislation – generally lump-sum withdrawals are not allowed.
- All withdrawals are fully taxed in year of withdrawal.
- Withdrawal/pension income received by a resident is reported to CRA and holder on form T4A – includes full amount of withdrawal in the year.
- Withdrawal/pension income received by a non-resident is reported to CRA and holder on form NR4 – includes full amount of withdrawal and amount withheld.

B. Registered Retirement Savings Plan (RRSP)

Product description:

Personal/individual retirement savings vehicle. Must be registered with CRA.

Contributions/deposits:

- Limits on allowable contributions, based on earned income from employment and self-employment and comprehensive retirement savings system limits.
- Maximum contribution to an RRSP is $22,000 for 2010: contribution to an RRSP will not be allowed to the extent of contributions to other registered retirement plans under the comprehensive retirement savings system limits.
- Contributions are tax-deductible.
- All contributions must be reported to CRA.

Growth in plan:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- No limits/restrictions on withdrawals.
- All withdrawals are fully taxed in year of withdrawal.
- Plan must be converted to retirement income by the end of the calendar year in which the individual attains age 71.
- Withdrawals by a resident are reported to CRA and holder on form T4RSP – includes full amount of withdrawal and amount withheld if a lump-sum payment.
- Withdrawals by a non-resident are reported to CRA and holder on form NR4 – includes full amount of withdrawal and amount withheld.

C. Registered Retirement Income Fund (RRIF)

Product description:

Retirement income vehicle that must pay out a minimum amount each year. No maximum limit on amount of withdrawal. Must be registered with the CRA.

Contributions/deposits:

- Restricted to transfers from other registered retirement plans (most generally RRSPs, but transfers from RPPs and other registered retirement plans are allowed) – no “new money” contributions allowed.

Growth in plan:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- Minimum annual withdrawal based on age and fund balance at beginning of year.
- No maximums placed on withdrawals.
- All withdrawals are fully taxed in year of withdrawal.
- Withdrawals by a resident are reported to CRA and holder on form T4RIF – includes full amount withdrawn and any amount withheld (withholding required where withdrawals exceed the prescribed minimum withdrawal).
- Withdrawals by a non-resident are reported to CRA and holder on form NR4 – includes full amount of withdrawal and amount withheld (withholding required on all withdrawals).

D. Deferred Profit Sharing Plan (DPSP)

Product description:

Trusteed employer-sponsored savings plan. Must be registered with CRA.

Contributions/deposits:

- Employer contributions made by reference to profits and deductible to employer.
- Annual limits on the amount contributed on behalf of each employee, based on employee earnings and comprehensive retirement savings system limits.
- Maximum contribution to a DPSP is $11,225 for 2010: contribution to a DPSP will reduce available RPP and RRSP contribution room under the comprehensive retirement savings system limits.
- No employee contributions allowed.

Growth in plan:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- All withdrawals are fully taxed in year of payment
- Withdrawals/pension income received by residents are reported to CRA and resident on form T4A – includes full amount of withdrawal in the year and tax amount withheld.

- Withdrawals/pension income received by non-residents are reported to CRA and non-resident on form NR4 – includes full amount of withdrawal and amount withheld.

E. Registered Education Savings Plan (RESP)

Product description:

Plan registered with CRA to promote savings for post-secondary education. Some government grants also available to plan.

Contributions/deposits:

- Contributions are not tax deductible.
- Lifetime limit of $50,000 per beneficiary – contributions only allowed until age 21 of beneficiary.
- Government grants to a maximum of $7,200 may also be available where beneficiary is Canadian resident.

Growth in plan:

- Earnings grow tax-deferred within plan.
- Limited deferral period.

Withdrawals:

- Original contributions not taxable; amounts representing growth in plan are taxed upon withdrawal.
- Withdrawals will be taxable in the hands of the student who is enrolled in a qualifying post-secondary program. Reported to the student on Form T4A.
- If student does not attend a qualifying post-secondary program, plan must be collapsed and growth can be returned to contributor where it will be taxed as normal income with a 20% additional tax imposed.

F. Registered Disability Savings Plan (RDSP)

Product description:

Savings plan registered with CRA. The plan is intended for parents and others to save for the long-term financial security of a disabled individual.

Contributions/deposits:

- Contributions are not tax-deductible.
- Beneficiary must be Canadian resident in year of contribution and qualify for the disability tax credit (i.e. loss of activities of daily living).
- Contributions permitted until the end of the year in which the beneficiary attains age 59.

- No annual contribution limit, but $200,000 lifetime limit in respect of a particular individual.
- Income-tested government matching contributions excluded from taxable income in year of contribution.

