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

July 21, 2011

CC:PA:LPD:PR (NOT-l21556-10)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C.
20044 U.S.A.

Dear Sirs/Madam:

Comments Regarding the Implications of the Foreign Account Tax Compliance Act ("FATCA") on the Capital Markets Business Sector

Thank you for the transition relief provided in *Notice 2011-53*. We greatly appreciate the recognition by the IRS and Treasury of financial institutions' need for additional time for to become compliant with FATCA. We are similarly sympathetic to the unwieldy task with which Congress has charged your offices in connection with implementing FATCA and hope that through our comment letters we will assist your efforts by providing insight into the various business realities to which the regulations will apply.

This letter does not specifically address any issues that might arise in connection with *Notice 2011-53*. Rather, it focuses on issues that have come to the attention of our FATCA project team in connection with our FATCA implementation effort for business units involved in investment banking, proprietary trading and funding, syndications, securitizations, derivatives, notional principal contracts, securities lending, sale/repurchase transactions, commodities trading and fixed income trading. At RBC, these business units collectively comprise the capital markets business. Some of these issues relate to a need for transition relief beyond the scope of *Notice 2011-53*, due to the unique way in which certain capital markets business is conducted. Others relate to a need for specific guidance that will facilitate our efforts to implement FATCA in accordance with the specified timeframes.

I. Executive Summary

We respectfully recommend that the following solutions be adopted in order to assist capital markets businesses in implementing FATCA without subverting the legislative objectives or the prescribed timelines.

1. Definitive guidance should be provided as to whether payments under Master Agreements (defined below in

III.2.) will be within scope of the passthru payment provisions. Please note that we recommend that payments under a Master Agreement not be considered passthru payments.

2. If it is determined that payments under a Master Agreement will be considered passthru payments, we recommend as follows:

i. Transactions in certain notional principal contracts ("NPCs"), derivatives, securities lending, sale/repurchases ("repos") (collectively, "Financial Products"), as discussed herein, should be immediately excluded from the scope of the passthru payment provisions and consideration should be given to further exclusions;

ii. A two year grace period until 7/1/2015, should be provided to allow capital markets businesses to attempt to obtain the required documentation from contract account holders (described below), regardless of whether such account holders open new accounts with the PFFI or its affiliates during this period; and

iii. Relief from Chapter 4 withholding tax should be provided for any Specified Legal Relationship (see definition in III.I.) existing prior to the later of June 30, 2013 or three months after the date regulations related to *sections 1471* through *1474 of the Code* are finalized.

3. Participating Foreign Financial Institutions ("PPFs") should have two years after an extended deadline for collecting counterparty documentation to build any systems that are found to be necessary, given any refusal by account holders to provide documentation or the need to satisfy a market demand for such PFFI to perform withholding on behalf of other PFFIs.

4. Definitive guidance should be issued to address the following:

i. Adopt the documentation recommendations in III.4.(i). related to excepted non-financial foreign entities ("NFFEs"), PFFIs; and U.S. financial institutions ("USFIs");

ii. Permit PFFIs to rely on copies of Form W-8 and that Form W-S be subject to the same expiry provisions as Form W-9; and

iii. Provide that as long as a legal entity is able to demonstrate that it has ready access to the appropriate U.S. tax forms or record of FATCA documentation, it will not be necessary for that legal entity to obtain its own original or copy of such form or record.

5. The terms "active business", "regularly traded", and "established securities market" should be defined in the manner described in III.5. for purposes of Chapter 4. To the extent withholding in respect of NFFFs is not within the scope of the transitional relief contained in *Notice 2011-53,* provision of these definitions should be prioritized.

II. Background

At RBC, due to the expanded definition of passthru payment provided for in the Notice, we have found that the capital markets business has more systems affected by FATCA than any other business unit (by a multiple of 5). Accordingly, the need to make systems changes is particularly pressing for this business unit and reductions in the number of systems to which changes are required would offer a meaningful reduction in total financial and time costs to this business.

Equally important, the capital market business has thousands of separately-negotiated contracts with counterparties, many of which will need to be re-negotiated in light of FATCA, provided that the counterparty consents to such re-negotiations. Accordingly, any regulations that minimize the need for capital markets businesses to renegotiate existing contracts will afford substantial savings and significantly reduce the complexity of complying with FATCA.

