[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
THE CANADIAN BANKERS ASSOCIATION]

November 2, 2010

From: Hannah, Darren [DHannah@cba.ca]
Sent: Monday, November 01, 2010 4:03 PM
To: Notice Comments
Cc: Fung, Nancy
Subject: *Notice 2010-60*

Attachments: 101101 ~ CBA Submission re *IRS Notice 2010-60 ~* Revised pdf; 101101 ~ Attachment ~ ABBS Regulation.pdf; 101101 ~ Attachment ~ FINTRAC ~ Client Identification Guidelines pdf; 100519 ~ Signed CBA Comments to US on FATCA Provisions pdf; 101101 ~ Attachment ~ FCAC Publication ~ Opening a Personal Bank Account pdf

Please find attached the comments of the Canadian Bankers Association (CBA) on *Notice 2010-60*, as well as supporting documentation referenced in the comments. Also attached for reference is the CBA letter of May 19, 2010, which is referenced in the comments. Please feel free to contact me if you have any questions

Sincerely,

Darren Hannah
Director Banking Operations
Canadian Bankers Association

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November 1, 2010

John Sweeney
Office of Associate Chief Counsel (International)
CC:PA:LPD:PR (NOT-121556-10)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Mr. Sweeney:

Thank you for the opportunity to comment on *Notice 2010-60*, "Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code" ("Notice").

The Canadian Bankers Association (CBA) works on behalf of 51 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 263,400 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy, the Association also promotes financial literacy to help Canadians make informed financial decisions.

Our comments in this letter should be read in conjunction with those in our earlier letter of May 19, 2010. While we appreciate that the Notice provides insight in some areas, our review of the Notice indicates that our comments and concerns raised in that letter are still present.

The Canadian banking industry recognizes that the objective of Treasury and the IRS is to develop regulations that allow for the maximum level of compliance among foreign financial institutions (FFI) while achieving the objectives of the legislation. Canadian banks want to be able to comply with Chapter 4 but to do that, they need to have certainty that they will be able to comply with their obligations under their FFI agreements while respecting domestic law and managing their compliance burden. Our approach in this submission is to offer to the IRS and Treasury a roadmap to developing regulations by outlining the regulatory flexibilities that we would need in order to be able to comply with Chapter 4. As with our May 19 submission, this letter is intended to complement any individual submissions you may receive from CBA members.

The premise that we have used in developing these recommendations is that Chapter 4 is built on a risk-based framework. The flexibility that Treasury and the IRS offer through regulation is based on an assessment of the risk of tax evasion posed by different classes of FFIs, persons, and payments. Reducing documentation, reporting and withholding requirements for those entities, accounts, and payments that are low-risk allows both FFIs and Treasury/IRS to focus their resources where they are most likely to achieve the goals of the Treasury and the IRS. We respect that approach and the comments and recommendations below are placed in that context.

A Risk-Based Approach to Accounts

Chapter 4 clearly acknowledges that, in the area of tax evasion risk, not all accounts are created equal. Chapter 4 empowers the Secretary to exempt those accounts that present a low risk of tax evasion. In that vein, the CBA recommends that Treasury and the IRS take a tiered approach to compliance requirements based on the likelihood that the account could be used as a tool by U.S. tax evaders to shelter income or hide assets. The advantage of a tiered approach is that it allows U.S. tax authorities to better target their resources on accounts at higher risk. It would also be consistent with Section H of the Notice ("Potential Modifications to Chapter 4 Requirements Based on Availability of Information from Other Sources") which acknowledges that information may be available from other sources and that, where it is, that should be taken into account in determining compliance requirements.

Tier One – Full Exemption

From a risk-based perspective, accounts that pose the lowest risk are those that are already subject to enhanced tax information reporting under a tax-sharing agreement with the U.S. and that are held in countries that have comparable personal income tax rates. The Canada-U.S. Tax Treaty provides for automatic reporting to the IRS by the Canada Revenue Agency (CRA) of virtually all taxable income where the recipient has a U.S. address and where the CRA uncovers any financial information that may be relevant to the IRS as part of an audit. n1 More generally, the Treaty provides that

> *The competent authorities of the Contracting States [IRS and the Canada Revenue Agency] shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which the Convention applies insofar as the taxation thereunder is not contrary to the Convention.* n2

If there is additional information that the IRS feels would be relevant for the purposes of administering U.S. tax law, the Treaty also allows that "If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall endeavor to obtain the information to which the request relates in the same way as if its own taxation was involved notwithstanding the fact that the other State does not, at that time, need such information." n3 This relationship makes it virtually impossible for a U.S.-resident tax evader to use a Canadian financial account to evade U.S. income taxes and gives U.S. tax authorities an open-ended tool for obtaining information that they believe they need to enforce U.S. tax law. Moreover, Canada and the U.S. also have similar tax systems and personal tax rates. n4 The combination of the extensive information sharing associated with the tax treaty and the similar personal tax regimes means that there is little likelihood that accounts held by U.S. persons in Canada would be used as a tool for tax evasion. Providing an exemption for accounts held in countries with these arrangements and similar tax rates would encourage more countries to develop enhanced tax information sharing arrangements with the U.S., which would be an effective step towards the objective of Chapter 4, which is an improved flow of tax information.

