

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
RBC FINANCIAL GROUP]

September 3, 2010

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RE: Foreign Account Tax Compliance Act Provisions in the Hiring Incentives to Restore Employment Act of 2010 (“FATCA”)

Additional Comments Following Meeting of July 7, 2010

Dear Messrs. Eggert and Grinberg;

Further to our meeting with you and a representative of the Internal Revenue Service (“IRS”) on July 7, 2010, we are pleased to have the opportunity to provide additional information and/or recommendations related to the following areas.

- Assumptions applied for purposes of developing RBC’s initial estimate of costs associated with entering in agreements under *section 1471(b)* (“FFI Agreements”).
- General attributes of various types of accounts and account holders that generally pose a low risk of tax evasion.
- Background information regarding trusts and considerations related to the identification of “substantial United States owners” of a trust.

The comments in this letter do not take into account the content of *Notice 2010-60*, released on August 27. We will submit additional comments in response to the Notice in due course.

We look forward to continuing to work closely with Treasury and the IRS, both directly and through various industry associations, in connection with the development of detailed regulations and guidance that enable the provisions of FATCA to meet their stated objectives, and at the same time can be clearly understood and readily implemented by FFIs entering into FFI Agreements without being excessively burdensome.

1. Cost of Entering into an FFI Agreement ~

During our meeting, you expressed interest in receiving more information related to the assumptions taken into account when preparing our initial estimates of the costs associated with entering into an FFI Agreement.

In preparing the cost estimates, we made some basic assumptions regarding the scope of the FATCA provisions which are related to some of the issues discussed in our letter of June 30 and during our meeting, and which include the following ~

- No portion of the income paid to retail banking clients through deposit accounts or clients holding RBC or third-party retail mutual funds will be considered to be passthru payments that would be subject to withholding if paid to a recalcitrant account holder, so that it is not necessary to implement major changes to the systems on which these accounts are maintained in order to apply withholding under FATCA.
- Mutual funds that are widely-held will not be required to enter into FFI agreements nor identify unitholders that are specified United States persons or United States owned foreign entities.

If these assumptions are invalid, the cost estimates will increase significantly because of the complexity associated with making the systems and procedural changes that would be required, taking into account the issues set out in our letter of June 30.

Within each of our major business lines, we estimated costs under both “best case” and “worse case” scenarios, with the “best case” being that requirements to gather additional information to identify “United States accounts” will apply on a go-forward basis only (i.e., new procedures will only be applied for new accounts opened on or after the effective date and existing accounts would be “grandfathered”), and the “worse case” requiring that additional information also be gathered for all existing account holders.

We then estimated the costs of implementation under the following categories

- Operational and process changes, including those

impacting clients such as changes in account opening agreements, forms and procedures;

- Systems;
- Program management; and
- Employee and staff augmentation and training required to gather additional information from clients and input additional information into systems.

As we mentioned during our meeting, the estimates provided are preliminary and we will continue to refine these estimates as we gain additional information regarding the detailed requirements and analyze the impact on RBC businesses in greater detail.

What is clear from our initial estimates is that these costs, even for the “best case” scenario, will be very substantial and RBC, and no doubt other FFIs, will be making a commercial assessment of the costs and benefits of entering into an FFI Agreement, before deciding whether or not to do so,

2. General Attributes of Account Types that Represent Low Risk of Tax Evasion

In our letter of June 30, we identified a number of types of Canadian accounts and account holders that we believe represent a low risk of tax evasion and therefore should be excluded from the definition of United States account. You requested that we identify the general attributes of these types of arrangements and other arrangements which could be considered to pose a low risk of tax evasion. In this regard, we have identified the following attributes of many such arrangements.

- Arrangements exempt from withholding tax on interest and dividends under an income tax treaty with the United States.
- Arrangements subject to tax or other regulatory conditions, restrictions or supervision in the jurisdiction in which they are organized. Examples of such conditions and restrictions might include some of the following.
 - The arrangements are approved and /or registered with local regulators or authorities who monitor ongoing compliance.
 - Annual or lifetime contributions are limited.
 - The life of the arrangement is limited.

