June 7, 2011

NOT-121556-10

Email: via the Federal eRulemaking Portal at Notice.Comments@irscounsel.treas.gov

Internal Revenue Service
1111 Constitution Avenue
NW, Washington, DC 20224
U.S.A.

Re: The Investment Funds Institute of Canada's Comments Pertaining to Notice 2011-34

The Investment Funds Institute of Canada ("IFIC") has reviewed Notice 2011-34 and its impact on Canadian mutual funds and their managers. There are a number of issues which we would like to raise with you as part of the continuing process of working with you in the development of the FATCA system. This letter is also a follow-up to our meeting with Treasury officials on January 10, 2011 and our subsequent letter of February 10, 2011 to Messrs Eggert, Grinberg and Plowgian.

1. **Treatment of Canadian Registered Retirement Plans** As previously discussed with you our view that Canadian registered retirement plans and other similar plans should be exempt from potential characterization as US accounts. As noted, the majority of such plans are individual retirement savings accounts or plans established to achieve government sanctioned social objectives.[1] See Appendix A attached hereto (previously provided to you) which contains a description in legislative form of these types of plans. Please note that our legislative form description is drafted in a non-country specific format. In other words, it is intended to describe plans situated in Canada, as well as plans situated in other countries. We wonder if you have had an opportunity to review our description and whether it might be possible to have a discussion of it with you at some point in the near future, either formal or informal.

Notice 2011-34 deals with this issue to some degree where it notes that it is proposed to prescribe "certain foreign retirement plans" as entities described in section 1471(f). However, we note that this proposed treatment would not appear to assist Canadian mutual funds. In particular, because it is not proposed to treat such entities as non-US accounts, it would appear to still be necessary to apply the testing procedures set out in Section I of Notice 2011-34 to such entities. However, since it is proposed that payments beneficially owned by foreign retirement plans will be exempt from withholding under section 1471(a), it would appear to be contrary to the policy of this exemption to require such testing

[1] We also note that such plans are not the same as conventional employer sponsored pension plans.

procedures to be applied to such entities. Accordingly, we believe that the Secretary should exercise the discretion given to him in section 1471(d)(2) to exclude foreign retirement plans (including Canadian registered and other similar plans) from the definition of financial account. In turn, this would have the effect of excluding such entities from potential characterization as US accounts. We would appreciate your consideration of this issue.

2. **Meaning of Term "Documented US Account" in Step 1** Canadian mutual funds are not currently part of the QI system. Accordingly, they do not currently obtain a Form W-9 from US investors. However, there are accounts which Canadian mutual funds treat as US accounts for Canadian tax purposes.[2] For these accounts, the funds typically withhold from specified categories of payments and issue a Canada Revenue Agency ("CRA") Form NR4 to the US investors. As previously mentioned to you, the NR4 information is automatically provided by the CRA to the IRS. Thus, it would be practical for Canadian mutual funds to treat such accounts as "documented US accounts". Alternatively, one might treat such accounts as having US indicia and proceed as set out in Step 4 of Notice 2011-34. We would have no objection to this approach. However, we note that proceeding in this way would only treat such accounts with a balance or value in excess of $50,000 as US accounts. We would appreciate your guidance on this issue.

3. **Aggregating Accounts** Notice 2011-34 states as follows:

> … for purposes of determining the balances or values (as relevant) of accounts in each of the below steps, an FFI will be required to treat as a single account all accounts maintained by the FFI or its affiliates that are associated with one another due to partial or complete common ownership of the accounts under the FFI's existing computerized information management, accounting, tax reporting or other record-keeping systems.

The foregoing statement would appear to exclude aggregation of accounts in the following situation:

(a) Where a single investor holds securities of two or more different FFIs which are registered in the name of a nominee securities or mutual fund dealer which is not an affiliate of the investment fund managers for the various FFIs.

The foregoing statement would appear to require aggregation of accounts in the following situations:

(a) Where a single investor holds two or more different classes of shares of the same legal entity.

(b) Where a single investor holds the securities of two or more different legal entities that are part of a group of FFIs that have entered into FFI Agreements under the centralized compliance option proposed in Section VI of Notice 2011-34 and such investments are recorded on a single computer system.

---

2 Generally because of the use of a US mailing address for the account.

We would be grateful if you would confirm that you agree with the above conclusions. We would also be grateful if we could have an opportunity at some point to discuss various other fact patterns where we are simply unsure of the analysis.

