

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
THE INVESTMENT FUNDS INSTITUTE OF CANADA]

November 1, 2010

Mr. John Sweeney
Office of Associate Chief Counsel (International)
CC:PA:LPD:PR(NOT-121556-10), Room 5203
Internal Revenue Service (IRS)
PO Box 7604, Ben Franklin Station
Washington, DC 20044
E-mail: Notice.Comments@irs.counsel.treas.gov

Dear Mr. Sweeney:

Re: Comments on *Notice 2010-60* – “Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code”

On behalf of The Investment Funds Institute of Canada (“IFIC”) and its members, I thank you for the opportunity to provide our comments in respect of the Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code (“Notice 2010-060”).

IFIC is the national association representing Canada’s investment funds industry. Our members comprise investment fund managers, fund distributors and organizations that provide services to the investment fund industry (e.g., legal and accounting firms). Funds offered by IFIC members are typically structured as a trust or corporation, the interests in which are sold through retail distribution channels, that is, through dealers that may be related to or independent of fund managers. These funds typically publish financial statements on a semiannual basis and the net asset value (NAV) per unit or share on a daily basis. As of September 30, 2010, there were 2,406 mutual funds in Canada, with estimated total assets under management of Cdn \$ 691.5 billion.

IFIC submits this letter to assist the U.S. Department of Treasury and Internal Revenue Service (“IRS”) (hereinafter collectively referred to as the “Treasury”) in developing guidance to implement, in respect of investment funds, the Foreign Account Tax Compliance Act (“FATCA”) provisions enacted as part of the Hiring Incentives to Restore Employment Act (“HIRE Act”). IFIC also responds to the preliminary implementation guidance provided in *Notice 2010-60*, 2010-37 I.R.B. (September 13, 2010). We hope that our comments will provide relevant information regarding our industry and that, with this information, Treasury’s guidance to implement the FATCA provisions may be updated to provide improved direction on when the provisions should and should not apply, and how implementation may be shaped to ensure that resources are steered towards areas where there are greater risks of U.S. tax evasion. We believe that the framework found within Internal Revenue Code (IRC) *section 1471-1474* can be interpreted to provide relief from the FATCA provisions in situations where there is a low risk of tax evasion by United States persons.

Outline of Comments

The focus of our submissions ~ elaborated on in detail in the attachment to this letter ~ is briefly summarized as follows.

- First, investment funds resident (domiciled) in Canada should come within the scope of certain provisions of the Code that provide some relief from FATCA. There are two principal grounds for that relief:
 - The equity interests in Canadian investment funds (i.e., the units or shares of the fund) should be considered to be “regularly traded on an established securities market”. Thus, those interests in the funds would be excluded from the definition of “financial account”. Accordingly, as there will not be any financial accounts, there would not be any “United States accounts” and the funds should be classified as “deemed-compliant foreign financial institutions” (“deemed-compliant FFIs”). IFIC seeks confirmation from Treasury that this would be the case.
 - Payments made to Canadian investment funds would pose a very low risk of tax evasion. An informal survey conducted by IFIC indicated that approximately 99 percent of investors in most Canadian investment funds are residents of Canada. These survey results are supported by the fact that the regulatory regime in the U.S. generally requires registration to distribute units of Canadian investment funds in the United States, with certain limited exceptions. Therefore, either as part of the guidance to be provided by Treasury or through the Regulations, IFIC requests that certain investment funds be treated as a class of persons that pose a low risk of tax evasion. Accordingly, such funds would not have to enter into a full-fledged FFI agreement. IFIC proposes a definition of “widely held investment plan” for consideration by Treasury that can be incorporated into the guidance or Regulations, as the case may be, for this purpose. This definition would not be country-specific, but rather could be applicable to funds in any country.

- Second, there are a number of classes of persons holding units of Canadian investment funds that pose a very low risk of tax evasion. If the guidance to be provided by Treasury or the Regulations were to treat such persons as posing a low risk of tax evasion, the administrative and information systems burden of complying with FATCA would be more proportional to FATCA's potential financial benefit to the Treasury. It would also reduce, we believe, investment funds' and the Treasury's administrative costs associated with monitoring a significantly greater number of FFIs and account holders. We estimate that 12 million people living in Canada hold mutual funds. We seek the Treasury's approval of these additional classes of persons, referenced below, as persons that pose a low risk of tax evasion.
- Third, we would like clarification regarding the party responsible for FATCA compliance in certain situations, and point out some other areas of legal and practical concern.

