

January 25, 2012

The Honourable James M. Flaherty
Minister of Finance
Department of Finance Canada
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Email: jflaherty@fin.gc.ca

Dear Minister:

Foreign Account Tax Compliance Act (FATCA)

I am writing to you on behalf of the ACPM, to express our concerns on the ramifications FATCA may have on the Canadian retirement income system. In particular, the reporting and withholding requirements under this US legislation present significant privacy concerns and increased administrative burdens and costs on Canadian retirement plan sponsors and custodians. At a time when governments across Canada are working to reduce pension costs and expand pension coverage, the detrimental effects of FATCA may only serve to negate any such efforts.

We understand that you and your officials have been in discussions with US Government officials concerning the impact of FATCA on Canadian financial institutions. We hope that by providing you with our concerns on the impact of FATCA on the Canadian retirement income system, you will be able to raise these issues in your ongoing discussions with the US government and have Canadian Retirement Arrangements (as defined below) exempted from the application of FATCA.

We have also raised these concerns through a direct submission to the US Internal Revenue Service (copy attached).

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 along with other Canadian funded retirement savings arrangements subject to the Canadian *Income Tax Act* (eg, RRSPs, DPSPs, TFSAs, RCAs and PRPPs) (collectively, **Canadian Retirement Arrangements**) would be categorized as FFIs.

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 FACTA'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 questions as to whether sponsors and custodians of Canadian Retirement Arrangements could meet such FATCA reporting requirements while complying with 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 acknowledged that 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, it is acknowledged that 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 tax legislation or under 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 Canadian government should be advocating to the US Treasury and IRS that all Canadian Retirement Arrangements should be exempt from treatment as FFIs. In an ideal world, FATCA or its regulations should be amended so as to exclude Canadian Retirement Arrangements. However, achieving a definition of “foreign retirement plan” under the intended Treasury and IRS guidance that covers all Canadian Retirement Arrangements, regardless of such things as 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 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.



ACPM/ACARR

The Association of Canadian Pension Management

L'Association canadienne des administrateurs de régimes de retraite

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.

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We encourage the Canadian government to continue in its efforts to limit the application of FATCA on Canadian financial institutions, including working to achieve an exemption from FATCA for all Canadian Retirement Arrangements, regardless of criteria such as the sponsoring employer or citizenship of the participants. We would be pleased to provide further assistance or explanation as required.

Yours sincerely,

Bryan Hocking
Chief Executive Officer, ACPM