Within the capital markets business, we have two types of accounts: those opened using standard KYC, credit and AML processes and forms (completed and signed by the client) and those documented by specific, customized contractual agreements between the bank and a counterparty. Where a foreign financial institution ("FFI") conducts business with a counterparty pursuant to a bilateral (or sometimes multilateral) contract, typically the contractual arrangement governs the relationship. The counterparties and contracts are vetted by a variety of control points within the financial institution (e.g., legal, tax, credit, AML, etc.). As a result of the additional scrutiny and negotiation of contractual terms associated with opening these accounts, the normal account opening process (in which a standard form account opening document and term sheet is provided to and completed by the client) is not followed. In contract-type accounts, there is no potential to change the terms of the account pursuant to a mailing to advise account holders that the standard terms of the account have changed and continued use of the

account constitutes acceptance of the new terms. As detailed below, this means that changes to the contract type of accounts must be negotiated on a contract-by-contract basis, and there is potential for a counterparty to refuse to agree to new terms and conditions sought by a PFFI.

III. Discussion

1. Certain Consequences of Treating Payments Made Under Contractual Arrangements as Passthru Payments

PFFIs have a number of existing contractual relationships for which the grandfathering relief contained in section 501(d)(2) of the HIRE Act (as clarified by *Notice 2011-60, Notice 2011-34* and *Notice 2011-53)* ("grandfathering relief") is largely ineffective. As discussed below, if the payments made under these existing contractual arrangements are treated as passthru payments, certain terms of the contract may need to be renegotiated and a reporting system (and possibly a withholding system) will likely need to be specifically developed for these transaction types. Accordingly, it is very important to capital markets businesses that the scope of the passthru payment provision be determined with precision as soon as possible.

Among the contracts and transactions that may not qualify for the existing grandfathering relief are those that are based on one of several industry standard form transaction master agreements, published by various industry organizations (collectively referred to as "Master Agreements"). A Master Agreement is typically executed by two or three parties that wish to enter into a number of Financial Products transactions with each other. Master Agreements typically do not have a specified term. In some instances, parties are transacting under the terms of a Master Agreement that was entered into 20 years ago.

In the event that a counterparty to any one of RBC's existing contractual arrangements (currently based on Master Agreements) chooses to be a non participating foreign financial institution ("Non-PFFI") or recalcitrant account holder, RBC's responsibility for Chapter 4 withholding tax may be called into question. A Non-PFFI may take the position that the contract requires the payor to gross up the payment for any Chapter 4 withholding, thus undermining the intent of the legislation. We are hopeful that this conflict will not arise with many of our counterparties, but until information becomes available regarding which FFIs have decided to become PFFIs, this remains a significant concern.

While there are standard form Master Agreements, parties routinely negotiate changes to the standard form before they execute the contracts. Schedules to these agreements are customized through lengthy negotiations between the counterparties. RBC has entered into several thousand Master Agreements, and some of these agreements have been negotiated by investment managers on behalf of hundreds (sometimes thousands) of parties.

One of the most frequently used Master Agreements is the International Swaps and Derivatives Association Master Agreement ("ISDA"). We estimate that approximately 70% of our derivatives and NPC transactions are governed by an ISDA.

ISDAs typically contain tax provisions that provide for a gross-up of taxes on amounts paid by one counterparty to the other, for any tax that is an "Indemnifiable Tax". It is our view that, absent modification of the standard definition, a reasonable argument could be made that any withholding tax imposed under Chapter 4 would be within the scope of the term Indemnifiable Tax. n1 Accordingly, under many existing ISDAs, it is conceivable that a PFFI may be called upon by its counterparty to gross-up payments it makes to a Non-PFFI or an undocumented counterparty once the passthru payment withholding becomes operative. Grossing-up a payment for FATCA tax would effectively cause the PFFI to bear the responsibility for costs intended to be borne by a Non-PFFI or recalcitrant account holder. n2

In many Master Agreements executed by FFIs (particularly those that govern longstanding transaction relationships) there is no requirement for a counterparty to provide U.S. tax documentation. In these circumstances, in order to obtain the proper U.S. tax documentation, a PFFI would have to re-open negotiations with its counterparty. In circumstances where the counterparty is a Non-PFFI or an NFFE that is protected by a gross up clause, there may be no comparable interest on the part of the counterparty to obtain tax documentation from a PFFI. This would place a PFFI in a significantly weaker bargaining position than its non-compliant counterparty.

