Canadian Life
and Health Insurance
Association Inc.

Association canadienne
des compagnies d'assurances
de personnes inc.

THE INVESTMENT FUNDS
INSTITUTE OF CANADA

April 30, 2012

CC:PA:LPD:PR (REG-121647-10)
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

SUBMITTED VIA FEDERAL e-RULEMAKING PORTAL

Re: REG-121647-10: "Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Entities"

The Canadian financial services sector welcomes the opportunity to comment on the proposed Treasury regulations (REG-121647-10) (the "Proposed Regulations") issued under Chapter 4 of Subtitle A of the Internal Revenue Code ("Chapter 4" or "FATCA"). This submission has been prepared jointly by the Canadian Bankers Association, the Canadian Life and Health Insurance Association, the Investment Funds Institute of Canada, and the Investment Industry Association of Canada (descriptions of each association are included in Appendix A).

This submission includes:

- A summary of key recommendations from a policy and legal perspective (Attachment A – page 4);
- A document elaborating on each of the key recommendations (Attachment B – page 10); and
- An attachment making a number of recommendations for technical changes and clarifications to ensure that the regulations reflect the policy intent with no unintended consequences (Attachment C – page 40).

We would also like to acknowledge at the outset the value of the proposed "intergovernmental approach" that Treasury is exploring with several countries that would see FATCA reporting on a tax authority-to-tax authority basis. This is a welcome development and we encourage Treasury to undertake similar processes with other countries, including Canada. In addition, we underscore the need for a global approach to FATCA that minimizes differences in compliance for global FFIs that will be operating in various "FATCA partner" countries with different bilateral intergovernmental agreements (IGAs) as well as in "non-FATCA partner" countries without IGAs. Our comments on the Proposed Regulations are not premised on the existence of any IGAs but rather reflect the changes that we believe are necessary or desirable for the implementation of FATCA.

As a general point, one of the challenges of FATCA administration will be to maintain sufficient flexibility in the regulations to keep up with financial and regulatory developments in all the countries with institutions that enter into FFI agreements. Neither the industry nor the domestic

laws governing the industry are static. Conflicts of law and unintended consequences that do not exist currently may arise in the future and will need to be addressed.

While our recommendations are extensive, they largely draw from the same underlying theme – the need to manage complexity. FATCA implementation is very complex. It touches all parts of the financial services sector in all parts of the world. For institutions operating across national borders with diverse product lines, that makes FATCA implementation particularly complex. There are several dimensions to complexity, all of which are addressed in these recommendations.

- **Scope Complexity –** Several of the recommendations aim to better target FATCA by reducing compliance requirements for low risk accounts and low risk institutions by:
    - Amending the registered deemed compliant categories for local FFIs, local banks, non-reporting members, and restricted funds, as well as adding an additional category for deemed compliant life insurers; and
    - Extending the low value account exemption for new accounts to all financial accounts.

- **Operational Complexity** – Many of our recommendations are designed to make FATCA requirements clearer and simpler to implement, and to remove ambiguities by:
    - Extending the grandfathering date so FFIs have time to adjust contracts to reflect FATCA requirements;
    - Removing the requirement for renewal of documentation unless there is a change in circumstances;
    - Allowing FIs to rely on their domestic AML/KYC procedures for documenting clients;
    - Simplifying the entity classifications; and
    - Clarifying the presumption rules so that everyone has the same understanding of what constitutes a U.S. person.

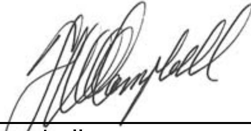
- **Legal Complexity –** Some recommendations address some potential legal issues by:
    - Removing the restriction on expanded affiliated groups (EAGs) having limited branches or limited FFIs past 2015;
    - Amending the requirement related to record retention to include the option of recording the details of the documentary evidence reviewed; and
    - Removing the requirement to terminate relationships with U.S. persons who refuse to consent to transfer their account information to the IRS.

