

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
THE INVESTMENT TRUSTS ASSOCIATION, JAPAN]

November 1, 2010

Internal Revenue Service
CC:PA:LPD:PR (NOT-121556-10)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Comments on Foreign Account Tax Compliance Act Provisions

Dear Sir/Madam:

The Investment Trusts Association, Japan (“JITA”) appreciates the opportunity to provide these comments in response to *Notice 2010-60* concerning regulatory and administrative interpretation and implementation of the Foreign Account Tax Compliance Act (“FATCA”), which was enacted on March 18, 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010 (Pub. L. 111-147). The JITA comprises of 125 investment trust management companies, 19 securities companies, and three custodian banks and others, and are engaged in various activities to protect investors and to contribute to the sound development of investment trusts and investment companies.

Japanese investment trusts are managed by investment trust management companies acting as Qualified Intermediaries (“QI”s) who fulfill the U.S. reporting requirements. As we have observed the development of FATCA, we understand the purpose of the legislation; however, in light of the types of transactions and information subject to FATCA, we were concerned about certain aspects of the legislation that were expected to place a great deal of administrative burden on Japanese financial institutions including the investment trust management companies, and submitted our comments in late August. Now that *Notice 2010-60* was issued and the U.S. Department of Treasury (the “Treasury”) and the Internal Revenue Service (the “IRS”) are requesting additional comments on FATCA, we would like to request that the Treasury and the IRS duly consider the following recommendations.

Application of the Exemption

It is especially difficult for nonresident investors living outside of Japan to establish a new account at the institutions distributing Japanese investment trusts in Japan, such as Japanese securities companies and registered financial institutions (collectively referred to as “Distributor” or “Distributors”). It is often the case that business departments of these Distributors refuse to establish a new account for a nonresident investor as there are legal and tax issues that may arise as a result of opening an account for a nonresident investor. Especially, as the tax issue would also exist in the investor’s resident country, Distributors have to make an extra effort to promote an understanding of these issues to nonresident investors as they manage the investors’ accounts and, therefore, inevitably exhibits negative at-

titude toward nonresident investors in light of various compliance responsibilities associated with them.

Unlike the U.S. income tax regime for U.S. persons, income tax is generally levied through withholding tax with respect to income generated from financial assets, and a few individuals pay such tax by filing a tax return. Accordingly, the Distributors are required to maintain their investors' records for tax purposes. In light of the additional compliance cost and administrative uncertainty associated with maintaining accounts for nonresident investors, the Distributors are essentially placing some restrictions on accounts opened by nonresident investors in practice. The following are specific examples of the requirements imposed on the Distributors that maintain nonresident accounts:

(1) Income Tax Ruling 121-5 provides that investment income beneficially owned by diplomats or offices of foreign consulates are exempt from income tax withholding. Thus the Distributors are required to specifically identify and maintain records for the accounts held by such customers, and the Distributors generally restrict relationships with such customers or put special procedures in place to handle them.

(2) Section 24(1) of the Local Income Tax Act provides that the Distributors withhold local income tax from the investment income beneficially owned by the individual investors who maintain a place of abode within the local jurisdiction; however, such withholding is not required for nonresident investors. Accordingly, the Distributors are required to separately maintain records for nonresident investors for tax purposes (in order to apply withholding tax rates differently from nonresident investors), and in some cases do not accept new trades from nonresident investors.

(3) Furthermore, the Distributors generally attempt to avoid accepting a new nonresident investor because the Distributors must confirm the treaty implications with the country of nonresident investor as well as any applicable local tax law of that country and would face a significant amount of administrative burden.

(4) In some cases, the Distributors do not accept new nonresident customers, especially the U.S. resident customers (other than certain limited types of investors such as institutional investors), because they understand

they are not permitted to solicit securities transactions to nonresident customers as they are not licensed securities broker in the U.S..

As you can see in these examples, many Distributors have policies in place such that no new account is opened for nonresident investors who reside outside Japan, in order to avoid administrative burden and the necessity to evaluate foreign tax and treaty implications of the customers' transactions.