Recommendation: Provide an exemption for all accounts (deposit and custody) held in countries that have enhanced tax information sharing arrangements with the U.S. and that have comparable personal income tax regimes.

Tier Two – Reduced Requirements

The second tier would capture accounts held in countries that have a less extensive tax exchange agreement with the U.S. and similar personal tax rates. While not as low risk as those in tier one, we believe that from a risk-based perspective, accounts in this tier present a very low risk of harbouring U.S. tax evaders since tax information is shared and there is likely to be little, if any, revenue loss to

the U.S. since these individuals would already be paying domestic tax at a rate similar to that which they would pay in the U.S. We recommend that accounts held in countries with those features be offered a reduced compliance burden by providing the following additional flexibilities.

- **Extend the application of the exclusion under section 1471(d)(1)(B)(ii) beyond depository accounts to include all types of financial accounts.** The legislation as written only seems to contemplate an exclusion for depository accounts. Presumably the treatment of depository accounts is meant to allow for the fact that depository accounts are a wide-spread product used for daily financial management. While we certainly support that view, it should also be recognized that in many countries (including the U.S, itself) investing in securities, particularly through mutual funds, has become a key component of the long-term savings strategies for middle class families. To use Canada as an example, according to Statistics Canada (the Government of Canada's national statistics agency), as of 2005, 12% of Canadian families have investments in mutual funds held outside of registered retirement savings plans (RRSPs, discussed below) with a median account size of CDN$ 24,200 (US$ 23,230). A further 10% of Canadian families held individual securities outside of RRSPs, with a median account size of CDN$ 11,600 (US$ 11,140). n5 Clearly, these are not likely to be U.S. tax evaders and the vast majority of accounts are small. We understand that U.S. officials have indicated that they are reluctant to extend the exclusion to cover all types of accounts because they are already refraining from aggregating across legal entities. We do not view the two as being in conflict. The intent of extending the exclusion to cover other financial accounts would merely be to avoid extending identification and reporting requirements to a large number of small accounts.

- **Confirm that there will be no requirement to aggregate across legal entities.** As we noted in our submission of May 19, Canadian bank financial groups operate on a universal banking model with global operations. Requiring aggregation of deposits across affiliates would make it effectively impossible to use this provision because systems are simply not sufficiently

interconnected and robust to provide that type of single-client evaluation. Legal restrictions also prevent the sharing of information between legal entities without client consent, adding yet another dimension of complexity to aggregation. Our understanding is that officials have indicated publicly that they understand this issue and do not intend to exercise the discretion they have under the legislation to require aggregation across legal entities for this purpose, which we would certainly welcome.

- **Eliminate the requirement to aggregate across accounts.** As many respondents noted to Treasury and the IRS in previous correspondence, the requirement to aggregate across accounts greatly hinders the usefulness of the minimum size exemption. Aggregation is extremely difficult to do with certainty. Issues such as accounts opened under slightly different names (e.g. an old account opened before marriage and a second one opened after marriage) and accounts opened through different distribution channels complicate aggregation. Moreover, removing the aggregation requirement would not create significant additional risk for Treasury and the IRS since, as a practical matter, it would be difficult to envision an individual opening up a series of $ 50,000 accounts in order to evade Chapter 4 reporting.

One particular complexity in account aggregation within a legal entity relates to accounts held in foreign bank branches. Financial institutions can expand internationally either by establishing a separate foreign subsidiary or, where permitted, by establishing a foreign branch. Foreign branches are exactly that – a branch of the domestic bank. Requiring aggregation of foreign branch accounts with those held by the domestic bank would introduce additional legal complexities because it would require the transfer of personal and account information across international borders for the purposes of compliance with Chapter 4. This brings into the equation the privacy legislation of the countries in which the branches are located. As well, it would require aggregation across systems often operating on different platforms, which is very complex.

These three measures combined would have the following key benefits from a compliance perspective:

- It would operationalize the policy objective of scoping out small-value savings and transactional accounts.

