

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
ONTARIO TEACHERS' PENSION PLAN BOARD]

December 23, 2011

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Dear Ms. Corwin and Messrs. Danilack, Musher and Caballero,

Ontario Teachers' Pension Plan Board (OTPPB) is the administrator of one of the largest pension plans in Canada. We are writing to express our concerns regarding the potential application of the Foreign Account Tax Compliance Act ("FATCA") provisions, as detailed in the Hiring Incentives to Restore Employment Act (the "HIRE Act"), to OTPPB. We appreciate the opportunity to provide comments on the development of additional guidance.

Background

OTPPB is a statutory corporation, without share capital, that was continued pursuant to the *Teachers' Pension Act* with the primary purpose of administering the Ontario Teachers' Pension Plan (the Plan), a defined benefit pension plan that funds pensions for school teachers that are employed in the province of Ontario, Canada. OTPPB held \$ 107.5 billion in net assets as at December 31, 2010 which is ultimately used to pay pensions of the retired teachers of Ontario as agreed under the terms of the Plan.

OTPPB qualifies as a tax-exempt pension corporation and the Plan qualifies as a registered pension plan under the Canadian Income Tax Act. It is regulated by the Financial Services Commission of Ontario to confirm compliance with the co-sponsors are responsible for the plan performance and oversight through their participation in the Board (which is responsible for oversight of the Plan). OTPPB also serves as the trustee for a Registered Compensation Arrangement (“RCA”) established for the benefit of administrators and school teachers whose pensions exceed the limits imposed by the regulations under the Canadian Income Tax Act.

We understand and appreciate that the intent of FATCA is to ensure that all US persons pay the legitimate US taxes. Based on the legislation as currently drafted and the proposed guidance issued in *Notice 2010-60*, we believe that pension corporations such as OTPPB should be exempt from FATCA withholding either as an entity posing low risk of tax evasion pursuant to *section 1471(f)(4)* of Chapter 4 of the HIRE Act (as a retirement plan) if the strict definitional requirements can be satisfied, or as a foreign government, under *section 1471(f)(1)* of Chapter 4 of the HIRE Act. We believe these definitions should be clarified to explicitly allow organizations such as OTPPB to clearly fit within the exemptions.

In particular, *Notice 2010-60* indicates that the IRS and Treasury are considering including retirement plans that meet certain pre-defined conditions in the category of entities that will be considered low risk for purposes of *section 1471(f)*. We believe these conditions should be broadened as described below, because if they are adopted as currently drafted they could prevent many legitimate pension plans and pension corporations from accessing the exemption.

In addition, we believe further clarification should be provided as to whether entities that are exempt from taxation under *section 892* will be considered foreign governments for purposes of the *section 1471(f)* exemption.

Concerns with Existing Exemption for Retirement Plans

Pursuant to *Notice 2010-60*, Treasury and IRS have indicated that a foreign retirement plan will be identified as posing a low risk of tax evasion if the retirement plan meets the following criteria:

- i. The plan qualifies as a retirement plan under the law of the country in which it is established;
- ii. The plan is sponsored by a foreign employer;
and
- iii. The plan does not allow US participants or beneficiaries other than employees that worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued.

Definition of retirement plan

We are concerned that OTPPB may not meet the current criteria outlined in *Notice 2010-60* for being exempt under FATCA, even though it is an integral part of a retirement plan that poses a low risk of tax evasion, because the current criteria would not appear to include an administering entity in the definition of “retirement plan”. This approach would exclude many low risk retirement plans that are administered by a separate entity such as OTPPB.

With respect to the the Plan, OTPPB is both the administrator and the sole legal entity with respect to the Plan, i.e. the Plan is not a separate legal entity. The Plan is not distinct from the administrator and therefore the administrator is the only entity subject to the tax regime. Accordingly, it is necessary to ensure that this entity, i.e. OTPPB, is captured by the definition of “retirement plan” to ensure that the objectives of the exemption are met.

We believe that any pension corporation that qualifies for exemption from tax in its country of creation, or for an exemption under a tax convention entered into with the United States, should also be eligible for exemption under FATCA as low risk.

Plan sponsor

The current criteria appear to require that the actual employer be the sponsor of the plan. This approach would exclude many retirement plans that are not sponsored by the beneficiaries’ direct “employer,” yet pose no greater risk (and possibly less risk) than a plan that is solely employer-sponsored. In addition, as the term “employer sponsored” is not defined under current guidance, many plans will have difficulty determining whether the exemption applies.

We are concerned that the governance of OTPPB may not neatly fit within this criterion. The Plan is jointly sponsored by the Ontario Ministry of Education (i.e. the Ontario government) and the Ontario Teachers’ Federation (a labour federation that represents teachers in Ontario’s publicly-funded schools). All contributions are made by the employees and the Ontario Ministry of Education. However, the ‘employers’ of the teachers are the separate school boards, who are overseen and funded by the Ontario Ministry of Education.