In many instances, amending the ISDA to ensure that FATCA is clearly outside the scope of an Indemnifiable Tax or other problematic contractual clauses will take time, exposing a PFFI to the risk of paying the withholding tax on any confirmed transactions in addition to possible legal costs of renegotiating and updating the contract. In some cases and in some jurisdictions, unilaterally terminating a confirmed transaction will be very difficult and may result in potential legal action and damages being suffered by a PFFI. Moreover, terminating one transaction may also necessitate a PFFI terminating an offsetting hedge with another counterparty and incurring the costs associated with the additional termination as well. In some instances, a PFFI may have the ability to terminate the one contract but not the hedging contract, thereby leaving the PFFI with unanticipated exposure.

PFFIs are likely to seek to terminate transactions rather than bear the burden of the Chapter 4 withholding tax, where possible. It is our view that a PFFI being economically compelled to terminate transactions under a long-standing contract would result in a substantial adverse business impact, particularly in circumstances where there is only a very remote relationship between payments made under a Master Agreement and withholdable payments. To provide some level of perspective, we estimate that, on average, RBC confirms over 75,000 transactions a week with its counterparties (excluding exchange-traded transactions).

i. The Time Pressure for a Clear Statement as to the Scope of Passthru Payments

If the passthru payment provisions are rewritten in a manner that exempts Master Agreements from their scope, there will be no need for a PFFI to re-negotiate Master Agreements or terminate existing transactions. Moreover, if no transactions covered by Master Agreements are within scope of the passthru payment provisions, there will be no need for PFFIs to develop withholding systems for payments related to such arrangements. Consequently, it is critical to these businesses that clear

guidance as to whether such payments are within the scope of the passthru payment provisions be provided. If payments under Master Agreements are determined to be within the scope of the passthru payment provisions, in addition to re-opening negotiations with counterparties, it may also be necessary for the capital markets businesses to develop withholding systems related to payments made pursuant to Master Agreements.

The level of work that may be required from these businesses in order to comply with FATCA varies wildly; under a best case scenario no work need be undertaken, under a worst-case scenario there is a need to begin working on these changes almost immediately.

Accordingly, in order to provide the necessary time to renegotiate contracts and develop systems, or conversely, to avoid PFFIs devoting time and funds to activities that will ultimately prove unnecessary, we respectfully ask that definitive guidance be provided as to whether payments under Master Agreements will be within scope of the passthru payment provisions as soon as possible.

ii. Interim Approach to Consider if Payments on Master Agreements Constitute Passthru Payments

In discussions between the IRS, Treasury and Canadian industry participants on June 30, 2011, it was indicated that at the present time there is a reluctance to conclude that all Financial Products should be outside the scope of the passthru payment provisions. However, it was suggested that perhaps certain types of Financial Products could be excluded. While we respectfully recommend continued consideration be given to excluding all or virtually all transactions documented on Master Agreements from the scope of the passthru payment provisions, an immediate interim declaration that certain types of Financial Products are excluded would provide some assistance in limiting the scope of work to be performed.

While we may comment further on passthru payments and Financial Products in a subsequent comment letter, it is our view that there are some types of Financial Products that are obvious candidates for such an exemption. In particular, some Financial Products clearly do not have U.S.-referenced assets for which a Financial Product may function as an alternative investment strategy. The following are amongst the classes of referenced assets that do not clearly relate to a U.S. investment: commodities, foreign currencies, interest rates, credit, precious metals, oil and gas, power, industrial materials, emissions, and greenhouse gases. Consequently, forwards, options, spot transactions, derivatives, NPCs and trading in such Financial Products are arguably less attributable to withholdable payments than payments under certain other Financial Products. The foregoing list should not be considered comprehensive; therefore, the absence of a particular asset class from this list should not be construed as implying that payments on Financial Products that reference such assets should be considered passthru payments.