- It would significantly reduce the number of recalcitrant account holders. Most small account holders have little, if any, U.S.-source income that could be withheld upon, therefore compliance rates on documentation among this group is likely to be very low.

- It would reduce the compliance burden for FFIs.

Recommendation: For accounts held in countries with less extensive tax information exchange agreements with the U.S. and comparable personal income tax rates, reduce the documentation, reporting, and withholding requirements by:

- **extending the scope of the minimum account size exemption beyond depository accounts to include all types of financial accounts;**

- **confirming the intent not to require aggregation across legal entities; and**

- **remove the requirement to aggregate across accounts held in within a single entity, including aggregation of accounts held in foreign branches.**

Tier Three – More Limited Relief

The third tier would represent accounts held in countries that do not have a tax information exchange agreement with the U.S. and have tax rates substantially below those prevailing in the U.S. FFIs falling into this category would be subject to more limited relief from the documentation and reporting requirements of Chapter 4. However, even in this group, relief may be required from the requirement to aggregate across accounts because of its operational complexities.

A Risk-Based Approach to Identification of U.S. Persons

The CBA recognizes that the key objective of Chapter 4 is to identify U.S. persons who are potentially subject to U.S. tax and obtain sufficient information to assess whether there are grounds for suspicion that such persons are evading U.S. tax. Chapter 4 is relatively silent on how that is to be accomplished. We appreciate the guidance that the IRS and Treasury have offered since it provides greater insight on the mechanics of how the identification process is expected to work. It is in that

vein that we would like to offer some recommendations to help further clarify and refine the processes outlined in sections III.B.2 and III.B.3 of the guidance.

Notice Section III.B.2 ~ Individual Financial Accounts

New Individual Accounts

The Notice sets out the following five-step approach for treating new individual accounts:

1. Assess whether the aggregate balance of the depository accounts in which the individual has an interest are below the $ 50,000 threshold. Unless the FFI has elected not to apply this step, those accounts may be treated as non-U.S.

2. Of the remaining accounts, identify those where the account holder has already been identified as a U.S. person.

3. Of the remaining accounts, obtain "documentary evidence establishing U.S. or non-U.S. status of the account holders."

4. Among accounts that are not documented as U.S. accounts from step 3, "examine all other information collected in connection with the new individual financial account . . . to identify indicia of potential U.S. status."

5. Where US indicia has been identified in step 4, the FFI must obtain documentation to verify the U.S. status (or non-U.S. status) of the account holder. Those account holders who do not provide such information will be deemed to be recalcitrant.

Setting aside step 1 (comments related to which are included in the section entitled "A Risk-Based Approach to Accounts", above) and step 2, our comments below focus on steps 3 through 5.

Step 3 provides that the FFI will obtain and review "documentary evidence establishing U.S. or non-U.S. status". However the Notice has failed to clarify what types of documentary evidence can be obtained for this purpose. In the case of a new or pre-existing account with U.S. indicia such as a U.S. address or U.S. place of birth for the account holder, the Notice specifically indicates that for an account holder to establish non-U.S. status, they must provide a non-U.S. passport or other similar evidence of non-U.S. citizenship. This suggests that in other circumstances, additional forms of

documentary evidence may also be acceptable. Flexibility in this area is necessary since the practical reality is that many people may not have a passport. For example, in the case of Canada, 41% of Canadians do not have a passport. n6 By contrast, 96% of Canadians have a bank account. This suggests that, in effect, 40% of bank account holders in Canada could not produce a Canadian passport if asked to do so.

The CBA recommends that rather than trying to prescribe new account opening documentation requirements, FFIs should be able to rely on the documentary evidence that they normally obtain as part of their account opening process both for individuals and entities. For both individuals and entities, account opening is driven by the need to "know your client". The purpose of know-your-client rules is not to establish the nationality of individuals but rather to simply establish that they are who they claim to be and where they live, and document that the institution has done so. Therefore, identification requirements are focussed on meeting that objective.

- For individuals, account applicants are typically asked to produce at least two pieces of identification, at least one of which is issued by the federal or provincial government (it may or may not be photo ID depending upon the type of identification). Since the intent is to verify their identity and residency, it may (e.g. passport) or may not (e.g. driver's license) verify their nationality.

- For entities, account applicants are required to provide personal information (name, date of birth, address, and occupation) for each principal owner (25% or more equity interest in the business) along with identification to verify this information, and similar information for anyone who is an authorized signing officer of the entity.