We have the following specific recommendations and comments for Treasury to consider under the FATCA provisions:

1. Equity interests in investment funds resident in Canada should be excepted from the definition of "financial account" within the meaning of section 1471(d)(2)(C), and thus such investment funds may be deemed-compliant FFIs under *section 1471(b)(2)(A)*. IFIC understands that these investment funds would have to comply with such procedures as the Treasury may prescribe, such as some sort of self-certification or audit procedure, to ensure that such institutions do not maintain United States accounts.
2. IFIC proposes that investment funds resident in Canada be regarded, pursuant to *section 1471(f)(4)*, as a class of persons that pose a low risk of tax evasion and, accordingly, would not have to enter into a full-fledged FFI agreement. Not all Canadian resident investment funds would qualify for this treatment. IFIC proposes a definition of "widely held investment fund" that would so qualify, which

would not be limited or specific to Canadian investment funds, for consideration by Treasury.

3. IFIC requests relief from FATCA in respect of the classes of persons or financial accounts described below. In each case, the rationale for requesting such relief is that the class of person or financial account, as the case may be, poses a low risk of tax evasion relative to the compliance burden associated with such person or account for the funds and the IRS. Some of our submissions are grounded in the Code and others relate to the guidance to be provided by Treasury and include our responses to specific requests for comments contained in *Notice 2010-60*.

a. We recommend that the de minimis exception provided in *section 1471(d)(1)(B)* should be broadened from “depository accounts” to include all “financial accounts”, including interests in investment funds, and that the \$ 50,000 de minimis exception, or whatever higher amount that may be agreed to, apply in respect of all financial accounts (i.e., including all mutual fund investments) held by a person with a single legal entity, excluding those financial accounts already excepted as foreign retirement plans (see 3.b below);

b. We seek confirmation that Canadian government-sanctioned “registered retirement savings plans” (“RRSPs”) and “registered retirement income funds” (“RRIFs”) come within the definition of “individual retirement plan” in *section 1473(3)(c)* and thus would be excluded from the definition of “specified United States person”. In the alternative, the class of foreign retirement plans described in *Notice 2010-60* that are considered low risk should be expanded to include RRSPs and RRIFs, which would then be excepted under *section 1471(f)(4)*;

c. While there are certain small family trusts that could be deemed compliant under *Notice 2010-60*, there are also other fiduciary-type plans that similarly pose low risks of tax evasion and should be excepted under *section 1471(f)(4)*, or treated as non-financial foreign entities (NFFE) excepted under *section 1472(c)(1)(G)*; and

d. Individuals who reside in the U.S. for a period greater than 183 days per year (frequently known as “snowbirds” when from Canada), who claim “closer connection” status to another country under an income tax treaty with the United States, and who are properly documented for purposes of chapter 3 and 61 of the IRC, should be exempt from specified United States person status under *section 1473(3)*.

4. IFIC requests clarification of *Notice 2010-60* that, to the extent that fund units/shares are sold through custodians or brokers, it is the intermediary custodian or broker which has the closest relationship with the client that is the FFI responsible for identifying and reporting any U.S. accounts with regard to these units/shares.

5. Regarding pass-thru payments, an FFI will be required to deduct and withhold a tax equal to 30 percent of any such payment made to a recalcitrant account holder. It was indicated in *Notice 2010-60* that comments have been previously made regarding the difficulties in determining whether a payment is “attributable to” a withholdable payment, We would like to explain the specific difficulties for this withholding requirement by Canadian mutual funds.

6. In the context of legal issues, the requirement that our members provide information may contravene Canada’s Personal Information Protection and Electronic Documents Act (“PIPEDA”) and substantially similar legislation in the provinces of Quebec, Alberta and British Columbia. In addition, mutual funds may be prohibited from closing any existing accounts of U.S. persons pursuant to the contract entered into with such account holders.

7. We continue to review a number of areas of operational concern.

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It is generally expected that it would take our members 18 months or more to put in place the systems and procedures necessary to comply with FATCA. We therefore hope that provision will be made to ensure that the required systems and operational changes can be made in a commercially reasonable time frame by requesting that two years after the Regulations have been enacted and all guidance published be made available for this purpose.

Attached is more detailed discussion of our request for relief and/or comments regarding the guidance to be provided by Treasury in respect of FATCA.

We would very much appreciate an opportunity to meet with the Treasury and the IRS to elaborate on our concerns and answer any questions that you may have; we may have additional comments at that time. We will call shortly to obtain an appointment and if you would like clarifications in the meantime, please do not hesitate to contact Barb Amsden, Director, The Investment Funds Institute of Canada (bamsden@ific.ca; 1 (416) 309-2323).

Yours sincerely,

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FOOTNOTES:

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References to the Internal Revenue Code of 1986, as amended (“IRC” or the “Code”), unless otherwise indicated.