- Contributions are tax deductible but withdrawals are fully taxable.
- Contributions are not tax deductible but income and growth within the plan are tax-exempt or tax-deferred until withdrawal.
- The use of funds accumulated in the plan is restricted to certain purposes (e.g., education, retirement, disability, medical, death benefits, etc.).
- Beneficiaries of the arrangements must satisfy certain conditions (e.g., mentally or physically infirm, a student at a recognized educational institution, etc.).
- Arrangements operated by employers to administer and provide pension, retirement and other employee benefits, often designed to not only compensate employees but also increase long term motivation and retention, particularly among senior staff and executives. Attributes might include the following.
 - Stock-based employer compensation plans which hold stock of the beneficiary's employer or a corporation related to the employer and the stock is regularly traded on a recognized securities exchange or the beneficiary holds a limited percentage of the outstanding shares of the corporation.
 - Employer-sponsored arrangements where contributions are based on employment earnings (e.g. bonus deferral arrangements).
 - Beneficiaries (or "participants") of such arrangements must be an employee of the sponsor of the arrangement or a company affiliated with the sponsor.
 - The employer and the employee are dealing with each other at arm's length such that the employee has little, if any, control over the arrangement.
- Charitable organizations being entities that are

established and operated exclusively for genuine charitable purposes and that devote their resources to charitable activities which are generally regarded as providing a tangible public or social benefit.

- In many jurisdictions, charities are required to register with government or other independent bodies responsible for their regulation, must demonstrate that they meet certain conditions in order to be granted such charitable status and are subject to ongoing regulation, scrutiny or supervision to ensure that this status is maintained. In some cases, this will include scrutiny by tax or other fiscal authorities to ensure that fiscal advantages that may be available to charities are only granted to genuine cases.
- The England and Wales Charities Act 2006 provides the following list of charitable purposes which are similar to the purposes listed in *Section 501(c)(3)* of the US Internal Revenue Code and which may be useful for purposes of identifying attributes of charitable organizations that could be applied to entities worldwide.
 - The prevention or relief of poverty.
 - The advancement of education.
 - The advancement of religion.
 - The advancement of health or the saving of lives.
 - The advancement of citizenship or community development.
 - The advancement of the arts, culture, heritage or science.
 - The advancement of amateur sport.
 - The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.
 - The advancement of environmental protection or improvement.

- The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage.
- The advancement of animal welfare.
- The promotion of the efficiency of the armed forces of the Crown or of the police, fire and rescue services or ambulance services.
- Other purposes currently recognized as charitable and any new charitable purposes which are similar to another charitable purpose.

3. Trusts and the Identification of “Substantial United States Owners” of a Trust

During our meeting on July 7, you expressed an interest in receiving more information about trusts in general, as well as additional information that might be relevant to the determination of “substantial United States owners” of a trust. Below, we have provided additional information related to both areas.

i. General Background Information Regarding Trusts

Given the range of different ways in which modern trusts can be used, it is not surprising that there is no “one size fits all” definition of a trust. However, in the context of a discussion on the impact of FATCA, the following provides a reasonable general definition.

A trust is created when a person (the “settlor” or grantor) transfers legal ownership of property (the “trust property”) to another person (the “trustee”) with the intention of creating a binding obligation on that person to deal with the trust property over which he has control for the benefit of persons (the “beneficiaries”) who have equitable rights to enforce the obligation.

The following points are worth noting in the context of the subsequent discussion on the impact of FATCA on trusts.

- The settlor may be the trustee, but for the purpose of this discussion the settlor and the trustee are usually different and in the case of an offshore

trust, the trustee is often an offshore trust company or a senior trust professional employed by such offshore trust company.