In addition, as of June 30, 2010, the total net asset balance of Japanese investment trusts is 88.3 trillion yen, including publicly offered investment trusts of 59.4 trillion yen and privately offered investment trusts of 28.8 trillion yen. Ninety-seven percent of the investment trusts are classified as open-end type, which can be issued or redeemed at any time and is similar to the mutual funds in the U.S. Accordingly, issuance and redemption of trusts are frequently recorded: during the month of June 2010, the amount of total sales was 5.2 trillion yen, including publicly offered trusts of 4.6 trillion yen and privately offered trusts of 0.6 trillion yen, and the amount of total redemptions were 4.7 trillion yen, including public offered trusts of 4.1 trillion yen and privately offered trusts of 0.6 trillion yen. As beneficial owners of the investment trusts are replaced each time the issuance or redemption of the trusts occur, it would take considerable effort to keep track of all owners and requires frequent administrative procedures that would be burdensome.

In Japan, all of the investment trust management companies have entered into QI agreements after the QI regime was implemented on January 1, 2001. These companies acting as QIs verify and maintain necessary documentation regarding the investment trusts they manage in accordance with the agreements with the IRS. In addition, Japanese trust banks acting as upstream QIs separately submit documentations regarding the investment trusts as well. Furthermore, securities companies and certain other financial institutions selling Japanese investment trusts are also acting as QIs. This means that the Japanese investment trust market is essentially comprised of QIs, and thus it is highly unlikely that U.S. person can utilize Japanese investment trusts for the purpose of tax avoidance. From these perspectives, we would like to request that Japanese investment trust management companies acting as QIs and the investment trusts issued by these companies be listed as a class of institutions as described in Sec. 1471(b)(2)(B).

Treatment of Specific Types of Investment Trusts

In addition, we believe that the following types of investment trusts particularly pose low risk of U.S. tax evasion.

1. Publicly Offered Investment Trusts

Publicly offered investment trusts are regulated in the same manner as publicly traded companies (whose debt and equity securities do not constitute financial accounts) and are required to comply with the same reporting, disclosure, and registration requirements as publicly traded companies. Such regulatory requirements are the following:

(1) The public offering of investment trusts are governed by the section 4 of the Financial Instruments and Exchange Act (the “law”) as the public offering of securities. Accordingly, the securities registration statement must be submitted to the prime minister of Japan by the issuer (investment trust management companies) pursuant to section 5 of the law.

(2) Pursuant to sections 13 and 15 of the law, the issuer (investment trust management companies) must prepare prospectus and deliver it to the investor for the public offering.

(3) Pursuant to section 24 of the law, the issuer (investment trust management companies) must prepare annual securities report and submit it to the prime minister of Japan for every accounting period. If the length of accounting period is less than six months, then the report must be prepared and submitted semi-annually.

(4) Pursuant to section 24-5 of the law, the issuer (investment trust management companies) must prepare semiannual securities report and submit it to the prime minister of Japan if the accounting period of the investment trust is 12 month.

(5) Section 193-2(2) of the law requires the financial statements of public offered investment trusts to be audited by an independent certified public accountant or an audit firm.

(6) Pursuant to section 25 of the law, these documents described above, such as securities registration statement, annual securities report, and semiannual securities report, must be made available for public inspection.

In addition to the above requirements, section 14 of the Law on Investment Trusts and Investment Companies requires that the investment report must be prepared and delivered to beneficial owners for every accounting period. In other words, publicly offered investment trusts are essentially subject to the same requirements as publicly traded companies and operated in a highly transparent environment. Furthermore, the daily fair net asset value per unit value of the investment trusts is dis-

closed to the public. We believe that publicly offered trusts possess the same level of transparency as publicly traded companies.

Because publicly offered investment trusts are subject to the same stringent registration, reporting, and disclosure requirements as publicly traded companies, and their investment units are offered for sale to the general public, it is virtually impossible to design it as tax avoidance vehicle. Accordingly, we believe that publicly offered investment trusts should be treated as posing low risk of U.S. tax evasion.