We appreciate the challenge that Treasury and the IRS are facing. By our count, over 170 submissions from approximately 30 jurisdictions representing every facet of the financial services sector have documented significant challenges in complying with FATCA. We appreciate the effort to address these concerns in the drafting of the Proposed Regulations. However, there are still many areas that remain problematic – in some cases at a policy level and in other cases at a technical level. We have identified a number of changes that are required to make FATCA more workable from a Canadian perspective. The changes we are proposing are consistent with FATCA's policy objectives and would improve its efficiency and workability. We may also have further comments as we continue to analyze the Proposed Regulations, including the problematic issue of foreign passthru payments.

Given the complexities and widespread impact noted above, it is unreasonable to expect full compliance by the time that the IRS has indicated that it will be in a position to have FFI agreements take effect (July 2013). **We therefore recommend that FFIs be given at least 18 months from the effective date of their FFI agreement to complete FATCA implementation.**

We would be pleased to speak with you further about our recommendations and, more generally, about FATCA and its impact on Canadian financial institutions and their clients.

Sincerely,



Terry Campbell
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Frank Swedlove
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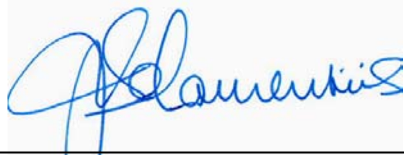

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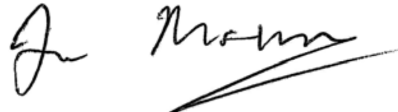

Ian Russell
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Attachments (6)

ATTACHMENT A

SUMMARY OF KEY RECOMMENDATIONS

The following is a summary of our key recommendations that we believe are necessary or desirable for the implementation of FATCA. As requested in the preamble to the Proposed Regulations, our recommendations follow the same order as the Regulations. For ease of reference, included in each recommendation is the page number where a detailed explanation of the recommendation can be found in Attachment B. While we believe that IGAs will be critical to implement FATCA, our recommendations are not premised on the existence of any IGAs.

ELECTION TO BE WITHHELD UPON (page 10):

- *Subject to the agreement of the withholding agent to take on such responsibility*, a participating FFI (including a PFFI that is not a QI) should be permitted to elect to be withheld upon in respect of any one or more of the following types of payments:
    - US FDAP income;
    - gross proceeds that are withholdable payments;
    - foreign passthru payments that are income; and
    - gross proceeds that are foreign passthru payments.

GRANDFATHERED OBLIGATIONS (page 11):

- Extend the grandfathering date in the Proposed Regulations to July 1, 2014 (or some later date, taking into account the release of final regulations).

- Clarify the language of §1.1471-2(b)(2)(ii) to specifically include all life insurance and annuity contracts.

IDENTIFICATION AND DOCUMENTATION (page 12):

- Streamline the entity account categories into three categories: FFIs, Exempt Beneficial Owners, and non-financial foreign entities (NFFEs), with the NFFE category being further split between active and passive. (p. 12)

- Amend §1471-3(c)(5)(iv) to read as follows: "With respect to an account maintained in a jurisdiction with anti-money laundering rules that have been approved by the IRS in connection with a QI agreement (as referenced in §1.1441-1(e)(5)(iii)), any of the documents other than a Form W-8 or W-9 typically used for identification purposes, including documents referenced in the jurisdiction's attachment to the QI agreement for identifying individuals or entities; and". (p. 13)

- Amend §1471-3(c)(5)(v) to read as follows: "Any financial statement, third-party credit report, bankruptcy filing, SEC report, a report or confirmation notice from a consumer reporting agency, public data base, or other third party source, or other document identified in the specific payee documentation requirements in paragraph (d) of this section." (p. 13)

- Broaden the requirements in §1.1441-1(e)(4)(iv) to allow for other forms of electronic transmission, and in particular to allow for the transmittal by email of a withholding certificate (in electronic format), written statement or such other forms that may be prescribed. (p. 14)