- The settlor may be, but need not necessarily be, one of the beneficiaries.
- The relationship between the trustee and the beneficiaries is fiduciary and not contractual in nature. The trustee has fiduciary obligations to the beneficiaries contained in the trust document and/or in the governing law of the trust that primarily require the trustee to act in the best interests of the beneficiaries.
- Trusts may:
 - be settled during the settlor's lifetime (inter vivos) or created by will on the death of the testator (testamentary).
 - be revocable by the settlor during his lifetime or irrevocable.
 - contain fixed interests as regards to income and/or capital or be wholly discretionary.
 - provide beneficiaries' interests that are conditional.
 - name specific beneficiaries in the trust documents and/or define a broad class of beneficiaries.
 - in the international trust environment, contain provisions that allow over time for the addition, removal or exclusion of persons as beneficiaries or classes of beneficiaries.
 - contain provisions that reserve certain powers to the settlor or a named third party, or otherwise restrict the powers of the trustee.

This list is intended to provide an indication of some of the characteristics of trusts that we believe will be useful when considering the impact of FATCA and its implementation. It is not exhaustive. While some providers of trust services may have adopted "off the shelf" trust precedents over the years, many more have worked with legal and tax advisors to tailor trust provisions to meet the specific needs and circumstances of the settlor in each case. There is no such thing as a "standard" or "typ-

ical” trust which will be a significant factor in determining how professional trustees will address the impact of FATCA.

As indicated above, the trustee’s duties and obligations to its beneficiaries are fiduciary, not contractual in nature. There is a potential conflict for any trustee that itself enters into or is otherwise bound (perhaps by a parent company) by the terms of an FFI Agreement, between its contractual obligations under such FFI Agreement and its fiduciary duties to its beneficiaries. We may comment further on this aspect when we have more information regarding the detailed regulations and guidance, and the terms of the FFI Agreement.

Uses of Trusts

Because of the flexibility that trusts offer, an individual may choose to set up a trust for many different reasons and very often more than one, including but not limited to the following.

Estate and succession planning

- Passing the economic benefit of assets down the family generations to the chosen heirs at a time and in amounts or proportions determined by the settlor during his or her lifetime rather than on death.
- Avoidance of forced heirship provisions in the settlor’s home jurisdiction that might require the assets to be passed in a manner contrary to the settlor’s wishes.
- Avoidance of probate formalities and duties payable on death especially where assets held are complex and/or spread across multiple jurisdictions and/or where it is important that direct ownership and control is uninterrupted.

Provision for family dependents

- Provision for minors, including grandparents establishing trusts for the education of grandchildren.
- Provision for family members with disabilities.
- Lifestyle funding for younger family members without providing access or control of larger capital sums until they reach a predetermined age.
- Provision for spendthrift dependents even when they

become adults, while affording protection of family wealth for future generations.

- Confidential provision for illegitimate dependents or second families.

Asset protection

- Subject always to laws on defrauding creditors, protecting assets from future creditor claims and litigation.
- Pre-marital settlements designed to protect family assets in the event of future divorce proceedings.
- Addressing concerns over possible political instability and structuring to protect against possible future “nationalization” of assets.
- Preserving confidentiality over a family’s financial affairs in circumstances where there are possible threats to family security.

Holding shares in family businesses

- Holding shares in a large family business with multiple family interests enabling an equitable separation of management of the business from enjoyment of the economic benefit of ownership in circumstances where not all family members wish to or are able to participate in management of the business.

Charitable purposes

- Facilitate philanthropic objectives of high and ultra high net worth families within charitable trusts whose sole purpose is to hold assets for funding specific or general charitable activity.

Estate freeze

- Providing for future generations by settling or passing assets into trust where the current owner retains the economic interest in the current value but future growth accrues to beneficiaries in future generations.

Tax Planning

- While taxation is rarely the sole motivation for establishing a trust structure, it is almost always a factor that needs to be considered and addressed in conjunction with tax advisors.
- Taxation will normally be more of an issue where there is an international dimension to the trust structure including:
 - Holding assets in multiple jurisdictions.
 - Family members in multiple jurisdictions or moving from one jurisdiction to another.
 - Transfer of assets across borders.