These measures are driven in part by requirements set out in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, and, in the case of banks, supplemented by ID requirements in *Access to Basic Banking Services Regulations.* Attached are guidelines on compliance with federal identification requirements (see page 26 for details on ID requirements) and a copy of the *Access to Basic Banking Services Regulations.* No present law in Canada requires banks to ask for proof of citizenship with the result that customers could not be compelled to provide this information. Therefore, exceptionally rigid requirements for documentation of citizenship at the time of account opening will likely result in one of two outcomes -- either FFIs will not be able to meet the terms of the FFI agreement or they will be saddled with a very large number of recalcitrant account holders. Neither outcome is in the interest of the FFI or the U.S. government.

Recommendation: Revise step 3 to clarify that FFIs are to review the documentary evidence they have obtained as part of their normal account opening procedures and assess whether it establishes the account holder as a U.S. person.

After reviewing the information obtained during account opening, if an account is not documented as a U.S. account, the Notice requires that the FFI "examine all other information collected in connection with the new individual financial account . . . to identify indicia of potentia U.S. status" (step 4) and, if any is found, "obtain certain documentation [to verify U.S. or non-U.S. status] or treat the account holder as a recalcitrant account holder" (step 5). Among the indicators of potential U.S. status the Notice includes "an 'in care of address', a 'hold mail' address, a P.O. address that is the sole address on file with the account holder." While the other indicia listed have a clear linkage to potential U.S. status, it is difficult to see how a post office box can be viewed as an indicator of U.S. status. People choose to direct their mail to a post office box for a variety of reasons. Of particular concern are residents of rural Canada. In rural areas, addresses are often general rather than specific – an address will often simply be the name of the recipient, a rural route number that designates which mail route the recipient lives on, and the name of the community where the post office is situated. Depending upon how item (iv) is interpreted, it could be construed to capture rural addresses, which would essentially mean that many rural Canadians are deemed to have indicia of U.S. status.

Recommendation: Remove item (iv) from step 4. At a minimum, clarify that item (iv) does not capture mailing addresses where a specific street name and number are not applicable.

Step 5 requires that, where there is potential indicia of U.S. status related to an account identified as a non-U.S account, FFIs obtain from applicants a completed Form W-8BEN and/or documentary evidence, which for this purpose is described as "a non-U.S. passport or similar evidence of non-U.S. citizenship". The current version of the Form W-8BEN is very complex. Our concern is that presenting such a complex form to applicants for completion is a recipe for creating recalcitrant account holders since (1) Canadian banks cannot compel clients to complete them as a condition of opening the account, and (2) many applicants with no U.S. source income may simply choose to ignore the request since they will have little incentive to put themselves through the difficulty of filling out the Form W-8BEN. A simpler form may reduce resistance among applicants and therefore reduce the number of recalcitrant account holders.

An even more effective alternative that would further reduce the number of recalcitrant account holders would be to permit FFIs to ask applicants at the time of opening to confirm their non-U.S. status, record that, and rely upon it for the statement. While banks cannot compel clients to answer that question, the refusal rate to a simple question is likely to be lower than the refusal rate associated with being presented with a form. Therefore, relying on a verbal statement in response to a question would greatly reduce the number of recalcitrant account holders that will otherwise result from this process.

Recommendation:

- **The IRS should work with FFIs to develop a simpler**

form for establishing non-U.S. status as an option in place of the current Form W-8BEN.

- **Treasury and the IRS should confirm that where FFIs obtain a Form W-8BEN as additional documentation to confirm non-U.S. status, there should be no requirement to reconfirm such status by renewing the Form W-8BEN if the FFI has no indication that circumstances have changed.**

- **FFIs should have the option of obtaining verbal confirmation of non-U.S. status in place of documentary evidence or a completed form.**