Growth in plan:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- Payments must begin by the end of the year in which the beneficiary attains age 60.
- Maximum withdrawals based on age and life expectancy.
- Government matching contributions and investment income earned in the plan included in income for tax purposes when paid to the beneficiary.
- Payments to Canadian residents reported on T4A.

G. Tax-Free Savings Account (TFSA)

Product description:

TFSAs are savings plans registered with CRA. They are designed to encourage savings for future expenses, including retirement. They are analogous to Roth IRAs in many respects. They are targeted at lower-income individuals to whom benefits payable under retirement plans registered with the CRA might reduce publicly funded retirement benefits otherwise available to those individuals.

Beginning in 2009, Canadian residents who are 18 years of age or older may establish TFSAs. TFSAs are accorded special tax treatment. Contributions to the plan are not deductible, but payments from the plan are not subject to Canadian tax.

Contributions/deposits:

- Contributions are not tax-deductible.
- All contributions are reported electronically to CRA.
- Must be Canadian resident in year of contribution.
- Annual contribution limit is $5,000 (subject to indexing based on changes to a consumer price index; unused contribution limits roll over to succeeding years).

Growth in plan:

- No current tax on income earned/accrued within the plan.
- Account balances are reported electronically to CRA.

Withdrawals:

- All withdrawals are reported electronically to CRA.

APPENDIX F

QI Attachment for Canada

1. QI is subject to the following laws and regulations of Canada governing the requirements of QI to obtain documentation confirming the identity of QI's account holders:

    i. *The Proceeds of Crime (Money Laundering) and Terrorist Financing Act*;
    ii. *The Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*;
    iii. For its members, the Investment Industry Regulatory Organization of Canada (IIROC) (formerly the Investment Dealers Association of Canada) Dealer Member Rules, Rule 1300 and Policy No. 2;
    iv. The *Income Tax Act* (Canada).

2. QI represents that the laws identified above are enforced by the following enforcement bodies and QI shall provide the IRS with an English translation of any reports or other documentation issued by these enforcement bodies that are relevant to QI's functions as a qualified intermediary:

    i. Financial Transactions and Reports Analysis Centre (FINTRAC) of Canada;
    ii. For its members, IIROC; and
    iii. The Canadian Minister of National Revenue.

3. QI represents that the following penalties apply to failure to obtain, maintain, and evaluate documentation obtained under the laws and regulations identified in item 1 above:

    i. Items 1(i) and (ii): an Administrative Monetary Penalty not exceeding C$1,000 in the case of a minor violation; a penalty not exceeding C$100,000 in the case of a serious violation; a penalty not exceeding C$500,000 in the case of a very serious violation; or
    ii. Item 1(iii): monetary penalties not exceeding C$1,000,000 for an employee of a dealer and C$5,000,000 for a dealer per offence, disgorgement, reprimand, restrictions on trading, suspension, termination or expulsion from IIROC and individuals may be banned from the industry; or
    iii. Item 1(iv): monetary penalties for each form which is missing or does not include a valid Social Insurance Number, or for making false statements.

4. QI shall use the following specific documentary evidence (and also any specific documentation added by an amendment to this item 4 as agreed to by the IRS) to comply with section 5 of this Agreement, provided that the following specific documentary evidence satisfies the requirements of the laws and regulations identified in item 1 above. In the case of a foreign person, QI may, instead, use a Form W-8 in accordance with section 5 of this Agreement. Either QI, or a banking or securities association in Canada, may request an amendment of this item 4.

    i. For natural persons:
        a) Passport;
        b) National Identity Card;
        c) Driving license;
        d) Provincial health insurance card;
        e) Birth certificate provided by an individual under the age of 21;
        f) Government-issued Age of Majority Card;
        g) Canadian citizenship card;
        h) Record of Landing (IMM1000) or Confirmation of Permanent Residence (IMM 5292) issued prior to 1/1/2004;
        i) Permanent Residence Card;

j) Canadian Forces Identification Card issued by the Canadian Department of National Defence;
k) A government-issued Certificate of Indian Status;
l) Alberta Photo Identification Card;
m) B.C. Identification card;
n) Government of Newfoundland and Labrador Photo Identification Card;
o) Nova Scotia Photo Identification Card;
p) Prince Edward Island Voluntary ID;
q) Saskatchewan Mandatory Photo ID;
r) An otherwise acceptable Form W-8 (W-8BEN/W-8ECI/W-8EXP) or a copy of same, with the penalties of perjury statement modified by replacing the words "foreign person" with the words "not a U.S. citizen or U.S. resident alien";
s) For accounts opened prior to January 1, 2001, a Social Insurance Number that does not indicate non-residence (i.e., a number that does not begin with the digit "9"), that has been established by the QI as valid, and that must be reported to the Canada Revenue Agency in one or more periodic filings, and the QI has no other information that suggests the person is a non-resident of Canada.