2. Investment Trusts and Investment Companies Listed on Exchanges

Publicly offered investment trusts and investment companies listed on exchanges must also meet the requirements of various securities exchanges on which they are listed. They are subject to various disclosure requirements imposed by the securities exchange, and the market price of those investment trusts are made public, and virtually possess the same level of transparency as publicly traded companies. Accordingly, we believe that investment trusts listed on exchanges should be treated as posing low risk of U.S. tax evasion, and the equity and debt interest in those trusts should not constitute financial accounts in the same manner as publicly traded securities issued by financial institutions.

3. Privately Placed Investment Trusts Owned Exclusively by Retirement Plans

Certain investment trusts are privately placed only for pension funds established under the relevant Japanese laws, and play a key role in the Japanese pension systems. As these investment trusts are integral parts of pension plans, they cannot be used as a tool to evade U.S. tax. Furthermore, we believe that these privately placed investment trusts meet the three criteria described in Section II C in the *Notice 2010-60*, and therefore should be treated as posing low risk of tax evasion.

4. Privately Placed Investment Trusts Owned Exclusively by Qualified Institutional Investors

Certain investment trusts are privately placed only for Qualified Institutional Investors as defined by section 2(3)(1) of the law which generally include Financial Instruments Business Operators and certain other financial institutions as enumerated by the section 10 of the “Cabinet Office Ordinance on the Definition in Section 2 of the Financial Instruments and Exchange Act”. Because the beneficial owner of these investment trusts are only certain types of Japanese financial institutions, the investment trusts themselves pose low risk of U.S. tax evasion.

5. Privately Placed Investment Trusts Owned by a Small Number of Investors

The privately placed investment trusts described in section 2(3)2(c) limit the number of investors to 49 or less pursuant to section 13 of the Cabinet Office Ordinance promulgated thereunder. Because the number of investors are limited, and certain other restrictions are imposed on the acquisition of interest in such trusts, we believe that these types of investment trusts pose low risk of U.S. tax evasion.

6. Privately Placed Investment Trusts with Restrictions on Transferability to U.S. Individual and Entity Investors

In case of privately placed investment trusts which has restrictions on sales to U.S. investors, whether individuals or entities, through the trust agreements and distribution agreements. We believe that these types of investment trusts pose low risk of U.S. tax evasion.

7. Privately Placed Investment Trusts sold through QIs or participating FFIs

We consider that privately placed investment trusts should not be treated as financial institutions so long as they are distributed through the Distributors that are either QIs or participating FFIs due to the inherent low risk of tax evasion through such investment trusts.

Furthermore, we believe that investment trusts and investment companies listed on exchanges do not constitute financial accounts for FATCA purposes regardless of our recommendation 2 mentioned above, because section 1471(d)(2)(C) specifically excludes the “interests which are regularly traded on an established securities market” from the definition of financial accounts.

As previously stated, the total net asset balance of Japanese investment trusts is 88.3 trillion yen, which includes the investment by publicly offered investment trusts in U.S. financial assets of 9.5 trillion yen. If the current FATCA provisions are to be implemented as they are today, the impact on the Japanese investment trusts market would be considerable, and we cannot deny the negative consequence including disinvestment in U.S. securities by the investment trust management companies and other Japanese financial institutions. Accordingly, we request that the U.S. Treasury and the IRS to consider pragmatic and fair solutions in implementing the FATCA.

Lastly, we look forward to working with you throughout the implementation of the FATCA provisions and remain at your disposal for a meeting or call to expand further on the above considerations.

Yours sincerely,

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FOOTNOTES:

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Based on the number of investment reports issued according to the study of 56 investment trust management companies, a publicly offered investment delivers about 11,590 reports to its investors as an average of 2,041 publicly offered investment trusts. This represents more than half of 3,764 publicly offered investment trusts outstanding as of June 30, 2010.