Preexisting Individual Accounts

The issue of how to address pre-existing account holders was discussed at length in the CBA submission of May 19 and in the joint Institute of International Bankers/European Banking Federation submission dated April 23, 2010. We were pleased to see that some operational elements of the recommendations made therein, such as the use of automated searches of existing electronic databases to identify potential U.S persons, was incorporated into the Notice. However, we were very disappointed that the key plank of that proposal was not incorporated -- that for existing accounts, FFIs should not have to go back to clients to verify their non-U.S. status if there are no indicia on hand to suggest otherwise. We appreciate that the Notice indicates that if the FFI does not have to go out to the client if it has “collected, reviewed, and maintained documentary evidence sufficient to establish the U.S. or non-U.S. status of such accounts” and stored it in an electronically searchable format; however, the reality is that supporting documentation is often not kept on file, and certainly not in an electronically searchable format. Often a notation of the type of identification that is obtained at the time of account opening was recorded but a copy of the identification is not kept. Moreover, no Canadian law requires that institutions record date of document issue or expiry. Therefore, no record of this would exist. In addition, privacy commissioners in Canada are averse to FFIs retaining copies of documentation, preferring instead that documents be inspected and customer information recorded. Therefore, the reality is that the guidance is effectively asking FFIs to go back out to most clients who are not exempt within five years to verify their non-U.S. status. While we appreciate the necessity of the requirement to verify large accounts (i.e. exceeding $ 1 million) since these are more material from a financial perspective, without an effective minimum exemption threshold, such as $ 50,000 measured on a per-account basis, Canadian bank financial groups would be required to document roughly 200 million accounts of under $ 50,000 worldwide. That will almost certainly result in a huge number of recalcitrant account holders since most clients with no U.S.-source income will have little incentive to respond to the FFI’s request for documentary evidence to verify their non-U.S. status.

Recommendation:

- **Remove the requirement to assess all pre-existing accounts with balances exceeding the $ 50,000 threshold within five years.**

- **Clarify that a notation of the type of identification collected at account opening is sufficient to be considered as "maintaining documentary evidence" and eliminate the need for the notation to include date of document issue or expiry.**

Notice Section III.B.3 – Financial Accounts Held by Entities

The Notice sets out a process for determining which entities are U.S. entities, foreign financial entities and foreign non-financial entities. The approach that has been taken is to, in effect, assume that all foreign entities that are not identified as U.S. entities are foreign financial institutions (FFIs) unless there is documentation on file (or they can produce documentation) to verify that they are engaged in "active trade or business". If they cannot/will not do so, they will be deemed to be non-participating foreign financial institutions and be subject to withholding. As a practical matter, this would seem to be a recipe for creating recalcitrant account holders. The vast majority of banks' business clients are small businesses. There is little likelihood that many of these firms will have any material U.S.-source income on which to withhold. Therefore, they will have very little incentive to comply.

Several submissions made previously to Treasury and the IRS on Chapter 4 implementation, including those made by the CBA and the IIB/EBF, discussed at length the issue of identifying pre-existing entity accounts. We were pleased to see that some of that thinking, in particular, that the Notice has adopted the principle of using searchable electronic databases to identify U.S. entities. However, step 4 then requires FFIs to "examine the entity's account file for evidence that the entity is engaged in an active trade or business" and cites examples of evidence such as financial statements, information on persons employed, receivables and so forth. Much of the information of this type would only be collected if the business client was also applying for credit. While Canadian banks have 2.7 million business deposit accounts, they only have 1.2 million business borrowing accounts. This suggests that in over half of the business accounts, it is unlikely that they will have much information about the finances or operations of the business beyond a business license or trade name. Even of the 1.2 million borrowing accounts, the vast majority are small businesses – 76% (915,000) have authorized credit of less than $ 100,000 and over half (625,000) are micro-borrowers with authorized credit of under $ 25,000. A large proportion of lending to small and medium-sized enterprises (SMEs) is currently done using credit scoring, so in the case of many SMEs, a credit score may be virtually the only element of current financial information in the file. Noting the figures above, many of the 915,000 accounts mentioned above would fall into this category and virtually all of the 625,000 microcredit accounts would be captured here. We note that the guidance indicates that "Treasury and the IRS are also considering permitting FFIs to rely in part on information obtained from third-party credit databases" (p. 38).

Recommendations:

- **Allow FFIs to rely on third party credit databases to assess whether entities are engaged in an active trade or business.**

- **For small to medium-sized enterprises, FFIs should be able to rely solely on a business license or trade name as evidence of engagement in an "active trade or business".**

If an entity has been identified as a non-financial foreign entity (NFFE) with any U.S. owners, the Notice indicates that FFIs are required to report to the IRS both the names, addresses and taxpayer identification numbers of all U.S. owners of the entity as well as financial information about the entity itself (account balance, gross receipts and withdrawals or payments from the account). While the U.S. owners are U.S. persons subject to U.S. tax law, the entity itself is not, therefore, it is very questionable whether the FFI can provide this type of information to the IRS since the FFI has no basis for making such a transfer.

Recommendation: In the case of entities with substantial U.S. owners, remove the requirement to transfer financial information related to the account of the U.S-owned foreign entity to the IRS.

Recalcitrant Account Holders

One area where the Notice had offered very limited clarification, and raised new questions, is with respect to the treatment of recalcitrant account holders.

