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DU CANADA



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Delivered By Email: Consultation-Legislation@fin.gc.ca

Tax Policy Branch – Tax Legislation Division
Finance Canada 90 Elgin Street
Ottawa, ON K1A 0G5

Dear Sirs and Mesdames:

RE: Proposed Reporting Requirements for Trusts (Trust Reporting)

We are writing to provide comments on the proposed Trust Reporting rules contained in draft legislation to amend the *Income Tax Act* (Canada) (the **ITA**)¹ released on February 4, 2022 (**Proposed Rules**). Unless otherwise noted, all references to sections and components thereof are to the ITA as it is proposed to be amended by the Proposed Rules.

The Canadian ETF Association (**CETFA**) represents Canadian managers of exchange traded mutual funds (**ETFs**)² and other participants in the ETF industry in Canada. The Investment Funds Institute of Canada (**IFIC**) is the voice of Canada's retail mutual fund industry. CETFA and IFIC (the **Organizations**, or **we**) bring together Canadian fund managers, distributors and service providers to foster a strong, stable investment sector where Canadian investors can realize their financial goals.

Firstly, on behalf of the participants of these two associations, we would like to thank the Department of Finance (Canada) for considering the letter sent by CETFA dated August 10, 2018. In that letter, CETFA expressed their concerns that for units of trusts traded on designated stock exchanges, the managers and trustees of the trusts do not have visibility into the ultimate beneficial owners of the units for trust reporting purposes. Accordingly, we are extremely pleased that proposed new paragraph 150(1.2)(h) provides an exception to the Trust Reporting rules for “a trust, all the units of which are listed on a designated stock exchange”.

Secondly, we wanted to draw your attention to one further issue affecting ETFs managed by our members if the Proposed Rules are enacted in their current form. In particular, we are concerned with the difficulties our members may face in fulfilling their reporting obligations in respect of an ETF that is a Non-Qualifying Split Fund (as defined below).

1. What is a Non-Qualifying Split Fund?

A **Non-Qualifying Split Fund** is an ETF that meets two conditions:

- Some of its units are listed on a designated stock exchange (the **ETF Series Units**) and others are not listed on a designated stock exchange (the **Mutual Fund Series Units**); and

¹ RSC 1985, c 1 (5th Supp).

² We note that there are some unit trusts, units of which are listed on Canadian stock exchanges, which are not regarded as ETFs

- It does *not* qualify as a “mutual fund trust” as defined in subsection 132(6).

With respect to the first condition, most ETFs managed by our members have all of their units listed on a designated stock exchange (the **Pure ETFs**). However, some of our members have funds where units are issued in series and some, but not all, of the fund’s series are listed on a designated stock exchange (the **Split ETFs**).

With respect to the second condition, each ETF managed by one of our members is expected and intended to qualify as a “mutual fund trust” as defined in subsection 132(6). However, occasionally, an ETF managed by one of our members (or another publicly-listed unit trust) does not qualify as a mutual fund trust for either of the following reasons:

- When launched, the ETF does not gather a sufficient number of unitholders before the 91st day after the end of its first taxation year for the trustee to be able to elect pursuant to subsection 132(6.1); or
- The ETF qualified as a mutual fund trust initially, but has since lost such status because it did not retain a sufficient number of beneficiaries.

Accordingly, a Split ETF that fails to qualify as a mutual fund trust will be a Non-Qualifying Split Fund and will face the issue discussed below.

2. The Issue for Non-Qualifying Split Funds

A Non-Qualifying Split Fund is not exempt from the enhanced trust reporting rules because it cannot take advantage of:

- proposed new paragraph 150(1.2)(f), because it does not qualify as a mutual fund trust; or
- proposed new paragraph 150(1.2)(h), because not all of its units are listed on a designated stock exchange.