- Remove the requirements in §1.1471-3(c)(6)(iv) that a copy be certified or notarized where not required under domestic law and allow copies to be sent by mail. (p. 14)

- Provide a general safe harbour provision that where an FFI is operating in a FATF-compliant country, documentation examined or collected pursuant to local AML/KYC regulations is sufficient for the purposes of obtaining documentary evidence under FATCA. (p. 15)

- Remove the requirement in §1.1471-3(c)(6)(ii)(C) to renew documentary evidence except where the financial institution becomes aware of a change in circumstances (as defined in (D)). (p. 16)

- Treasury and the IRS should provide for separate W-8BEN forms for individuals and entities and remove the expiry date. (p. 17)

- Either remove the reference to a U.S. telephone number from §1.1471-4(c)(4)(i)(A) or, at a minimum, refer explicitly to the primary telephone number. (p. 17)

<u>FFI AGREEMENTS</u> <u>(page 17):</u>

- Amend §1.1471-4(a)(5) to require closure or termination only in instances where doing so would not put the FFI at risk of violating the law or breaching the terms of a contract / service agreement. (p. 17)

- The IRS should only require an external audit where patterns of compliance failures are identified, and not as a follow-up on an isolated instance of non-compliance. (p. 18)

- Isolated instances of non-compliance should not lead to an event of default. (p. 18)

- §1.1471-4(c)(2)(iv) should be amended as follows: "A participating FFI must retain either an original, certified copy, or photocopy (including a microfiche, scan, or similar means of record retention) of the documentation collected***<u>, or maintain a record of the documentary evidence examined (including the type of document, any reference number contained in the document and the place where the document was issued),</u>*** to determine the chapter 4 status of its account holders." (p. 19)

- Amend the last sentence of §1.1471-4(c)(7)(i) to remove the requirement to have retained a record of the name of the employee who reviewed the documentation. (p. 20)

- Amend Section 1.1471-4(c)(10) as follows: "…a responsible officer of the participating FFI must certify to the IRS within ***90 days of the one year anniversary*** ~~**one year**~~ of the effective date of its FFI agreement that the participating FFI has completed the review of all high-value accounts to the extent described in paragraphs (c)(8)(ii) and (iii) of this section and to the best of the responsible officer's knowledge, after conducting a reasonable inquiry, the participating FFI did not have any formal ~~**or informal**~~ practices or procedures in place from **February 8, 2012**, through the date of such certification, to assist account holders in the avoidance of chapter 4 of the Internal Revenue Code. Practices or procedures that assist account holders in the avoidance of chapter 4 include, for example, instructing account holders to split up accounts to avoid classification as a high-value account. Additionally, a responsible officer of the participating FFI must certify to the IRS within **90 days of the two year anniversary** ~~two years~~ of the effective date of its FFI agreement that it has completed the account identification procedures and documentation requirements of this paragraph (c) for all financial accounts that are preexisting obligations or, if it has not obtained the documentation required to be

obtained under this paragraph (c) with respect to an account, treats such account in accordance with the requirements of its FFI agreement. (p. 21)

- The “Special Aggregation Rules Applicable to Relationship Managers” in §1.1471-4(c)(3)(ii)(B)(3), §1.1471-4(c)(4)(iii)(C) and §1.1471-4(c)(4)(iv)(B)(3) should be removed from the Proposed Regulations (including cross references to those sections). (p. 22)

- Amend §1.1471-4(c)(8)(i) (“Enhanced review for high-value accounts”) as follows: “All preexisting individual accounts not identified as U.S. accounts under paragraph (c)(4)(ii) or (c)(7)(ii) of this section and that have a balance or value that exceeds $1,000,000 at the end of the calendar year preceding the effective date of the participating FFI’s FFI agreement, or at the end of any subsequent calendar year, will be treated as a high-value account subject to the additional enhanced review requirements described in this paragraph (c)(8). For purposes of determining the balance or value of an account, a participating FFI must apply the aggregation rules of paragraphs (c)(4)(iii)(B) **~~and (C)~~** of this section. If a participating FFI applied the enhanced review procedures of paragraphs (c)(8)(iii)(A) and (B) of this section to an account in a previous year, the participating FFI will not be required to re-apply such procedures to such account in a subsequent year.” (p. 22)