Pass-Thru Payments

Chapter 4 requires that FFIs withhold on recalcitrant account holders. The Notice acknowledges that a number of parties (including the CBA) have expressed concern about the difficulty in trying to assess whether a payment is "attributable to" a withholdable payment, and therefore subject to withholding, and asks for views on how to make such a determination. As we noted in our letter of May 19, payments made into a bank account often provide little insight about whether or not they constitute withholdable payments. As a simple example, a cheque drawn on a U.S. bank and deposited into Canadian bank account is clearly a U.S.-source payment but the institution accepting it on deposit has no way of knowing whether or not it is a withholdable payment because it does not know what the payment is for. Interest paid on deposit accounts poses a similar challenge. Where interest is paid on deposits held by a recalcitrant account holder, the bank has no way of assessing how much of the interest may be attributable to income accruing to the bank by way of U.S.-source payments. Interest is simply an expense of the bank that it pays to depositors for the use of their funds.

Recommendation: Clarify the definition of pass-thru payment to include only payments that are known by the institution to be directly-attributable to withholdable payments.

Termination of FFI Agreements

The Notice requests comments on what should be done to address "long-term recalcitrant accounts, including whether, and under what circumstances, Treasury and the IRS should consider terminating FFI agreements due to the number of recalcitrant account holders remaining after a reasonable period of time." Embodied in this statement are two key issues, each of which is addressed below.

- *Defining a "long-term recalcitrant account holder"* – In making this definition, one needs to separate out the concept of a recalcitrant account from that of a dormant account. Banks around the world constantly deal with the problem of dormant accounts, which are accounts on which there is no activity and where the account holder cannot be contacted either because they have moved without closing their account or, in some cases, because they are deceased. It certainly would not be in the interest of either the IRS or the FFI to penalize the FFI because of dormant accounts that have indicia of U.S. status because the FFI is powerless to address the situation. To reconcile this situation, the term "long-term recalcitrant account holder" should be clarified to only capture active accounts.

- *Determining whether to terminate an FFI agreement* – In making this judgement, one needs again to consider a risk-based approach. As noted earlier, the risk that accounts located in a country with a tax-information sharing arrangement with the U.S. and with comparable personal tax rates are harbouring U.S. tax evaders is very low. Terminating an FFI agreement on the basis of a significant number of such accounts would be an exceptional and unwarranted step from a risk-based perspective. It should also be noted that the laws of some countries will not permit accounts to be terminated solely for failure to comply with FATCA information requirements. While we have documented the "obligation to serve" requirements in Canada, it should be noted that our research suggests that other countries such as France, Norway, and Ireland have their own variants of "obligation to serve"

requirements. n7 It would not be in the interest of either the FFI or the IRS/Treasury to terminate agreements in such circumstances because termination would have a cascading effect on the compliance of the rest of the financial group. Incorporating the "tiering" concept into the decision to terminate would also further encourage countries to become more tax-transparent with U.S. authorities.

Recommendations:

- **Clarify that a long-term recalcitrant account holder is a recalcitrant account holder who has not clarified his/her U.S. status for an extended period of time but who continues to actively use his/her account.**

- **Define the "reasonable steps" that an FFI should take to try to remediate recalcitrant accounts. Clarify that "reasonable steps" are limited to those that an FFI can take within the bounds of domestic law. Beyond that, it must be recognized that FFIs have little control over a recalcitrant account holder to force them to provide information.**

Other Issues

Retirement Plans

The Notice highlights the special case of "retirement plans" as being a class of entity that technically falls within the definition of a foreign financial institution but that poses a low risk of tax evasion. The CBA strongly concurs with that assessment, but believes that the parameters that the IRS and Treasury propose to use to determine which retirement plans are exempt is too restrictive. The Notice indicates that this exemption will extend only to employer-sponsored retirement plans. As noted in both the May 19 CBA submission and the June 30 Royal Bank of Canada submission, the Government of Canada, like the U.S. government, has developed individual, registered savings plans that are designed to help middle-class individuals provide for their retirement as well as other long term financial needs. In the U.S., the Government has established Individual Retirement Accounts (conventional and Roth) to encourage private retirement savings; in Canada, the government has established Registered Retirement Savings Plans (RRSPs) and Registered Retirement Income Funds (RRIFs). The Canada-U.S. Tax Treaty recognizes the similarity of the products, both in design and intent, and classifies all of them as pensions for the purposes of the Treaty.

