



Pension Investment
Association of Canada

Association canadienne des
gestionnaires de caisses de retraite

May 25, 2012

CC:PA:LPD:PR (REG-121647-10)
Room 5205
Internal Revenue Service
PO Box 7604
Ben Franklin Station, Washington, D.C. 20044

Email: Notice.Comments@irscounsel.treas.gov

Dear Sir/Madam:

Foreign Account Tax Compliance Act (FATCA)

We are sending this letter on behalf of the Pension Investment Association of Canada (PIAC) to set out our comments on the proposed regulations relating to information reporting by foreign financial institutions (FFIs) and withholding on certain payments to foreign financial institutions and other foreign entities.

PIAC has been the national voice for Canadian pension funds since 1977. Senior investment professionals employed by PIAC's member funds are responsible for the oversight and management of over \$1 trillion in assets on behalf of millions of Canadians. PIAC's mission is to promote sound investment practices and good governance for the benefit of pension plan sponsors and beneficiaries.

In our letter of January 30, 2012, PIAC provided comments on IRS Notice 2010-60, as amended by Notice 2011-34, and the proposed exemptions thereunder for "foreign retirement plans". As we commented then, FATCA has potential significant ramifications for the Canadian retirement income system. We thank the US Treasury and the IRS for giving greater clarity to the exemptions for foreign retirement plans as set out in the proposed regulations, which addressed a number of our concerns – in particular the exemption of employer sponsored registered pension plans.

Unfortunately, some difficulties remain with the proposed regulations and FATCA's impact on the Canadian retirement system, as not all Canadian retirement

arrangements would appear to be covered under the proposed regulations and thereby excluded from the operation of FATCA.

Impact of FATCA

FATCA creates a new tax information reporting and withholding regime on payments from the US to certain foreign (including Canadian) financial institutions (FFIs). It appears that under FATCA, Canadian Registered Pension Plans (RPPs), as defined in the Canadian *Income Tax Act* (ITA), would be categorized as FFIs. RPPs generally would appear to be exempt from FATCA by virtue of paragraph 1.1471-5(f)(2)(ii)(A)(1). However, other Canadian funded retirement savings arrangements subject to the ITA would also be categorized as FFIs. Such other arrangements include: Registered Retirement Savings Plans (RRSPs), Deferred Profit Sharing Plans (DPSPs), Registered Income Funds (RIFs), Retirement Compensation Arrangements (RCAs) and Pooled Registered Retirement Plans (PRPPs).

PIAC is particularly concerned about Retirement Compensation Arrangements referred to as RCAs, as these vehicles are often used as extensions of our members' pension plans to ensure that the plan design as established is deliverable at all ranges of income. Most RCAs fund benefits that are referred to as "excess plans" in the US. That is, these plans provide benefits above the tax permitted limit, but within the plan design (or "the pension promise") that applies to all members of the plan. For context, the tax permitted annual limit in Canada is currently \$2,646.67 per year of service.

The FATCA reporting requirements would require the sponsors and/or custodians of Canadian RCAs with US holdings to report to US authorities on the beneficiaries of Canadian RCAs who are US citizens or taxpayers. A failure to comply with FATCA's reporting requirements could result in any US investments made by or through Canadian RCAs being subject to a 30% withholding on all such US investments. Avoiding the application of FATCA by not holding US assets may not be feasible or practical given the integrated nature of the Canadian and US economies.

As we noted in our previous correspondence regarding RPP's, meeting FATCA's requirements for an RCA would present an onerous and costly burden on Canadian pension stakeholders. For example, given the frequent interchange of employees across the Canada-US border, it is not practical or feasible for Canadian sponsors or custodians to simply exclude US citizens from participating in such plans and/or to even do the due diligence required to determine which plan beneficiaries are US citizens. Furthermore, it raises serious questions as to whether sponsors and custodians of RCAs could meet such FATCA reporting requirements while complying with any applicable Canadian privacy and/or fiduciary requirements.

Finally, if a plan's assets do become subject to FATCA's 30% withholding, it is not clear who bears the cost of such withholding. The withholding appears to apply to all US investments of the FFI, not just those that can be attributed to a particular beneficiary – as such, the withholding cost may have to be borne by all plan beneficiaries and/or the plan sponsor through reduced returns on investments.

Exemption Required for Retirement Compensation Arrangements

We believe that RCAs should be exempt from treatment as FFIs, as these vehicles form part of the sponsoring organization's pension promise. The proposed regulations represent a substantial improvement over the proposal set out in Notice 2010-60. However, it is not clear to us that RCA's would be covered under the proposed regulations under FATCA, and thereby excluded from the operation of FATCA.

Given the Canadian tax regime under which Canadian RCA's operate, the case can be made using the FATCA terminology that RCAs pose "a low risk of tax evasion", and thus should rightly fall within the kinds of foreign retirement plans the US Treasury and IRS intend to exclude under FATCA. Contributions to RCAs along with any earnings there under, are subject to a 50% withholding tax to be paid to the Canada Revenue Agency (CRA) – as such they are not an efficient savings vehicle and thus should not be viewed as posing a risk of tax evasion. In addition, all amounts paid out of RCAs are included in taxable income, meaning it would eventually be captured in any tax reporting required by US taxpayer beneficiaries of such arrangements.

We trust that our views on exemption under FATCA for Retirement Compensation Arrangements (RCAs) are reasonable and we would be happy to discuss this further with you at your convenience. We thank you for this opportunity to share our concerns with you.

Yours sincerely,



Julie Cays
Chair