- Replace the proposed §1.1471-4(c)(8)(ii) (Relationship manager inquiry”) with the following:

“§1.1471-4(c)(8)(ii) Relationship manager inquiry
With respect to all high-value accounts described in paragraph (c)(8)(i) of this section, a participating FFI must identify all accounts to which a relationship manager is assigned **~~(including any accounts aggregated with such account)~~ and any additional accounts that the relationship manager knows or has reason to know are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person shall be treated as a high-value account for purposes of §1.1471-4(c)(8)(i). For any accounts** for which the relationship manager has actual knowledge that the account holder is a U.S. person, **~~In such case,~~** the participating FFI must obtain from the account holder a Form W-9, and a valid and effective waiver as described in section 1471(b)(1)(F)(i), if necessary. A participating FFI must identify such accounts and obtain the appropriate documentation within one year of the effective date of its FFI agreement, or will be required to treat the holder of such account as a recalcitrant account holder as provided in §1.1471-5(g)(3)(i)(B). In order to meet its obligations under the FFI agreement, a participating FFI is also required to implement procedures to ensure that a relationship manager identifies any change in circumstances of an account. For example, if a relationship manager is notified that the account holder has a new mailing address in the United States, the participating FFI will be required to treat the new address as a change in circumstances and will be required to obtain the appropriate documentation from the account holder as described in paragraph (c)(4)(i)(B)(3) of this section.” (p. 22)

- Eliminate the time limitation on limited branches and limited FFI affiliates in §1.1471-4(e)(2)(vi) and 4(e)(3)(v). (p. 23)

- Amend §1.1471-4(e)(2)(v) and 4(e)(3)(iv) to delay intra-group withholding requirements until the end of 2015. (p. 23)

- Provide a centralized compliance option for situations where there is common management, oversight and administration. (p. 24)

DEFINITION OF FINANCIAL ACCOUNT (page 25):

- Extend the $50,000 exception for new individual depository accounts to all types of new financial accounts. (p. 25)

- Amend §1.1471-5(a)(4)(i) to read as follows: "Unless a participating FFI elects under paragraph (a)(4)(iv) of this section not to have this paragraph (a)(4)(i) apply to an account, the term U.S. account shall not include any account maintained by such financial institution during a calendar year if the conditions of paragraphs (a)(4)(i)(A), (B), and (C) of this section are met." (p. 25)

- Amend §1.1471-5(a)(4)(iv) to read as follows: "A participating FFI may elect to disregard the exception described in paragraph (a)(4)(i) of this section, including for an account that would otherwise meet the exception described in that paragraph by reporting such account." (p. 25)

- Amend the definition of "retirement accounts" (§1.1471-5(b)(2)(i)(A)(2)) to:
    - Revise the wording of §1.1471-5(b)(2)(i)(A)(2)(ii) to read in part as follows: "All of the contributions to the account are employer, government or individual contributions that are limited by reference to earned income of the individual or their spouse under the law …".
    - Revise the wording of §1.1471-5(b)(2)(i)(A)(2)(iii) to read in part as follows: "Annual contributions (other than form other accounts described in this paragraph (b)(2)(i)(A) or plans described in paragraph (f)(2)(ii) or this section or 1.1471(6)(f), or unused contribution limits carried forward from prior years)…" and "limits or penalties (including the immediate taxation of earnings) apply by law of the jurisdiction in which the account is maintained to withdrawals made before reaching a specified retirement age . . .". (p. 26)