In addition to RRSPs, the Government of Canada has also created tax-advantaged registered savings products to help Canadian residents achieve other socially desirable objectives such as saving for

education and providing financial assistance to people with disabilities ~ Registered Education Savings Plans (RESPs), Registered Disability Savings Plans (RDSPs), as well as the general-purpose Tax-Free Savings Accounts (TFSAs). These are registered with Canadian tax authorities and are targeted at middle-class Canadian residents, and therefore pose no risk of being used as tools for U.S. tax evasion but do serve a very important public policy objective shared by both of our Governments.

While these registered retirement and savings vehicles are typically not employer-sponsored, they are government-established savings and pension plans that are subject to extensive domestic documentation and reporting requirements, including registration of the plan owner and annual reporting to the Canada Revenue Agency of key financial information including net contributions and withdrawals from the plan and, in the case of TFSAs, reporting of all transactions made on the account. Therefore, they are highly unlikely to be used as a tool for tax evasion by U.S. persons. In addition, eligibility and funding rules make them virtually impossible to be used as a tax evasion vehicle.

- RRSP contributions are capped at the lesser of 18% of income or a prescribed annual limit ($ 22,000 for 2010) and must be converted into a retirement income vehicle (typically an RRIF) by age 71. Overcontributions are subject to penalties by the Canada Revenue Agency.

- RRIFs are subject to annual minimum withdrawal requirements so tax cannot be indefinitely deferred.

- Annual TFSA contributions are capped at $ 5,000 (indexed to inflation annually after 2009). Accidental Overcontributions are subject to a penalty of 1% of the overcontribution per month by the Canada Revenue Agency, and deliberate overcontributions are subject to a 100% penalty.

- RDSPs are only available to families with a dependent who has a certified disability.

- RESPs must be closed out within 35 years, are subject to a lifetime contribution cap of CDN$ 50,000 (approximately U.S.$ 48,000 ~ overcontributions are subject to a fine of 1% of the overcontribution per month) and can only be used for paying for higher education. n8
can only be used for paying for higher education. n8

Recommendation: In response to the request for comments on "whether other categories of foreign employee benefit or deferred compensation plans should be subject to the same treatment as foreign plans for Chapter 4 purposes", the CBA recommends that individual

government-registered savings products should also be exempted since they pose a low risk of tax evasion.

Privacy

The Notice requests comments on "specific situations in which foreign laws prevent the reporting of the information [required by Chapter 4], along with descriptions of steps that would be required of a participating FFI (and account holders of U.S. accounts maintained by the FFI) in order to overcome or waive any such restriction." The principal challenge associated with the reporting of information is obtaining customer consent to do so. One of the challenges of Chapter 4 is that it is constructed as an agreement rather than a requirement (albeit one with punitive consequences for failure to enter into an agreement). If it were crafted as a law then some relief may be possible since the provision of information to foreign authorities could be construed to be required by law. As it stands, if the FFI is providing the information, the customer will typically need to consent to the transfer of account information. The Office of the Privacy Commissioner of Canada (OPCC) has stated that "obtaining consent" is one of the ten principles that underlie Canadian privacy law. The OPCC elaborates on that in its compliance guide for private businesses by stating that private businesses must:

- *"Inform the individual in a meaningful way of the purposes for the collection, use or disclosure of personal data.*

- *Obtain the individual's consent before or at the time of collection, as well as when a new use is identified."* n9

The reality is that this consent very often may not be forthcoming.

While it is difficult to envision how an all-encompassing work around can be constructed to address this, it once again points to the importance of examining issues related to Chapter 4 from a risk-based perspective. Smaller accounts, especially those held in countries with tax information sharing arrangements and similar personal tax rates, pose little risk of loss to the U.S. Treasury but can generate huge compliance and reputational risks for FFIs. Therefore, extending the exemption of small accounts from FATCA documentation and withholding requirements to cover all financial accounts, and making it simpler to implement by relaxing the aggregation requirement, would alleviate (but not completely remove) the compliance challenges created by privacy laws.

Account Closure

A strict reading of the language in Chapter 4 suggests that there are two classes of recalcitrant account holders: those who are U.S. persons but refuse to consent to having their financial information provided to U.S. tax authorities, and those whose national status cannot be determined based on the information provided. The Notice, however, makes no such distinction but rather seems to define a recalcitrant account holder as an account holder with indicia of U.S. status who refuses to verify

his/her U.S. or non-U.S. status either by filling out a Form W-9/W-8BEN or by providing a non-U.S. passport. The Notice makes it clear that FFIs are obligated to withhold on recalcitrant account holders but is silent on the issue of account closure. We are unclear about how that silence is to be interpreted. In the absence of a clear statement to the contrary, we can only assume that the *section 1471(b)(1)(F)* requirement to close accounts of recalcitrant account holders who are identified as U.S. persons but who refuse to consent to provide their information to U.S. tax authorities stands. As we highlighted in our May 19 letter, section 448.1 of the *Bank Act* (excerpted below) along with the associated *Access to Basic Banking Services Regulations* (attached) requires that accounts be made available to all Canadian residents (citizens or otherwise) who provide very basic identification. Therefore, it is effectively impossible for Canadian banks to meet the account closure requirement because there is nothing prohibiting the individual from simply re-opening an account.