Accordingly, if the Proposed Rules are enacted in their current form, a Non-Qualifying Split Fund is required to provide information on all of its unitholders in order to fulfil its obligations under the Trust Reporting rules in proposed new section 204.2 of the *Income Tax Regulations* (the **Regulations**)³. A Non-Qualifying Split Fund will be able to provide information on the beneficial owners of its Mutual Fund Series Units without much difficulty. **However, for the same reasons (as described below) that apply in respect of Pure ETFs and for which relief has been provided in proposed new paragraph 150(1.2)(h), it is not feasible for a Non-Qualifying Split Fund to determine the beneficial owners of its ETF Series Units.**

The difficulties in identifying the ultimate beneficial owners of the ETF Series Units is because our members list such units on the Toronto Stock Exchange (the **TSX**) or the Aequis NEO Exchange (the **NEO**). Trading of the ETF Series Units on the TSX or NEO is processed by CDS Clearing and Depository Services Inc. or its nominee CDS & Co. (collectively, **CDS**). As a result, the ETF Series Units managed by our members are registered in the name of CDS and, in general, our members have no visibility into the beneficiaries of such units beyond CDS.

CDS does not collect, process, or distribute beneficial ownership information respecting the securities deposited with it. We suspect that a trustee reporting that the beneficial owner is CDS would not be providing useful information to the Canada Revenue Agency.

The only way our members would potentially be able to satisfy their reporting obligations with respect to the beneficial owners of a Non-Qualifying Split Fund’s ETF Series Units would be to try to rely on third-party service providers (e.g., Broadridge Financial Solutions). These entities can provide ETF managers with

³ CRC, c 945.

some general information about the holdings of the ETF Series Units. However, the information they can provide is insufficient to permit the Non-Qualifying Split Fund to comply with its reporting obligations under the Trust Reporting rules with respect to the ETF Series Units. Third-party service providers can provide estimates of the number of units held by particular brokers, the number of unitholders who each hold not less than one “block of units” and units having an aggregate value of not less than \$500, and the number of units held by beneficial owners resident in each province. However, these third-party service providers *cannot* identify the actual beneficial owners of the units – much less obtain their names, taxpayer identification numbers, *etc.*

3. Request

We respectfully request that the Department of Finance consider exempting a Non-Qualifying Split Fund from the beneficial ownership reporting requirements in respect of its ETF Series Units only (the **Request**). For greater certainty, a Non-Qualifying Split Fund would still be required to do the following despite the Request:

- File an annual income tax and information return as required by proposed new subsection 150(1.2); and
- Provide information on the beneficial owners of its Mutual Fund Series Units as required by proposed new section 204.2 of the Regulations.

For your reference and consideration only, we propose the following amendment to proposed new section 204.2 of the Regulations as an example of how the Request may be accommodated:

- (1) For the purposes of subsection 150(1) of the Act, every person having the control of, or receiving income, gains or profits in a fiduciary capacity, or in a capacity analogous to a fiduciary capacity, shall provide information in respect of a trust, unless the trust is subject to one of the exceptions listed in paragraphs 150(1.2)(a) to (o) of the Act, that includes the name, address, date of birth (in the case of an individual other than a trust), jurisdiction of residence and TIN (as defined in subsection 270(1) of the Act) for each person who, in the year,
- (a) is a trustee, beneficiary (subject to subsection (2) **and (3)**) or settlor (as defined in subsection 17(15) of the Act) of the trust; or
 - (b) has the ability (through the terms of the trust or a related agreement) to exert influence over trustee decisions regarding the appointment of income or capital of the trust.
- (2) For the purposes of subsection (1), the requirement in paragraph (1)(a) to provide required information in respect of beneficiaries of a trust in a return is met if
- (a) the required information is provided in respect of each beneficiary of the trust whose identity is known or ascertainable with reasonable effort by the person making the return at the time of filing the return; and
 - (b) in respect of beneficiaries not described in paragraph (a), the person making the return provides sufficiently detailed information to determine with certainty whether any particular person is a beneficiary of the trust.
- (3) For the purposes of subsection (1), the requirement in paragraph (1)(a) to provide required information in respect of beneficiaries of a trust in a return is not required for any beneficiaries that have an interest in the trust solely because they acquired units of the trust on a designated stock exchange.**

We thank the Department of Finance for considering our submission, and would be pleased to discuss our practical and technical concerns with you at your convenience. If you have further questions, please do not hesitate to contact either Grace Pereira at GPereira@blg.com, Josée Baillargeon at jbaillargeon@ific.ca or Pat Dunwoody at PatDunwoody@cetfa.ca.

Yours sincerely,

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