ii. For Legal Persons:
a) Canadian Acceptable Institutions, Acceptable Counterparties and Regulated Entities, that are identified as Canadian entities on IIROC's list of Domestic and Foreign Acceptable Institutions and Acceptable Counterparties;
b) For registered charities and other accounts individually registered with the Canada Revenue Agency, a notation of its unique tax registration number, provided that such tax registration number is valid and is regularly confirmed with the Canada Revenue Agency;
c) Copy of the certificate of incorporation, articles of association, trust agreement/deed/indenture or other constating documents;
d) Copy of extracts from public registers; or
e) An otherwise acceptable substitute Form W-8 (W- 8BEN/W-8ECI/W-8EXP) or a copy of same, with the penalties of perjury statement modified by replacing the words "foreign person" with the words "not a U.S. person".

5. QI shall follow the procedures set forth below (and also any procedures added by an amendment to this item 5 as agreed to by the IRS) to confirm the identity of account holders that do not open accounts in person or who provide new documentation for existing accounts other than in person. In the case of a foreign person, QI may, instead, use a Form W-8 in accordance with section 5 of this Agreement. Either QI, or a banking or securities association in Canada, may request an amendment to this item 5.

i. QI shall not open an account by any means other than by establishing in person the identity of a customer through the account holder's own identity documents, except as permitted in (ii), (iii), (iv) and (v) below.
ii. QI may obtain by mail or otherwise a copy that is an exact reproduction of the specific documentary evidence listed in item 4 above from another person that is subject to know-your-customer rules that have been approved by the IRS for purposes of qualified intermediary agreements, provided that the laws and regulations listed in item 1 permit QI to rely on the other person to identify the account holder.
iii. QI may obtain a photocopy of the specific documentary evidence listed in item 4 by mail or otherwise remotely from the account holder or a person acting on behalf of the account holder, provided that the photocopy can be associated with a valid Social Insurance Number of the account holder on file that does not begin with "9" or the

photocopy has been certified as a true and correct copy by a person whose authority to make such certification appears on the photocopy, and provided that the laws and regulations listed in Item 1 permit QI to rely on the certified photocopy to identify the account holder.

iv. a) QI may obtain by mail or otherwise a copy that is an exact reproduction of the specific documentary evidence listed in Item 4 from an affiliate of QI or a correspondent bank of QI, provided that the affiliate or correspondent bank has established in person the identity of the account holder and the laws and regulations listed in Item 1 permit QI to rely on documentation provided by that affiliate or correspondent bank to identify the account holder.

b) For accounts opened prior to January 1, 2001, if QI was not required under its know-your-customer rules to maintain originals or copies of documentation, QI may rely on its account information if it has complied with all other aspects of its know-your-customer rules regarding establishment of an account holder's identity, it has a record that the documentation required under the know- your-customer rules was actually examined by an employee of QI, an employee of an affiliate of QI, a correspondent bank of QI, in accordance with the know-your-customer rules, and it has no information in its possession that would require QI to treat the documentation as invalid under the rules of section 5.10(B) of this Agreement.

v. Where pursuant to a contractual relationship, a third party is acting as agent for QI, QI may rely on documentation (as defined in section 2.13 of this Agreement) obtained and retained by the third party in accordance with section 5 of this Agreement. The acts of such a third party agent of a QI will be imputed to the QI. The QI shall remain fully liable for the acts of such agent and QI shall not be permitted to assert any of the defences that may otherwise be available, including under common law principles of agency, in order to avoid tax liability under the Internal Revenue Code.

APPENDIX G

CLHIA Proposals for Life Insurance

The recommendations in Appendix A do not address some of the unique issues particular to life insurance which the Canadian Life and Health Insurance Association (CLHIA) has addressed in its submissions to the IRS and Treasury as follows:

"U.S. Account"

To focus section 1471(d)(1) on policies that potentially could be acquired for purposes of evading U.S. taxation, the definition of "U.S. Account" should exclude:

- small life policies (for example, those with a death benefit of $500,000 or less)
- small annuities (for example, those with aggregate premiums of $350,000 or less); and
- reinsurance contracts

Under actuarial principles, the $500,000 death benefit is approximately what a 40-year old male nonsmoker could obtain if he paid a single premium of $50,000. Thus, the size of such policies is consistent with the $50,000 cap that applies to depository accounts that are excluded from treatment as U.S. Accounts under section 1471(d)(1)(B) (the "Depository Account Cap").