> 448.1 (1) Subject to regulations made under subsection (3), a member bank **shall**, at any prescribed point of service in Canada or any branch in Canada at which it opens retail deposit accounts through a natural person, open a retail deposit account for an individual who meets the prescribed conditions at his or her request made there in person.

For information, attached is a plain-language publication provided by the Financial Consumer Agency of Canada (the Government of Canada's financial services consumer regulatory agency) describing the account opening requirements.

As we indicated in our May 19 letter, flexibility must be afforded to FFIs in jurisdictions that have "obligation to serve" legislation. No FFI can be placed in a position of having to violate domestic law in order to comply with Chapter 4. In the long-term, that is simply not a sustainable position since the conflict will inevitably come to a head at some point. It is the interest of all parties that some flexibility be afforded to address these unusual circumstances and that alternatives be considered that would achieve the objectives of the Treasury and the IRS.

Recommendation: Provide relief from the *section 1471(b)(1)(F)* requirement to close accounts of recalcitrant account holders in instances where it conflicts with domestic law.

Conclusion

In closing, I would like to reiterate that while the issues raised and the recommendations included in this letter are important for all Canadian banks, this should not be considered to be exhaustive treatment of the issue. With legislation as all-encompassing as Chapter 4, it is impossible to undertake an exhaustive treatment of the issue in the short amount of time that has passed since passage of the legislation and the release of the Notice. The CBA is continuing its analysis of the legal implications of compliance with Chapter 4. We anticipate that we will provide follow-up information to Treasury and the IRS on some of the issues raised in this letter as well as on other issues that may arise during the regulation-making process. In addition, individual Canadian banks may have additional issues

that they would like to raise with the IRS and Treasury based on their particular business practices and systems as they undertake their analysis of the legislation. Chapter 4 is a risk-based statute and it is through that lens that decisions should be made about administration. We have provided above a risk-based framework that we believe would help Treasury and the IRS meet the objectives of the legislation while concurrently supporting the broader policy objective of achieving greater tax information transparency.

The CBA and its member banks would appreciate the opportunity to meet with the Treasury and the IRS as an industry to discuss our proposal and issues. My staff will contact your office shortly to follow up.

Sincerely,

[signed]

Attachments

FOOTNOTES:

n1

Includes the following income documentation: Statement of amounts paid to non-residents (NR4), Statement of Fees, Commissions, or other amounts paid to non-residents for services rendered in Canada (T4A-NR), Employment Income (T4), Statement of Pension, Retirement, Annuity and Other Income (T4A), Statement of Old Age Security (T4(OAS)), Statement of Registered Retirement Savings Plan Income (T4RSP), Statement of Income from a Registered Retirement Income Fund (T4RIF), and Statement of Investment Income (T5).

n2

Canada-U.S. Tax Treaty Article XXVII(1), “Exchange of Information”.

n3

Canada-U.S. Tax Treaty Article XXVII(2), “Exchange of Information”.

n4

The OECD Tax Database indicates that the combined personal income tax rate at the average wage in the United States is 22.4% and in Canada is 22.8% (http://www.oecd.Org/dataoecd/44/3/1942514.xls) The combined top marginal personal

income tax rate is 41.7% in the United States vs. 46.4% in Canada. (http://www.oecd.org/dataoecd/46/18/2506453.xls)

n5

Statistics Canada, *The Wealth of Canadians: An Overview of the Survey of Financial Security 2005.* December 2006. p.14.

n6

Source: Passport Canada.

n7

In Ireland, the Government made provision of a basic bank account to all residents a requirement of the banking recapitalization program. Belgium and France have legislation providing residents with a right to a bank account. For more details, see European Commission, *Ensuring Access to a Basic Bank Account.* (http://ec.europa.eu/internal_market/consultations/docs/2009/fin_inclusion/consultation_en.pdf)

n8

There is some limited flexibility that allows accumulated contributions to be transferred to an RRSP or returned to the contributor if the child opts not to attend a college or university.

n9

Office of the Privacy Commissioner of Canada, *Canada's Personal Information Protection and Electronic Documents Act: A Guide for Businesses and Organizations* (September 2009). P. 9.