Governance & Regulatory Framework of Trusts

The legal and regulatory framework applicable to the conduct of business in the trust industry varies from one jurisdiction to another but will include some or all of the following characteristics.

- **Trust Law** ~ Statutory provisions and a substantial body of case law together providing trust beneficiaries with legally enforceable rights obliging trustees to act in their best interests.
- **Financial Regulation** Regulation to license and monitor professional trustees and to ensure that they have appropriate professional qualification, experience and integrity and are “fit and proper persons” to act as trustees.
- **Anti Money Laundering (“AML”) Legislation** ~ Legislation designed to prevent or detect criminal activity being facilitated through the finance industry including through trustees, AML legislation, regulations and guidance provide the basis for defining an FFIs current due diligence requirements with respect to the identification and verification of the identity of parties to the trust, including its settlor and beneficiaries. These requirements and guidelines are discussed in greater

detail below with regards to defining a “beneficial interest” in a trust and the identification of substantial United States owners.

RBC & the Global Trust Industry

Unlike corporations, trusts are not entities subject to public registration. Given the wide range of purposes for which trusts are used, the large number and wide variety of different types of trust service providers and trustees (professional and non-professional), and the substantial and ever increasing number of jurisdictions seeking to establish trust industries of their own, it is difficult to reasonably estimate the number of trusts that may exist worldwide and the overall size of the trust market.

RBC’s Canadian and international trust businesses make it one of the largest providers of trust services in the world but given the huge diversity in the global trust industry, it is important to note that no single provider has any significant market share nor can any single provider properly represent the industry as a whole.

This is why we have sought involvement from the Society of Trust and Estate Practitioners (“STEP”). STEP is the leading worldwide professional body for practitioners in the fields of trusts, estates and related issues, with more than 14,500 members worldwide in over 66 countries and a further 3,500 students studying for one of STEP’S professional qualifications.

Nonetheless we believe that the scale and diversity of our trust operations and the types of trusts we act for qualifies RBC to comment with some authority on the matters outlined herein. The purpose of the comments in this section is to provide Treasury and the IRS with further background information about the global trust industry which RBC believes may be helpful as you develop regulations and guidance for the implementation of FATCA.

In this regard, we have provided a short description of the nature and scale of RBC’s personal trust operations representing a key part of RBC’s Wealth Management business and comprising two distinct components.

RBC’s Canadian Trust Business

Within Canada, RBC’s typical personal trust business has the following characteristics:

- Income is generally payable to a named beneficiary for his or her lifetime (often a spouse or child of the settlor/testator) and on the death of that person, the remaining capital is distributable to other named beneficiaries or a class of beneficiaries (often children of settlor/testator). Approximately 70% of our personal trusts in Canada are testamentary, meaning they arise upon the death of an individual.

- Income and capital gains are taxable in accordance with Canadian federal and provincial laws. The trust is itself a taxpayer.
- The trust is governed by the laws of one of the provinces of Canada.
- RBC as sole or co-trustee (typically with a family member or other non-professional trustee) has legal ownership of the assets and often some discretionary decision making powers over payments of income and/or capital. It is less common in Canada for payments of both income and capital to be wholly within the discretion of the trustee.
- Under Canadian tax law, trusts are deemed to dispose of their assets every 21 years, triggering capital gains tax on the assets held within the trust.
- In most provincial jurisdictions within Canada, there are laws prohibiting the accumulation of income within a trust for more than 21 years, together with laws prohibiting non-charitable trusts to continue in perpetuity without distribution of all of the assets to one or more beneficiaries.

RBC's International Trust Business

RBC's international personal trust business has its largest operating units in Jersey and Guernsey in the Channel Islands. Both jurisdictions were assessed by the International Monetary Fund ("IMF") as long ago as 2003 as having a high level of compliance with the broad range of international standards against which they were measured. Jersey was reviewed again by the IMF as recently as 2009 and placed in the "top division of international finance centers" including those in the G20 and EU, and recognized for the "transparent and accountable manner" in which its finance industry is conducted. RBC also operates its international trust business in the Cayman Islands, Bahamas, Barbados, the U.S., United Kingdom, Switzerland and Hong Kong.