- The definition of "savings accounts" in §1.1471-5(b)(2)(i)(B) should be revised as follows:
    - Revise the annual contribution limit to permit additional contributions in any year to reflect unused prior year contributions and allow the annual contribution limit not to apply if the fund has a $500,000 or less lifetime limit.
    - Provide an exception to the stated contribution cap for accounts with multiple beneficiaries established for the purpose of funding higher education expenses.
    - Delete the earned income requirement since, in some of these arrangements, the express policy intent is to encourage savings for certain persons who may not have earned income but have clear future expenditures that will need to be addressed. (In this regard, we note that United States section 529 plans have no similar limitation.)
    - Revise §1.1471-5(b)(2)(i)(B)(3) to read as follows: "Limits or penalties (including the immediate taxation of earnings) apply on withdrawals from the account; and".
    - Provide that the "limits or penalties" requirement does not apply to savings plans with an annual contribution limit (subject to a rule permitting "catch-up" contributions) of $10,000 or less.
    - Revise §1.1471-5(b)(2)(i)(F) to read as follows: "For purposes of this paragraph (b)(2), an account is tax-favored if contributions to the account that would otherwise be subject to tax under the laws of the jurisdiction where the account is maintained are deductible or excluded from gross income of the account holder or if the taxation of investment income from the account is deferred (or such income is not subject to tax) under the laws of such jurisdiction, or both." (p. 27)

- Add a specific exception to §1.1471-5(b)(2) that would treat as an exempt financial account any pension or retirement plan or arrangement entitled to treaty benefits under the principles of §1.1471-6(f)(1)(i). (p. 29)

- Permit any single beneficiary of a Large Deemed Compliant Retirement Fund to have the right to no more than 10% of the fund's assets (§1.1471-5(f)(2)(ii)(A)(1)(ii)). (p. 30)

- Clarify the sources from which permissible rollovers may be made in respect of these categories of deemed-compliant FFIs. (§1.1471-5(f)(2)(ii)(A)(1)(i) and §1.1471-5(b)(2)(i)(D).) (p. 30)

- The IRS should be given the express authority under the regulations to exclude government-registered plans that are consistent with the principles underlying §1.1471-5(b)(2)(i). (p. 31)

DEEMED COMPLIANT FFIS (page 31):

- Amend §1.1471-5(f)(1)(i)(A)(5) to state that "substantially all accounts" (or similar wording) maintained by the FFI must be held by residents, and include a further sentence stating that "for greater certainty, entities with 95% of accounts held by residents are deemed to have met this test." (p. 31)

- Amend §1.1471-5(f)(1)(i)(A)(3) and 1.1471-5(f)(2)(i)(C) to remove the restriction on advertising the availability of a U.S. dollar account. (p. 31)

- Amend §1.1471-5(f)(2)(i)(D) to state that a local FFI can have no more than $1 billion in assets on its balance sheet and, if the FFI is a member of an EAG, the group may have no more than $2 billion in total assets on its consolidated balance sheet. (p. 31)

- Treat individual sub-funds included within a single legal entity as being separate FFIs by making appropriate amendments to the definition of "FFI" and/or the definition of "entity" and ensuring that such separate status is included for the purpose of applying deemed compliant conditions and status. (p. 34)

- Modify §1.1471-5(f)(1)(i)(D)(3) to state that agreements must prohibit sales to U.S. residents rather than U.S. persons (and others) outside the fund's jurisdiction of incorporation / organization (similar to the local FFI regulation). (p. 34)

- Modify the restricted distributor definition by removing §1.1471-5(f)(4)(iii) that prohibits them from being part of an international group and remove the size cap in §1.1471-5(f)(4)(v). (p. 34)

