ACPM/ACARR
The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

January 25, 2012

CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044
U.S.A.

Email: Notice.Comments@irscounsel.treas.gov

Dear Sir/Madam:

Foreign Account Tax Compliance Act (FATCA)

I am writing to you on behalf of the Association of Canadian Pension Management (**ACPM**) to set out our comments on the proposed definition of "foreign retirement plan" under IRS Notice 2010-60, as amended by Notice 2011-34.

As we understand from IRS Notice 2010-60, as amended by Notice 2011-34, the FATCA withholding provisions will not apply to any payment to the extent that the beneficial owner of such payment is part of a class of persons identified by the Secretary as posing "a low risk of tax evasion". Furthermore, we understand that the Treasury and the IRS intend to issue guidance providing that "foreign retirement plans" meeting certain criteria pose a low risk of tax evasion and therefore payments beneficially owned by such retirement plans will be exempt from withholding under FATCA. In addition, you have kindly asked for comments on the definition of retirement plan for this purpose and on other forms of foreign employee benefits or deferred compensation plans.

FATCA has the potential to create significant ramifications for the Canadian retirement income system. Accordingly, we welcome the steps taken by the Treasury and IRS in proposing exemptions for foreign retirement plans. Unfortunately, the proposed definition of a foreign retirement plan under Notice 2010-60 is potentially unworkable and too narrow from a Canadian perspective. As such, we set out in this letter suggestions as to how to how we believe this definition could be made more workable from a Canadian perspective.

ACPM

The Association of Canadian Pension Management (ACPM) is the informed voice of Canadian pension plan sponsors, administrators and their allied service providers. Established in 1976, ACPM advocates for an effective and sustainable Canadian retirement income system. Our members are drawn from all aspects of this industry from one side of this country to the other. They represent over 400 pension plans consisting of more than 3 million plan members, with assets under management in excess of $330 billion.

Impact of FATCA

FATCA creates a new tax information reporting and withholding regime for payments made from the US to certain foreign (including Canadian) financial institutions (**FFI**). It appears that under FATCA, Canadian registered pension plans (**RPPs**), as defined in the Canadian *Income Tax Act* (**ITA**), would be categorized as FFIs. In addition, other Canadian funded retirement savings arrangements subject to the ITA would be categorized as FFIs. Such other arrangements include: Registered Retirement Savings Plans (**RRSPs**), Deferred Profit Sharing Plans (**DPSPs**), Tax Free Savings Accounts (**TFSAs**), Retirement Compensation Arrangements (**RCAs**) and Pooled Registered Retirement Plans (**PRPPs**) (along with RPPs, these other funded retirement savings arrangements are collectively referred to in this letter as, **Canadian Retirement Arrangements**).

The FATCA reporting requirements would require the sponsors and/or custodians of Canadian Retirement Arrangements to report to US authorities on the beneficiaries of Canadian Retirement Arrangements who are US citizens. A failure to comply with FATCA's reporting requirements could result in any US investments made by or through Canadian Retirement Arrangements being subject to a 30% withholding on all such US investments.

Meeting FATCA's requirements 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 Canadian Retirement Arrangements 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 Canadian Retirement Arrangements

Under IRS Notice 2010-60, as amended by Notice 2011-34, it is noted that the Treasury and the IRS intend to issue guidance providing that "foreign retirement plans" meeting certain criteria pose a low risk of tax evasion and therefore payments beneficially owned by such retirement plans will be exempt from withholding under FATCA.

While this is good news, the proposed definition of a foreign retirement plan under Notice 2010-60 is potentially unworkable and too narrow from a Canadian perspective. For example, it is not clear under which law a foreign (ie, Canadian) retirement plan must qualify (would it be under federal tax legislation or under provincial pension benefits standards legislation). Another criteria is that it be sponsored by a foreign employer – what constitutes a foreign employer may not be clear given that many employers in Canada are US companies or are controlled by a US parent. In addition, multi-employer employer plans, prevalent in highly-unionized sectors, are often sponsored by a union for its members and thus may not meet the criteria of being 'sponsored' by an employer. Finally, there is a requirement that any US citizen participants in the foreign retirement plan be employed by the foreign employer in the country to which the plan relates – this may be too narrow given that US citizens may continue to be covered under a Canadian plan for a period of time while working outside Canada.

We believe the all Canadian Retirement Arrangements should be exempt from treatment as FFIs. Achieving a definition of "foreign retirement plan" under the intended Treasury and IRS guidance that covers all Canadian Retirement Arrangements, regardless of the sponsoring employer or citizenship of the participants, could provide a workable solution.

Given the Canadian tax regime under which Canadian Retirement Arrangements operate, the case can be made that such arrangements pose "a low risk of tax evasion", and thus should rightly fall within the kinds of foreign retirement plans the US Treasury and IRS are contemplating as excluding under its intended guidance.

For example, Canadian Retirement Arrangements are highly regulated by the Canada Revenue Agency (**CRA**) with prescribed limits under the ITA on amounts that may be contributed by members and/or employers, along with restrictions on the amount and timing of benefits that may be paid from such arrangements. Indeed, the limits applicable to Canadian Retirement Arrangements are well below the limits applicable to US based tax-assisted savings arrangements. Contributions to RCAs are an exception to this rule in that there are no precise limits on benefits or contributions; however, all such amounts contributed to an RCA, along with any earnings thereunder, are subject to a 50% withholding tax to be paid to the 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 Canadian Retirement Arrangements are included in taxable income, meaning it would eventually be captured in any tax reporting required by US citizen beneficiaries of such arrangements.

Amounts paid out of TFSAs are the exception to this; however, contributions to TFSAs are limited and are made with after-tax income and thus should not be viewed as posing a risk of tax evasion.

Defining a Foreign Retirement Plan

Ideally, the definition of foreign retirement plans should have a schedule listing the kinds of Canadian Retirement Arrangements as defined under the ITA (as noted and listed above) that meet the criteria for a foreign retirement plan, without reference to other criteria such as the sponsoring employer or citizenship of the participants. Such a schedule could list retirement arrangements from other jurisdictions that would also be recognized by the US Treasury and could be updated as new arrangements come to the attention of the US Treasury. Such a list, as opposed to a generic definition alone, would also make it much easier for the plan (or its custodian or funding agent) to identify or document itself to a withholding agent to verify its compliance with the definition of a foreign retirement plan.

It may be possible to still use a generic description of a foreign retirement plan in conjunction with a schedule listing the identified arrangements. For example, a foreign retirement plan could be defined as:

> In addition to the foreign retirement plans as may be identified on Schedule "X", any funded retirement or savings vehicle recognized under the foreign tax laws to which it is subject having the following characteristics: (i) contributions to such vehicle are limited by the foreign tax laws to which it is subject; (ii) benefits payable from such vehicle are limited by the foreign tax laws to which it is subject; *or* (iii) amounts received by the participant from such vehicle are included in taxable income under the foreign tax laws to which it is subject.

In our view, any arrangements meeting these constraints under applicable foreign tax legislation should not be subject to further criteria, such as the sponsoring employer or participant citizenship, in order to be exempt from the application of FACTA. As noted above, such additional criteria are unworkable from the a Canadian perspective given the nature of Canadian Retirement Arrangements. And more generally, we believe it would be unworkable for a plan (or its custodian or funding agent) to identify or document itself to a withholding agent as meeting any such additional criteria.

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We thank you for your time in reviewing our comments. We would be pleased to provide further assistance or explanation as required.

Yours sincerely,

Bryan Hocking
Chief Executive Officer, ACPM