In the event that the IRS and Treasury are not presently prepared to state that all Financial Products will be excluded from the passthru payment provisions, a statement that Financial Products related to the above-listed referenced assets will not generate passthru payments would provide some level of relief with regard to the need to renegotiate and re-document contracts.

2. The Need for Further Transition Relief

Thank you for clarifying that the grandfathering relief contained in the legislation applies to both withholdable and passthru payments on fixed term obligation entered into on or before March 18, 2012. This is generally very helpful. However, in the realm of Master Agreements, the grandfathering relief unfortunately provides little or no relief. Although Master Agreements do not generally create equity or equity-like instruments, because these agreements do not have a specified term, the grandfathering relief will not apply to the Master Agreement itself.

Transactions entered into pursuant to a Master Agreement are individually agreed to from time to time and a written confirmation of the specific transaction is issued. Confirmed transactions under a Master Agreement have a specified term. However, as indicated above, we enter into approximately, 75,000 confirmations for such transactions each week. Accordingly, between March 18, 2012 and July 1, 2013, we will enter into a very large number of transactions that will not qualify for grandfathering. Moreover, as described below, extending the grandfathering relief in its current form provides PFFIs with only a short window of opportunity, and will not remedy the need to renegotiate all existing Master Agreements. It is our view that further relief is necessary for these unique circumstances.

i. The Different Levels of Risks with Various Dated Master Agreements

As described below, the flexibility that a PFFI will have in managing its FATCA risk depends in part on the date of the Master Agreement. Master Agreements that pre-date the enactment of FATCA will provide the most flexibility and give a PFFI more negotiating power than Master Agreements that are dated post-March 18, 2010.

Absent substantial further guidance to the contrary, we anticipate that in order to protect RBC from potential adverse FATCA implications, we would have to adopt a policy of only confirming transactions after March 18, 2012 with a counterparty with which we have a Master Agreement that includes optimal FATCA language. Realistically, we will not be able to implement such a policy due to the very short time frame and the counterparty reluctance to revise Master Agreements at this time given the very limited FATCA guidance issued to-date.

a. Pre-March 19, 2010 Master Agreements

The termination provision of an ISDA Master Agreement generally allows a party to terminate a transaction for withholding taxes that are applicable as a result of legislation enacted after the date the Master Agreement is signed. Consequently, transactions entered into pursuant to an ISDA Master Agreement signed prior to March 18, 2010 could be terminated in the event a counterparty was subject to withholding tax under Chapter 4. This option would result in a PFFI incurring transactions termination costs (fees, penalties, legal expenses, etc.) rather than the Chapter 4 withholding costs that could apply if a counterparty were unable or unwilling to provide proper documentation and could

successfully assert that the gross-up provision would require the PFFI to bear the burden of any Chapter 4 withholding tax.

b. Post-March 18, 2010 Master Agreements

Regardless of the date a Master Agreement is executed, a counterparty that would otherwise be faced with a withholding tax cost is entitled to decline to enter into any future transactions with the counterparty. While this approach would not alleviate the tax cost associated with confirmed transactions, the ability to refuse to enter into new transactions would enable the PFFI to effectively cap any withholding tax costs (or risks of such costs) associated with transacting with a particular counterparty.

It has taken international banks some time to digest FATCA and appreciate the potential scope of this legislation. Consequently, to-date few banks, if any, have refused to transact unless a Master Agreement is modified to address FATCA. Even now, with the guidance relating to passthru payments provided in the Notice, a number of counterparties are refusing to discuss FATCA as part of the contract negotiations until regulations have been promulgated.

It would be unrealistic to suggest that we refuse to transact with such counterparties, given all of the uncertainty around scope, effective date of FATCA with regard to passthru payments and the current lack of precision regarding documentation requirements. It is also inappropriate for either party transacting in good faith in such an uncertain environment to be required to bear a substantial tax cost years after the inception date of the transaction.