4. **Private Banking Account** The proposed rules regarding private banking accounts do not appear to be relevant to mutual funds. The proposed definition of "private banking account" is as follows:

> A "private banking account" is any account maintained or serviced by an FFI's private banking department or any account maintained or serviced as part of a private banking relationship, including any account held by any entity, nominee, or other person to the extent the account is associated with the private banking relationship with an individual client.

Two points are noted. First, a mutual fund will never have its own private banking department (although the sponsoring financial institution may have such a department). Thus, an investment in a mutual fund should not be considered to be maintained or serviced by a private banking department of the mutual fund. Second, a private banking relationship is specified to exist "when one or more officers or other employees of the FFI are assigned by the FFI to provide [specified] services". Because a mutual fund will generally not have any employees or officers, this condition should not normally be satisfied for a mutual fund.

Notwithstanding the foregoing, we note that the definition of "private banking account", "private banking department" and the various related definitions are quite broad and are not in legislation form. Accordingly, we would appreciate your guidance on whether our understanding of this issue is correct.

In addition, we believe that the wide definitions of "private banking account" and "private banking department" should be further narrowed. As they currently read, there is no dollar threshold for their application, and they apply to all accounts where basic financial planning is provided rather than where a higher level of service is provided to very high net worth clients. Thus, we submit that this Step 3 of Notice 2011-34 should also incorporate the due diligence concepts in Step 5 for accounts with a balance or value in excess of $500,000.

5. **W-8BEN Issue** Where a pre-existing account with a value or balance of greater than $50,000 is identified as having US indicia, it may be necessary to obtain a Form W-8BEN from the account holder. In other situations where a Form W-8BEN is required to be obtained, the Form is generally required to be refreshed every three years. However, refreshing in the context of the FATCA system would not appear to be consistent with the policy of the system. Step 6 of Notice 2011-34 provides for an annual retesting beginning in the third year of all pre-existing individual accounts not otherwise identified as US accounts, but which had a balance or value at the end of the preceding calendar year equal to or greater than $500,000. If it were necessary to obtain a refreshed Form W-8BEN for accounts in the $50,000 to $500,000 range which have previously identified as having US indicia, this would constitute, in effect, an additional type of retesting. We would appreciate your guidance on whether our understanding of this issue is correct.

6. **Certification Standard** Various certifications regarding the various procedures required under FATCA will be required to be obtained from officers or agents of the FFI. We would appreciate your guidance on the appropriate standard for certifications. In our view, a reasonable standard would be, "To the best of my knowledge, after reasonable inquiry, I hereby certify that ….".

7. **Passthru Payments** In our view the proposed treatment of passthru payments outlined in Section II of Notice 2011-34 is somewhat more practical than previously contemplated. However, we have three issues we would like to raise with you:

(a) Although not clear from the various Treasury releases to date, we wonder if the system will treat inappropriately certain amounts as passthru payments. For example, consider the following facts:

(i) An investor acquires $100 of the securities of a Canadian mutual fund. 50% of the assets of the fund are US assets.

(ii) The investor turns out to be a recalcitrant account holder.

(iii) The investor subsequently redeems the securities for $100 (i.e., the securities have not increased in value). The redemption is funded by an equal disposition by the fund of US assets and non-US assets.

The proceeds from the sale of the US assets would appear to constitute a withholdable payment to the fund (i.e., under section 1473(1)(A)(ii)). Accordingly, the payment by the fund to the investor would appear to constitute a passthru payment on the basis that it is a "payment … attributable to a withholdable payment" (i.e., under section 1471(d)(7)). Since the investor in this example has no gain, the result is obviously inappropriate. It would also appear that the passthru payment system may work inappropriately in other situations. For example, if a distribution to an investor is treated as a passthru payment and then reinvested, a subsequent redemption may result in the payment being taxed, in effect, twice as a passthru payment. The analysis of this issue is obviously quite complicated and accordingly, we would be grateful if you would confirm whether our analysis is correct.

(b) We also wonder if there is a chicken and egg issue in the calculation of the passthru payment percentage in the following situation. FFI 1 invests in FFI 2, and FFI 2 invests in FFI 1. This might occur where various banks hold shares of each other. FFI 1 cannot calculate its passthru payment percentage until it knows the passthru payment percentage of FFI 2, and vice versa. A rule presumably need to be devised to deal with this situation.