Excluding life policies with a death benefit of $500,000 or less from treatment as U.S. Accounts (together with the exclusions for "no cash value," registered, and group contracts which we have also recommended) would remove approximately 90% of the policies issued by CLHIA members from the scope of Chapter 4, significantly reducing the compliance burden on life insurers. In addition, reporting only on larger policies would focus on the very types of policies that have the greatest potential for being used for tax evasion purposes, thereby allowing the IRS to devote particular attention to those contracts.

Because annuities issued by life insurers do not have an associated specified death benefit, we recommend that the cut-off for treating such annuities as non-U.S. Accounts be based on the aggregate amount of premiums paid for the annuities. (Use of aggregate premiums as the measuring amount to determine whether an annuity is "small" or not would be easier for insurers to monitor than cash value, which could vary day to day and the amount of which would not be within the control of the policyholder.) In this regard, one possibility would be to exclude annuities for which the aggregate premium is $50,000 or less, again by reference to the Depository Account Cap. However, that cut-off amount would exclude only a very small portion of the annuities issued by our members, and even much larger annuities would not present the tax evasion potential with which Chapter 4 is concerned. It would be more reasonable to use an aggregate premium amount of $350,000, which would exclude approximately 97% of the annuities issued by our members and which (as in the case of small life policies) would focus both the insurers and the IRS on annuities that have a greater likelihood of being used for tax evasion purposes.

Determination of Account Value

Life policies and annuities are valuable because of both the “inside build-up” of cash value and the contracts’ imbedded life protection or mortality/morbidity characteristics. In some contracts, it may be difficult to accurately determine anything more than the cash surrender value of the contract. Even where some life protection or similar value could be ascribed to the contract in addition to its cash surrender value, that incremental value would have no relevance to the purposes of Chapter 4, inasmuch as that value would not be accessible by the policyholder. Accordingly, we have recommended that life policies and annuities be valued for purposes of section 1471(c)(1)(C) based on their cash surrender value, net of applicable surrender charges, as of the relevant reporting date.

Foreign Currency

Life insurers should be allowed to elect to translate foreign currency amounts into U.S. dollars either at the applicable currency conversion rate in effect at the end of the relevant tax year or based on the average currency conversion rate for that year.

Reporting

Because of the many differences between insurance policies and investment products, we recommend that no information reporting on policies be required until actual payments are made under the policies. In addition, we recommend that the information required to be reported at that time be tied more closely to the information required to determine the policyholder’s tax liability under section 72 principles.

U.S. Branches

U.S. branches of foreign life insurers should be permitted to self-certify to withholding agents that a reportable payment is eligible for the effectively connected income exclusion.

APPENDIX H

<u>Alternative Know-Your-Client Methods</u>

In order to provide flexibility in instances where an account is opened in something other than a face-to-face environment, Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* allows for alternative know-your-client (KYC) methods that are do not necessarily involve the production of a physical piece of identification for inspection by an employee of the financial institution. Specifically, the Act provides the following alternative KYC techniques:

<u>IDENTIFICATION PRODUCT METHOD</u>
Referring to an independent and reliable identification product that is based on personal information in respect of the person and a Canadian credit history of the person of at least six month duration.

<u>CREDIT FILE METHOD</u>
Confirming, after obtaining authorization from the person, their name, address and date of birth by referring to a credit file in respect of that person in Canada that has been in existence for at least six months.

<u>ATTESTATION METHOD</u>
Obtaining an attestation from a commissioner of oaths in Canada, or a guarantor in Canada, that they have seen acceptable government-issued ID. The attestation must be produced on a legible photocopy of the document (if such use of the document is not prohibited by the applicable provincial law) and must include
(a) the name, profession and address of the person providing the attestation;
(b) the signature of the person providing the attestation; and
(c) the type and number of the identifying document provided by the person.

<u>CLEARED CHEQUE METHOD</u>
Confirming that a cheque drawn by the person on a deposit account of a financial entity has been cleared.

<u>CONFIRMATION OF DEPOSIT ACCOUNT METHOD</u>
Confirming that the person has a deposit account with a financial entity and retaining the name of the financial institution, the account number and the date of confirmation.

The Act allows that KYC requirements can be met provided that any of the following <u>combination</u> of these techniques is used:

1. Identification Product Method & Attestation Method
2. Identification Product Method & Cleared Cheque Method
3. Identification Product Method & Confirmation of Deposit Account Method
4. Credit File Method & Attestation Method
5. Credit File Method & Cleared Cheque Method
6. Credit File Method & Confirmation of Deposit Account Method
7. Attestation Method & Cleared Cheque Method
8. Attestation Method & Confirmation of Deposit Account Method