We believe that employer sponsorship is not a critical element in determining whether a retirement plan should be exempt from FATCA and this requirement may not be necessary. Rather, it should be the inherent nature and objectives of the plan that should determine whether a plan should be considered low risk. Accordingly, we believe that any pension corporation that qualifies for exemption from tax in its country of creation, or for an exemption under a tax convention entered into with the United States, should also be eligible for exemption under FATCA as low risk.

However, if sponsorship is retained as one of the criteria allowing a pension plan to be exempt under *section 1471(f)*, we suggest that guidance defining the term “sponsor” be provided, and that such guidance broadens the definition of “sponsor” to include an entity that has oversight over a pension

plan, or contributes financially to the plan, as well as the direct employer itself in the definition of “sponsor”.

Beneficiaries of the Plan

The criteria do not appear to allow for beneficiaries other than employees that worked for the foreign employer. Currently, many pension plans, including the Plan, allow benefits to continue to a spouse or dependent after the death of the employee. Such beneficiaries would not be considered employees of the foreign employer and therefore the plan would not meet the current criteria for exemption as low risk. Continuation of benefits after death should not invalidate a plan as low risk because benefits can only accrue in the Plan in respect of employment in Ontario as a qualified teacher or administrator or in respect of a period in which the teacher contributed to another Canadian registered pension plan. Therefore, the requirement that plans not allow US participants or beneficiaries other than employees that worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued should be modified to take into account continuation of benefits after the death of an employee.

To summarize, based on the current criteria, pension corporations, such as OTPPB, as well as many pension plans may not qualify for an exemption even though they pose a low risk of tax evasion. The Plan poses no risk of tax evasion since it is heavily regulated by the Financial Services Commission of Ontario (to confirm compliance with the Ontario Pension Benefits Act) and the Canada Revenue Agency (to confirm compliance with requirements to qualify as a registered pension plan under the Income Tax Act). The benefits payable under the Plan are pre-determined based on a formula that takes into account the years of service (in Canada only) by the employee and their salary. Further, any benefits may only be accessed in limited circumstances (e.g., the attainment of retirement age, or the extension of benefits to a spouse or dependent upon the death of a member). Finally, the provision of trustee services for the RCA does not generate fees to the OTPPB and poses no risk of tax evasion. We understand that Treasury and IRS are looking at expanding the criteria for foreign retirement plans and other persons posing a low risk of tax evasion. We believe that the comments mentioned above should be taken into account in making such modifications.

Retirement Compensation Arrangement

The above comments also are relevant for the Retirement Compensation Arrangement (RCA) for which OTPPB is the trustee. RCA is a trust separate from OTPPB. All members of the Teachers’ RCA are also members of the Plan. The RCA should be exempt from FATCA withholding as an entity posing low risk of tax evasion pursuant to *section 1471(f)(4)* of Chapter 4 of the HIRE Act (as a retirement plan).

An RCA is a plan or arrangement under which an employer or former employer makes contributions to a custodian and the custodian holds the funds in trust for the employee, former employee or other beneficiary on or after the employee’s retirement, termination of employment, or death. Plan members earning more than a threshold amount (\$ 127,432 in 2012) contribute to the RCA. These contributions are matched by the Ontario Government and participating employers. RCA contributions and

income earned in the RCA are subject to a 50% refundable tax which is refunded as distributions are made from the RCA. Distributions from the RCA are also subject to taxation in Canada. Payments out of the RCA to US residents, however, can qualify as periodic pension payments exempt from taxation under the Canada-US tax treaty. The Canadian Income Tax imposes a strict regime on the RCA and accordingly they also pose low risk of tax evasion. Accordingly, the definition of the retirement plan should be expanded to cover an RCA.

Exemption for Foreign Governments

We understand that Treasury and the IRS are considering making an exemption for FATCA purposes for certain entities that qualify for exemption from federal tax under *section 892 of the Code*. We agree with this approach and suggest that entities that can certify that they are exempt from taxation under the criteria established in *section 892* and related regulations should qualify for the *section 1471(f)* exemption.

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For the above aforementioned reasons, we would like Treasury and IRS to consider expanding the criteria to determine which persons pose a low risk of tax evasion and therefore, should be exempt from FATCA withholding. We would also request that Treasury and the IRS also consider organizations that are currently exempt under *section 892 of the Code* and/or Treaty as exempt from FATCA withholding.

We appreciate the opportunity to express our views and look forward to your comments. Please address any questions regarding this submission to the undersigned.

Sincerely,

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