- Add a deemed compliant category for insurers (which would include any licensed insurance branch) that meet the following criteria:
    - Licensed and regulated by the foreign jurisdiction in which it is organized.
    - The relevant foreign jurisdiction is FATF-compliant within the meaning of Prop. Treas. Reg. §1.1471-1(b)(22) or the insurer complies with FATF requirements.
    - Has no fixed place of business outside the relevant foreign jurisdiction, treating a branch as a separate entity for this purpose.
    - Does not solicit account holders outside of the relevant foreign jurisdiction.
    - 95% of all accounts are held by residents of the relevant foreign jurisdiction. (For this purpose, we propose that the final regulations specify that this percentage be satisfied as of the prior year end before the company or branch registers as a deemed-compliant FFI and as of the prior year end before it renews its

certification as a deemed-compliant FFI (i.e., every three years). We also propose that the final regulations specify that this percentage be based on the number of total accounts, regardless of value or nature, and that it be calculated based on the residency of policyholders as of the date of issuance of their contracts.)
    - Has policies in place to prevent account openings by U.S. persons who are not residents of the country, nonparticipating FFIs, or entities controlled or beneficially owned by U.S. persons (as determined under AML due diligence procedures). (p. 35)

- Amend §1.1471-5(f)(1)(i)(B) to state that where an FFI demonstrates that it is using best efforts to comply with the requirements of the non-reporting member deemed compliant category but legal impediments prevent full compliance, the EAG will not be penalized with loss of its participating status. (p. 36)

- Add a provision to §1.1471-5(f) permitting FFIs to make application to the IRS to be registered deemed compliant. (p. 37)

PAYMENT REPORTING (page 37):

- Amend 1.1474-1(d)(2)(ii) to clarify that PFFIs:
    - are not required to report the name of the non-participating FFIs;
    - report payments on the same basis as required for a U.S. account; and
    - report payments made by the PFFI.

INTERGOVERNMENTAL AGREEMENTS (IGAs) (page 38):

- IGAs should be used to:

    - deal with the conflicts of laws that have been raised in regard to complying with Chapter 4
    - identify accounts in that country that have low associated U.S. tax risk and that therefore should be excluded from treatment as U.S. accounts
    - provide that the identification documentation required by Chapter 4 is based on local AML/KYC rules.

- While IGAs are being negotiated with a country, we urge Treasury to issue guidance as necessary allowing for extended transitional relief during the negotiations.

ATTACHMENT B

DETAILED DESCRIPTION OF EACH KEY RECOMMENDATION

Our comments below are focused on the following key areas[1]:

1. Election to be withheld upon (page 10)
2. Grandfathered obligations (page 11)
3. Identification and documentation (page 12)
4. FFI agreements (page 17)
5. Definition of financial account (page 25)
6. Deemed compliant foreign financial institutions (FFIs) (page 31)
7. Payment reporting (page 37), and
8. Merits of IGAs (page 38).

As requested in the Preamble to the Proposed Regulations, we have organized our recommendations in the order of the Proposed Regulations to which they refer.

1. ELECTION TO BE WITHHELD UPON *[§1.1471-2(a)(2)(iii)]*

We note that under §1.1471-2(a)(2)(iii), the election by a participating FFI (PFFI) to be withheld upon is limited to Qualified Intermediaries (QIs) that are PFFIs, and the scope of the election is limited to U.S. source FDAP income payments for which the QI has not assumed withholding responsibility.

Limiting the types of payments in respect of which a PFFI can elect to be withheld upon will in many instances increase the complexity of implementing the withholding requirements for both the PFFI and the withholding agent. The PFFI that may still need to develop the ability to withhold Chapter 4 tax with respect to gross proceeds and foreign passthru payments. The withholding agent may need to implement one set of procedures to be applied in the case of their own recalcitrant and NPFFI accounts (for which withholding will apply to all passthru or withholdable payments (as applicable) made to such accounts) and another set for the accounts of the electing PFFI (for which withholding would only be applied to U.S. source FDAP income payments).

We believe that it is unnecessary for the regulations to limit the types of payment in respect of which a PFFI can elect to be withheld upon. We believe that in much the same way that paying agents and non-withholding QIs have developed acceptable industry practices and procedures for Chapter 3 withholding, the market will similarly develop acceptable practices and procedures to address withholding for PFFIs that elect to be withheld upon in respect of payments subject to Chapter 4 withholding.