The vast majority of trusts in the international trust business are inter vivos and while some have fixed entitlements as regards income and/or capital, the majority are wholly discretionary. International trusts invest in a broad range of asset classes, as might be expected given the international high and ultra high net wealth client base.

Other services provided to RBC & 3 Party Trustees

In order to understand the full impact of FATCA on RBC's services to trustees, it is important to note that in addition to RBC itself acting as trustee through its Canadian and international businesses as described above, RBC also provides other services including banking, custody, investment management and credit to trustees, both where RBC also acts as trustee and seeks such services from other parts of the RBC group and to 3rd party trustees. Such 3 party trustees may be professional firms that would also be FFIs (who may or may not enter into an FFI agreement) or they may be individuals acting as trustees in a private capacity and would not be regarded as FFIs.

How RBC deals with a trustee when providing such other services will depend upon the nature of the trustee, whether or not it is an FFI and if so, whether or not it has entered into an FFI agreement or is part of an FFI group which has done so.

ii. The Impact Of FATCA on Trusts And Issues For Foreign Trustees

Our initial written submission dated June 30, 2010 and our discussions on July 7, 2010 set out at a high level some of our concerns regarding the practical implications and ability of RBC to comply with the FATCA provisions, depending on how the regulations are drafted. We considered both situations where RBC is itself providing trustee services and those where RBC provides other services to a trust with either RBC or a 3 party acting as trustee holding financial accounts with RBC. Below we hope to provide further information and clarity around those issues, together with some recommendations for your consideration.

Defining a "Beneficial Interest" in a Trust

In the case of a trust that may have a specified United States person treated as an owner under the U.S. Grantor Trust rules, it is our experience that these rules are particularly complex and therefore are well understood by only a few more sophisticated advisors in this area. The FATCA provisions, however, must be understood, implemented and administered by all levels of staff of an FFI which enters into a FFI Agreement, including entry-level staff in client service capacities. More importantly, however, in order for an FFI that enters into an FFI agreement to be compliant these rules would need to be understood by the trustees and beneficiaries who are clients of the FFI so that they can provide the proper information needed by the FFI. Not all trustees, of course, are professionals. Many individuals appoint friends and family in the role. Even many professionals find these rules difficult to interpret. Relying on references to other U.S. legislation may make the quality of compliance with the rules unreliable.

In the case of a trust that does not have a specified United States person treated as an owner under the Grantor Trust rules, the definition of "substantial United States owner" of a trust (other than a collective investment vehicle) is, "to the extent provided by the Secretary in regulations or other guidance, any specified United States person which holds, directly or indirectly, more than 10 percent of the beneficial interests of such trust."

As discussed above, there are many varied uses for trusts and potentially significant numbers of trusts worldwide that have trustees with varying levels of savvy with regards to legal and tax matters. We anticipate that a large percentage of such trusts have no connections to the U.S. and requiring FFIs entering into FFI Agreements to implement procedures to confirm that trusts that are account holders do not have substantial United States owners will create a significant burden on the FFIs.

We recommend that the Secretary limit the exercise of its discretion regarding the circumstances under which identification of persons with more than a 10 percent beneficial interest in the trust is to be required (e.g., requiring identification only in circumstances involving some evidence of potential abuse and those that may pose a particular risk of tax evasion).

There are many attributes that indicate a trust poses a low risk of tax evasion and should not be captured should the Secretary choose to exercise discretion in this regard, including the following.

- Trusts below a certain dollar value.
- Testamentary trusts created following the death of the testator in accordance with the terms of his will.
- Trusts established for specific purposes, such as providing for the needs of disabled beneficiaries, former spouses and/or children following marriage breakdown, or education.
- Trusts which provide for the distribution of the capital to a charity or other non-profit entity upon the death of the income beneficiary,
- Informal trust arrangements under which a parent or other adult holds relatively small amounts of funds (often amounts received as gifts by the children for birthdays, christenings, religious holidays, etc.) “in trust for” children until they reach the age of majority.
- Trusts established by a corporation under a regulated program for the purposes of providing benefits to employees or former employees.
- Trusts established for a public purpose (such as land use trusts or trusts established for the benefit of First Nations arising from a land claim settlement).