Due to the current demand for us to continue to transact business, as well as the lack of clarity and buy-side awareness around FATCA requirements to-date, we continue to enter into Master Agreements with sub-optimal FATCA language. Many of these agreements will need to be renegotiated in order to update the tax provisions once further clarity around FATCA is provided. For the same reasons, we continue to confirm transactions for which payments will be made after the passthru payment provisions become operative. Generally, we will be unable to terminate these transactions and may face disputes with counterparties over withholding tax liability under Chapter 4.

c. Post-March 18, 2012 Confirmations, The Need for More Relief than is Provided by the Current Grandfathering Relief

All Master Agreements lacking an optimal FATCA provision will need to be renegotiated in order to transact post-March 18, 2012. We understand that the current goal is for proposed regulations to be released by the end of 2011. Therefore, the grandfathering relief only provides a very short window in which to renegotiate agreements where transactions will be confirmed after March 18, 2012.

Given the magnitude of this task, and the fact that the renegotiation of the withholding tax provisions should be performed by or heavily involve experienced U.S. tax professionals, this short timeframe is inadequate. Accordingly, PFFIs should be given a minimum of two years to renegotiate these agreements in order to update them with the necessary Chapter 4 withholding tax provisions. As described

above, there are legal provisions contained in a Master Agreement that may impede a PFFI from withholding tax even if a counterparty provides documentation to the PFFI establishing its status as an NFFE with undocumented substantial owners or as a Non-PFFI for reasons unrelated to the Master Agreement.

Accordingly, PFFIs should be entitled to transact under a pre-2013 Master Agreement for a two year period (i.e., until July 1, 2015) without any need to withhold tax under Chapter 4, regardless of whether the counterparty opens a new account or otherwise provides documentation to the PFFI during this time frame.

ii. Proposed Additional Relief for Accounts Governed
by Pre-existing Master Agreements

An international bank often has many relationships with a particular account holder. In many instances, that account holder will have multiple accounts with various business units of the international bank, and whether such business units are all within a particular legal entity or amongst different legal entities, they may or may not be aware that the account holder has other accounts with the international bank. Where that lack of knowledge exists, it may only be discovered on audit that a pre-existing account failed to be properly re-documented because of a new account opening. A new account may be opened for an existing account holder in circumstances where no new account opening documentation is required such as where a counterparty under a Master Agreement currently trading fixed income products begins to trade currency swaps. Alternatively, the new account opening may involve different business units within the same legal entity with systems that do not communicate with one another, for example, a counterparty under a Master Agreement entering into a syndicated lending arrangement to borrow funds. In the case of an existing contractual arrangement, even where the business unit with an existing relationship with the counterparty becomes aware of the updated status of the account holder, time may be required to amend the contractual arrangement in order for the proper FATCA withholding to occur in respect of the accounts to which the contractual relationship pertains.

We recommend that PFFIs should be allowed to utilize the transition relief proposed above to document all account holders of the pre-existing contract type of accounts, regardless of whether these account holders enter into new relationships with the PFFI after June 30, 2013.

Accordingly, relief from Chapter 4 withholding tax should be provided for any Specified Legal Relationship existing prior to the later of June 30, 2013 or three months after the date regulations related to *sections 1471* through *1474 of the Code* are finalized.

For this purpose, a Specified Legal Relationship should be defined as any legal relationship that involves a withholdable payment or a passthru payment where the PFFI or USFI does not have an undisputable legal or contractual right to demand proper documentation or withhold U.S. tax on payments made pursuant to the terms of the legal relationship and one or more party to the relationship refuses to provide a PFFI or USFI with the necessary documentation or authority.

3. Provide Further Time To Assess the Need to Withhold

Counterparties to Master Agreements are typically large organizations and financial institutions ("FIs", as defined in *section 1471(d)(5) of the Code*). At the present time, we are cautiously optimistic that most of our FFI counterparties will become PFFIs and that our NFFE counterparties will generally be exempted NFFEs. Consequently, even if payments made pursuant to Master Agreements constitute passthru payments, it is not clear whether it will be beneficial to invest in developing a system to withhold tax on such payments. Ideally, PFFIs would be able to gauge the extent of the requirement before undertaking the lengthy and expensive task of building systems capable of withholding that, conceivably, will rarely be utilized.