[1] Note, the CLHIA sent a submission to the IRS on April 5, 2012 with comments on the Proposed Regulations as they affect life insurers. Those comments have not been duplicated in this submission (with the exception of grandfathering and deemed compliant life insurers).

Recommendation:

***Subject to the agreement of the withholding agent to take on such responsibility*, a PFFI (including a PFFI that is not a QI) should be permitted to elect to be withheld upon in respect of any one or more of the following types of payments:**

- **US FDAP income;**
- **gross proceeds that are withholdable payments;**
- **foreign passthru payments that are income; and**
- **gross proceeds that are foreign passthru payments**.

2. GRANDFATHERED OBLIGATIONS *[§1.1471-2(b)]*

We appreciate the extension of the date within the definition of "grandfathered obligation" in §1.1471-2(b)(2)(i) to January 1, 2013. The extension has provided a small window of additional time for our members to deal further with the requirements of FATCA with respect to existing obligations in their businesses. However, significant concerns remain that this extension will not provide enough time for all FIs to understand the complex requirements of the Proposed Regulations and the impact of possible intergovernmental agreements (IGAs) implementing FATCA on existing obligations, causing uncertainty and disruption. In addition to the challenges of the grandfathering date, there continue to be problems with the narrow scope of the grandfathering provisions. We have identified the following areas that will be significantly impacted by timing and scope issues:

Master Agreements: If the passthru payment provisions of FATCA apply to payments made pursuant to Master Agreements[2], FFIs will be forced to re-open negotiations with counterparties with respect to existing Master Agreements, and to develop withholding systems related to such payments. If these Master Agreements are not made FATCA-compliant by January 1, 2013, FFIs will be economically motivated to cease or dramatically restrict the transactions they enter into with a number of counterparties after the grandfathering date. Additionally, the potential impact of IGAs on Canadian and foreign counterparties will need to be assessed, possibly requiring a further redocumentation process for all existing Master Agreements. All of this will need to be done prior to the January 1, 2013 deadline, a full six months before the effective date of FFI Agreements. **(Note that additional recommendations with respect to the capital markets businesses and grandfathered obligations are included herein as Appendix C.)**

Contractual Deposit Agreements: In banking, term deposits and other contractual deposit agreements entered into between January 1, 2013 and the effective date of FFI agreements will need to be re-evaluated in light of the FFI agreement and, if necessary and/or possible, adjusted.

Insurance: We also recommend that the definition of "grandfathered obligations" should be revised to clarify that it applies to all life insurance and annuity contracts in existence on the effective date (January 1, 2013 as currently proposed). As explained in the CLHIA's submission dated April 5, 2012, the Proposed Regulations do not specifically address the grandfathered status of a life insurance contract payable at death or a lifetime annuity. As defined, a grandfathered obligation[3] must have a stated expiration or term. Under §1.1471-2(b)(2)(ii)(C) and (D), a grandfathered obligation includes a life insurance contract payable on the earlier of a stated

[2] The term "Master Agreement" includes negotiated contracts within the capital markets businesses of FIs, including investment banking, proprietary trading and funding, syndications, securitizations, derivatives, notional principal contracts, securities lending, sale/repurchase transactions, commodities trading and fixed income trading.

[3] See §§1.1471-2(b)(2)(i) and (ii).

age or death and a term certain annuity; the status of a life insurance contract payable at death or a lifetime annuity is not specifically addressed. Although these contracts do not have a term specified in years, they clearly do have a "stated expiration," as death is unavoidable and the remaining length of these contracts can be actuarially determined. We see no policy reason not to grandfather such contracts, as they obviously represent current contractual liabilities of the insurer. Similarly, for deferred annuities, the length of these contracts is a period of years, the life of the annuitant, or both, and the contracts are binding obligations of the issuers. Although all life insurance and annuity contracts would appear to satisfy the requirements of §1.1471-2(b)(2)(ii), there is some ambiguity in the wording, and we are concerned that the specific references to certain life insurance and annuity contracts in §1.1471-2(b)(2)(ii)(C) and (D) could lead an IRS agent to exclude other types of contracts. Accordingly, the language of §1.1471-2(b)(2)(ii) should be clarified to specifically include all life insurance and annuity contracts. In addition, similar to the concerns expressed above for contractual deposits, we are concerned that the proposed grandfathering date of January 1, 2013 does not provide sufficient time to change contracts, particularly given the uncertainty over the final rules.