Where the Secretary does exercise its discretion to require identification of substantial United States owners of a trust, it will first be necessary to clearly define who has a “beneficial interest” in a trust. Numerous terms seem to be commonly used to describe persons with interests in a trust, including “beneficiary”, “beneficial owner”, etc. There are also different measurements applied for different purposes, adding to the confusion. In general terms, a “beneficial interest in a trust” commonly refers to the interest that a beneficiary of a trust has in the trust.

As discussed in our earlier commentary and conversation, beneficial interests may be vested, vested subject to divestment (i.e., if a certain condition were to happen that would remove that beneficiary’s entitlement), contingent (i.e., not vested until the happening of some future event) or discretionary (i.e., generally upon the trustee exercising a discretionary power).

It is not, in our submission, meaningful to try to measure a beneficiary’s interests that are either vested subject to divestment, contingent or discretionary unless and until the relevant circumstances change or the related discretionary power is exercised such that the beneficiary becomes absolutely entitled and even then, only to the extent of such absolute entitlement. Until this point, the beneficiary may never actually become entitled to any funds. Although we have not done an analysis of the AML legislation in all jurisdictions, in most jurisdictions in which RBC operates, requirements to identify and verify the identity of beneficiaries of a trust are generally limited to those beneficiaries with current entitlements under the trust. Typically it is not permissible for a trustee to make a distribution to any beneficiary whose identity has not been verified for AML purposes.

Below is an excerpt from the Canadian AML legislation [SOR 2007-122, s 24] -

Information on Beneficiaries

[] A trust company that is required to keep a record in respect of an *inter vivos* trust in accordance with these Regulations shall keep a record that sets out the name and address of each of the beneficiaries that are known at the time that the trust company becomes a trustee for the trust and

(a) if the beneficiary is a person, their date of birth and the nature of their principal business or their occupation, as applicable; and

(b) if the beneficiary is an entity, the nature of their principal business.

The reference to beneficiaries that are “known” at the time is generally interpreted to mean beneficiaries with current entitlements to income and/or capital, and interests that are vested (and not subject to divestment). It is also interesting to note that the requirements only apply to *inter vivos* trusts. No similar requirements exist for testamentary trusts.

Similarly, AML guidance notes issued by the Jersey Financial Services Commission in the Handbook for Financial Services Businesses indicates that a financial services business must collect identification information on the trustee and on the express trust, including identification information of beneficiaries with a “vested right”.

The UK Money Laundering Regulations 2007 set out requirements related to customer due diligence and the identification of beneficial owners in the case where the beneficial owner of an account is not the customer. In the case of a trust, *section 6(3)* provides that “beneficial owner” includes an individual who is entitled to a “specified interest” in at least 25% of the capital of the trust property, with “specified interest” defined in *section 6(4)* to mean a vested interest which is “in possession or in reversion” and “defeasible or indefeasible”.

Although there will be differences between AML legislation regarding the determination of “beneficial owners” of a trust (irrespective of the extent of their interest in the trust), we recommend that the guidance under FATCA rely on the determinations made under AML provisions applicable to the entity making the determination. It will create significant confusion if persons making the determination are expected to apply one definition for AML purposes and another for FATCA purposes.

It would be inappropriate to expect a trustee to attempt to identify and verify the identity of beneficiaries other than those that they are currently required to identify under applicable AML or other legislation, or as is necessary to fulfill their fiduciary obligations as trustee.

Identifying Persons Holding More than 10% of the Beneficial Interests of a Trust

For those circumstances in which it is required to determine if any specified United States person holds more than a 10% beneficial interest in a trust, clear guidance must be provided as to how such an interest is to be measured. We understand that in some circumstances, the IRS has indicated that an interest in a trust is to be determined in proportion to the persons “actuarial interest” in the trust.