From a potential liability perspective, failure to comply with FATCA will have the largest impact on the capital markets businesses of international banks, particularly if the passthru payment provisions continue to apply to payments only remotely attributable to withholdable payments. Therefore, absent transitional relief in respect of all or certain withholding requirements, choosing not to build a withholding system is a risk-based decision.

Our optimism regarding our ability to document all clients/counterparties for purposes of Chapter 4 is tempered by our concerns related to the changing environment we are experiencing. We note that historically, an investment manager, rather than the funds it represents, has been our counterparty on a Master Agreement. However, co-incident with the increased scrutiny on U.S. tax withholding and reporting, investment managers are increasingly choosing to act as agent for the funds, and ceasing to act as financial intermediaries. Consequently, where previously an investment manager was often established as the client for systems purposes (and had responsibility for U.S. tax withholding and reporting), it is now necessary to create separate accounts for each fund and to perform Chapter 3 withholding and reporting in respect of the fund or its investors.

With regard to the Financial Products businesses of FFIs, the withholding task under Chapter 3 is not significant enough under current law and regulations to justify creation of automated withholding and reporting systems. However, the level of reporting and/or withholding may substantially increase under Chapter 4, particularly if funds seek to appoint international banks as their agents for the purposes of withholding and reporting under Chapter 4. n3 Capital markets businesses will likely conclude it is necessary to develop robust documentation collection and verification processes as well as reporting systems related to these counterparties. Whether or not withholding systems will be similarly necessary in these scenarios is currently difficult to predict.

Given the above realities, and the lack of transitional relief provided to-date in respect of withholding requirements for transactions entered into after March 18, 2012, RBC is hesitant to take the risk that our cautious optimism regarding our ability to obtain FATCA documentation from account holders may prove incorrect. Accordingly, absent further direction from the IRS and Treasury in the very near future, the operations and information technology departments may need to proceed with implementation based on an assumption that payments on contractual obligations of a PFFI will constitute passthru payments and that withholding may need to occur in a number of instances.

All of these requirements may be short-lived for some PFFIs in respect of certain counterparties. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides that the majority of swaps (a term that encompasses far more derivatives than just swaps for purposes of the legislation) involving a U.S. counterparty are to be cleared through a clearing organization. Canadian, Australian and European regulators are adopting similar legislation with regard to counterparties organized in their jurisdictions. Consequently, in a relatively short period of time, a PFFI will need to document its account holders that receive payments from a clearing organization and the clearing organization itself. Existing transactions with a number of counterparties will be given up to the clearing organization; therefore, in many instances a different FI will handle the payment to the counterparty's custodial account in which the swap is held.

Accordingly, given the changes occurring in the industry, the need to renegotiate Master Agreements and the requirements to restructure a large portion of the derivatives business for regulatory reasons, in the event that the IRS decides that payments on Master Agreements are within the scope of the passthru payment provisions, we urge the IRS to provide the two years requested above for PFFIs to re-negotiate their contract accounts (until 7/1/2015) and an additional two years (i.e., until 7/1/2017) to build any withholding systems that are found to be necessary, given any refusal by account holders to provide documentation or the need to satisfy a market demand for us to perform withholding on behalf of other PFFIs.

4. Documentation Issues to be Addressed

As discussed below, we would appreciate some specific guidance regarding documentation so that we might begin to draft detailed provisions for contracts and to satisfy various industry participants' demands for such specificity so as to encourage them to agree to include FATCA-related language in contracts. We have proposed documents that might be acceptable in circumstances that are particularly relevant to the capital market business. We have also suggested some changes to the documentation rules that would ease the compliance burden without materially impacting the accuracy of information obtained.

i. Acceptable Documentation

In recent months, we have attempted to insert FATCA-related provisions into Master Agreements and other contracts and have met with resistance from the majority of counterparties. Some counterparties refuse to accept that withholding could apply to what they see as "wholly foreign" transactions. Others prefer to wait until an industry standard approach is agreed upon, final regulations are released or the exact documentation requirements are detailed.

With regard to existing legal agreements and arrangements that are entered into between now and the date the passthru payment provisions become operative, if the passthru payment provisions are to apply to these arrangements, we would like to begin to collect documentation that will satisfy the requirements of Chapter 4 and where applicable, include appropriate language regarding the provision of documents in our contracts in order to avoid creating Specified Legal Relationships (as defined above)

whenever possible. Therefore, it would be helpful to know what documents will satisfy the requirements of Chapter 4.