8. **Treatment of New Accounts** Section 1 of Notice 2011-34 deals with the treatment of pre-existing individual accounts where US indicia are identified. In particular, it specifies certain information which must be obtained from the investor. Notice 2010-60 issued last fall deals with the treatment of new accounts and the information which must be obtained from the investor. The information which is required to be obtained for pre-existing individual accounts and for new accounts appears to be subtly different. In the interests of compliance simplicity and practicality, we believe that such information requirements should be identical.

Thank you for your consideration of our concerns.

Yours sincerely,

Joanne De Laurentiis, President & CEO, The Investment Funds Institute of Canada

Cc: Danielle Nishida, Attorney Advisor, Office of Associate Chief Counsel (International), (danielle.nishida@irscounsel.treas.gov)
Ana Guzman, Associate Chief Counsel, Office of Associate Chief Counsel (International), (ana.c.guzman@irscounsel.treas.gov)
John Sweeney, Attorney-Advisor, Branch 2 - Department of the Treasury, Internal Revenue Service, (john.j.sweeney@irscounsel.treas.gov)
Jane Pearse, Director, Financial Institutions Division, Department of Finance (Canada) (jane.pearse@fin.gc.ca)
Jesse Eggert, Attorney Advisor, U.S. Department of the Treasury - Office of International Tax Counsel, (JESSE.EGGERT@DO.TREAS.GOV)
Michael Plowgian, Attorney Advisor, U.S. Department of the Treasury - Office of International Tax Counsel, (MICHAEL.PLOWGIAN@DO.TREAS.GOV)
Itai Grinberg, Attorney Advisor, U.S. Department of the Treasury - Office of International Tax Counsel, (ITAI.GRINBERG@DO.TREAS.GOV)
James Carman, Senior Policy Advisor, Taxation, The Investment Funds Institute of Canada, (jcarman@ific.ca)
Jon Cockerline, Director, Policy & Research, The Investment Funds Institute of Canada, (jcockerline@ific.ca)

APPENDIX A

Legislative Form Description of Registered Plans

Pursuant to the authority provided by paragraph 1471(f)(4), the following persons are identified by the Secretary and are prescribed as posing a low risk of tax evasion and thus subsection 1471(a) does not apply to such persons:

a. A trust, plan or other arrangement (referred to herein as "the plan") that is accepted for registration as and qualifies as a retirement 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 assets of the plan are to be held for the purpose of providing retirement income to the individual who established the plan (the "contributor") or to a spouse or common-law partner of the contributor;

   ii. Where contributions to the plan are deductible in computing the income of the contributor, withdrawals from the plan are required to be included in the income of the recipient thereof;

   iii. Income and gains realized in respect of assets retained within the plan are not subject to tax until such income or gains are withdrawn from the plan, at which time such amounts would be included in the income of the recipient;

   iv. A contributor must have income from employment or income from carrying on business in order to be permitted to make tax-deductible contributions to the plan. All other permitted contributions to the plan must be from another retirement plan of the individual or of a spouse, common-law partner of the individual, or of a parent or grandparent of the individual where the individual is financially dependent on the parent or grandparent;

   v. The amount of the annual or cumulative life-time tax-deductible contributions to the plan a limited to such amount as the government of the particular country considers to be sufficient to provide a retirement income comparable to that which would be provided by a registered employer sponsored defined benefit pension plan and will be reduced on a formula basis for a particular individual that is a member of such a pension plan; and

   vi. The terms and conditions of the plan must be approved by the government of the country in which it is established and the failure to comply with such terms and conditions may result in the loss of registration and the preferential tax treatment afforded to the plan; and

b. A trust, plan or other arrangement (“the plan”) that is accepted for registration, and qualifies under the tax law of the country in which it is established, for the purpose of fulfilling a social policy objective of the particular government, including but not limited to support for infirmity or disability, the advancement of education or retirement savings and which has all of the following attributes under such tax law:

   i. The amount of the annual or cumulative life-time contributions to the plan is limited;

   ii. The terms and conditions of the plan must be approved by the government of the country and the failure to comply with such terms and conditions may result in the loss of registration and the preferential tax treatment provided to the plan;

   iii. Where contributions to the plan are deductible in computing the income of the contributor, withdrawals from the plan are required to be included in the income of the recipient thereof; and

   iv. Income and gains realized in respect of assets retained within the plan are not subject to tax until such income or gains are withdrawn from the plan, at which time the government may or may not subject such amounts to tax.