In the context of FATCA, any method that is vague, complicated and requires specialized technical expertise will simply be impractical and overly burdensome in proportion to any additional benefits that might be achieved through the added degree of technical accuracy. We are also concerned that if the requirements are not easily understood, many entities may simply fail to provide sufficient information, resulting in recalcitrant account holders. We recommend that the basis for measuring be clear and easy to apply. We also recommend that for purposes of measuring a greater than 10% interest, only a vested interest in capital of the trust be taken into account. Discretionary interests should not be considered until such time as the discretion or power to make a distribution of trust assets is actually exercised in favour of a US beneficiary. Similarly, income-only interests should not be considered as the income entitlement will fluctuate annually depending on market conditions.

Exiting a Trust Relationship (i.e. “Closing” a Trust Account)

Bearing in mind that the trustee has a fiduciary, and not a contractual, relationship with the beneficiaries, where a trustee enters into an FFI Agreement and is unable to obtain a waiver to permit the reporting of information with respect to a trust that is determined to be a United States account, the trustee cannot simply terminate the relationship as it might were it contractual.

Some options open to the trustee might include the following.

- Resign in favour of a new trustee;
- Distribute the trust assets to the beneficiaries:
or
- Exclude from being a beneficiary any U.S. beneficiary
or any beneficiary whose identity had not been confirmed
as being non-U.S.

While the terms of the trust may provide the trustees with the discretionary powers to adopt one of the above options, the trustee would still be required to justify such action as being in the best interests of the beneficiaries which is unlikely to be possible. In such circumstances the trustee could not “close the account” without being exposed to a claim of a breach of trust on the basis that they exercised their powers for their own interest (i.e., in order to comply with their corporate obligation under the FFI Agreement) rather than in the best interests of the beneficiaries. In several jurisdictions, including many provinces of Canada, if the items in bullets above are not specifically provided for in the terms of the trust, a trustee may need to apply to the courts to be removed, to wind up the trust and distribute its assets, or to vary the terms regarding eligible beneficiaries.

We submit that trustees that have entered into an FFI Agreement and are trustees of trusts that are United States accounts and for which they are unable to obtain a necessary waiver to permit the reporting of the required information related to the account be allowed to continue the relationship. Otherwise, the FATCA provisions will conflict with the trustee’s fiduciary and legal obligations.

Key Recommendations in Relation to Foreign Trusts

The following is a summary of our key recommendations arising from this letter, our earlier letter of June 30 or from our discussions on July 7, regarding the application of FATCA to trusts and corporate trustees.

- Provide trust companies that are bound by an FFI Agreement and that open financial accounts for trusts under their administration with other FFIs, the flexibility of treating such accounts as either accounts for FFIs (the default) or as accounts for NFFEs (at the option of the trust company).

- Carve out testamentary trusts, charitable trusts, trusts for a public purpose and employee benefit arrangements on the basis that they pose a low risk of being used for tax evasion.
- Provide clear guidelines to permit the identification of a U.S. person treated as an owner of a trust under the U.S. grantor trust rules.
- Permit the identification of persons with a beneficial interest in a trust to be based on existing AML practices, and in any case, generally limit the definition of such persons to those beneficiaries with a current vested entitlement to capital.
- Limit the exercise of the discretion provided to the Secretary regarding the circumstances under which the identification of persons with more than a 10 percent beneficial interest in the trust is required (e.g., circumstances involving some evidence of potential abuse or those that may pose a particular risk of tax evasion).
- Do not require the “closing” of an account in the case of a trust for which a corporate trustee is unable to obtain the necessary waiver to permit the reporting of the information required under the FFI Agreement.

We trust that you will find these comments useful. If you have any questions regarding our comments, please do not hesitate to contact me by phone at (416)955-3845 or e-mail at ann.noges@rbc.com.

Yours truly,

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