Clearly, until FFIs begin to enter into FFI agreements, counterparties that will become PFFIs cannot be re-documented. However, we could begin to specify the type of documentation to be collected from counterparties and to collect the applicable documentation for individual accounts, excepted NFFEs and excluded FFIs if we were advised as to the specific documentation requirements. This would leave us with fewer pre-existing accounts to re-document after June 30, 2013.

We respectfully recommend that for purposes of Chapter 4, with regard to the below-listed types of account holders, acceptable documentation include (but not necessarily be limited to) the correspondingly listed documentation options:

Active business NFFEs:

- Self certification that the entity is not an FI and is engaged in an active business
- Form W-8BEN revised to include a box indicating that the entity is an active business NFFE
- Copies of the entity's constating documents and materials secured in connection with performing due diligence to satisfy local anti-money laundering requirements sufficient to confirm a for-profit objective and operations consistent with such objective

Corporations the stock of which is regularly traded on an established securities market:

- Self certification stating that the entity is not an FI, identifying the securities market on which the stock is traded and a representation as to the minimum trading volume of the corporation
- A copy of the entity's annual report filed with the securities regulator/exchange
- The same documents and information identified in *Notice 2010-60* as appropriate for identifying pre-existing accounts within this category

USFIs:

- Form W-9

- Self certification plus an EIN

PFFIs:

- Form W-8PFF1
- Self certification plus PFFI-EIN

Accordingly, we request that definitive guidance/regulations be issued providing that the above documentation will be acceptable for FATCA purposes. We anticipate that if Treasury and the IRS make a clear and definitive statement regarding the scope of passthru payments and the above documentation requirements, a consensus regarding an industry standard approach for any necessary modifications to the language of Master Agreements will rapidly follow.

ii. Changes to Form W-8

The requirement to obtain original Form W-8s and to renew such forms approximately every three years is arbitrary and adds needlessly to both the documentation efforts of PFFIs and the frustration of high ranking officers within non-U.S. organizations who are asked to execute innumerable originals of these forms. It is often asserted that a Form W-8 must be renewed because there is no U.S. tax identification number or reporting obligation in respect of the party completing the form. However, we would submit that the fact that the party is asked to execute and provide an original form every three to four years does not increase the accuracy of information provided on the form.

Accordingly, we request that for all U.S. tax purposes, PFFIs be permitted to rely on copies of Form W-8 and that Form W-8 be subject to the same expiry provisions as Form W-9.

iii. Eliminating the Need for Document Collection
by All Legal Entities

As you are aware, there are a number of instances where systems within an FI do not communicate with one another, either due to systems limitations or legal restrictions. However, many FIs are working on developing or already have a system that acts as a repository for client documents for a number of business units, spanning two or more legal entities. For legal entities within an affiliated group that have access to such a repository, it is our view that it should not be necessary for such entities to each obtain a U.S. tax form from a client.

Similarly, where an employee of one legal entity within the affiliated group has viewed and recorded the necessary FATCA documentary evidence for a client, all PFFIs that are able to readily access the system and file in which that information is recorded should be entitled to rely on the single request for client documentation.

Accordingly, we recommend that as long as a legal entity is able to demonstrate that it has ready access to the appropriate U.S. tax forms or record of FATCA information, it not be necessary for that legal entity to obtain its own original or copy of such form.

5. Definitions to be Provided

Defining the following key terms would assist our counterparties in determining whether or not they should be considered excepted NFFEs. This would be most helpful in assessing the level of complexity of FATCA compliance that will be required by certain entities and their counterparties.

i. Active Trade or Business

Notice 2010-60 provides that NFFEs engaged in an active trade or business will be considered "excepted NFFEs". As it is not explicitly stated that this exception will also apply to NFFEs that open new accounts, we ask that the IRS clearly state this to be the case. No guidance regarding how a PFFI might determine whether an NFFE is engaged in an active trade or business is provided in *Notice 2010-60.* We recommend that, for purposes of assessing whether an NFFE is an excepted NFFE as a result of being engaged in an active trade or business, the following test be applied:

An NFFE engaged in an active trade or business is any entity whose objectives as stated in its charter, articles of incorporation or other constating document are for-profit in nature, provided that such entity's financial statements evidence that such entity is attempting to carry on business in accordance with such stated objectives.

ii. Regularly Traded

Section 1472(c)(1)(A) of the Code provides that any corporation, the stock of which is regularly traded on an established securities market, constitutes an exempted NFFE. We recommend that "regularly traded" be defined for these purposes as:

A stock shall be considered regularly traded if

its trading volumes are equivalent to at least 2% of the organization's issued and outstanding shares per year.

This approach adopts a test similar to that set forth in *Treas. Reg. section 1.7704-1(j).*

We recommend that a corporation be permitted to provide a representation to this effect and that absent actual knowledge to the contrary, a PFFI or USFI not be required to investigate the veracity of such representation.

iii. Established Securities Market

We would prefer not to be required to apply the tests provided in *section 7704 of the Code* or to assess a particular securities market against criteria provided by the IRS in order to determine whether such market constitutes an "established securities market" for purposes of *section 1472(c)(1)(A) of the Code*.

We recommend that the IRS publish either a list of jurisdictions in which all regulated securities markets shall be treated as an "established securities market" for purposes of Chapter 4 or a list of each securities market that the IRS intends be treated as an "established securities market".

Accordingly, each of the above terms should be defined in the manner provided. To the extent withholding on NFFEs is to start earlier than withholding on FFIs, we respectfully request that guidance as to the scope of these exemptions b prioritized.

IV. Conclusions

We would like to reiterate our appreciation for the efforts by the IRS and Treasury in providing further transitional relief in *Notice 201* l-5v We acknowledge that there have been very few comment letters focussed on capital markets business-related issues, and anticipate that the lack of commentary may be partly responsible for the existing guidance's emphasis on the KYC style of account opening over the contract style of account opening. We that the information provided herein is useful, both in confirming or expanding your understanding of certain capital markets businesses and in communicating that the above-described business complexities of accounts governed by negotiated contractual arrangements warrant additional transitional relief.

While not specifically related to FATCA, we note that it would be very helpful if we could implement forthcoming regulations under *section 871(m) of the Code* and the regulations related to the qualified securities lending provisions concurrent with FATCA. Therefore, to the extent you have any ability to influence the dates for releasing such regulations, your assistance in facilitating a near-term publication date would be much appreciated.

We appreciate your consideration of our comments and trust that you will find them helpful as you continue to develop the detailed FATCA requirements. If you have any questions regarding these written comments or would like further details, please do not hesitate to contact the undersigned by phone at (647) 624-6018 or by email at lisa.chippindale@rbc.com.

Sincerely,

E. A. (Lisa) Chippindale
U.S. Tax Counsel (Canada)
Royal Bank of Canada
Toronto, Ontario

Copy:

John Sweeney, Senior Technical Reviewer. Internal Revenue Service; john.j.sweeney@irscounsel.treas.gov

Steven Musher, Associate Chief Counsel (International), Internal Revenue Service; steven.a.musher@irscounsel.treas.gov

Michael Plowgian, Attorney Advisor, Office of International Tax Counsel, United States Department of the Treasury; michael.plowgian@do.treas.gov

Jesse Eggert, Attorney Advisor, Office of International Tax Counsel, United States Department of the Treasury; jesse.eggert@do.treas.gov

FOOTNOTES:

n1

While there are also strong arguments that Chapter 4 withholding does not constitute an Indemnifiable Tax, it is our view that PFFIs should not be required to contend with this legal uncertainty with counterparties that do not wish to become PFFIs or provide the required documentation.

n2

Under Chapter 4 it is wholly within the recipient's control whether or not to become a PFFI or provide proper documentation in order to eliminate the withholding requirement. Typically, a payor would not agree to gross up a payment for a tax where the recipient controls the circumstances that will determine any liability for withholding.

n3

While there is no provision in the legislation for a PFFI to delegate its reporting responsibility to another PFFI, a PFFI is presumably entitled to hire a third party of its choice to prepare the necessary information returns on its behalf.