We recommend that Treasury exercise its general authority for rulemaking under Chapter 4 to release expedited guidance advising that the grandfathering date is extended until **July 1, 2014 (or some later date, taking into account the timing of the release of final Regulations)**, to allow FFIs a reasonable amount of time after the effective date of their FFI agreements to assess the status of regulations and IGAs implementing FATCA, and to re-document their existing agreements appropriately.

Recommendations:

Extend the grandfathering date in the Proposed Regulations to July 1, 2014 (or some later date, taking into account the release of final regulations).

Clarify the language of §1.1471-2(b)(2)(ii) to specifically include all life insurance and annuity contracts.

3. IDENTIFICATION AND DOCUMENTATION *[§1.1471-3]*

Determination of Entity Type

The Proposed Regulations contain in excess of 30 categories of entity accounts. For each category, there is an accompanying set of specific documentation requirements. Compliance with a system that complex is incredibly challenging. In order to categorize account applicants at the time of account opening, staff of FFIs would literally need to understand how to identify every category and know the documentation associated with each. That is unrealistic. A simpler alternative would be to streamline the entity categories into three main types of entities: FFIs, Exempt Beneficial Owners, and non-financial foreign entities (NFFEs), with the NFFE category being further split between active and passive. This would be far more manageable for FFIs.

Recommendation:

Streamline the entity account categories into three categories: FFIs, Exempt Beneficial Owners, and non-financial foreign entities (NFFEs), with the NFFE category being further split between active and passive.

Individual Accounts *[§1.1471-3(c)(5)]*

The Proposed Regulations reflect the efforts of Treasury and the IRS to provide more flexibility for acceptable documentary evidence by including references to existing anti-money laundering and know-your-client (AML/KYC) practices and offering more options for satisfying FATCA documentation requirements. However, there are still some key differences between domestic documentation standards and FATCA requirements that are problematic, both in respect of individual and entity accounts.

(i) Other Documentary Evidence

In comparing the "documentary evidence" standard in the Proposed Regulations to the standard ID used for customer identification in Canada, it becomes apparent that while great strides have been made to expand the list of acceptable documentation, there are still inconsistencies between documentary evidence acceptable under FATCA and that which is widely used for identification purposes in Canada. One notable, and particularly problematic, example is the Social Insurance Number (SIN) card.[4]

The challenge with a SIN card is that it does not contain an address field. Rather, the SIN card is very similar to the US Social Security Number (SSN) Card. It is issued by the federal government and contains the name of the individual, their SIN and a signature line. Among other purposes, the SIN is used as an individual's taxpayer identification number, similar to an SSN in the U.S.

A SIN card is widely used as a valid piece of ID for the purposes of account opening in Canada and is referenced in legislation related to account opening.[5] We believe the best solution to this problem – which we suspect is not unique to Canada – is to amend §1.1471-3(c)(5)(iv) to allow as acceptable any piece of ID typically used for identification purposes where the account is maintained in a jurisdiction with AML/KYC rules that have been approved by the IRS for QI purposes including, but not limited to, documents referenced in the jurisdiction's QI Attachment.

(ii) Remote Openings and Electronic Transmission of Documents

a) Remote Openings

In addition to expanding the breadth of acceptable documentary evidence, Treasury and the IRS are to be commended for taking into account the needs of remote account openings such as allowing electronic copies of documentary evidence in place of the actual document [§1.1471-3(c)(6)(iv)] and third party credit reports as documentary evidence [§1.1471-3(c)(5)(v)]. Allowance for remote openings is necessary given the growing prominence of electronic commerce and on-line banking.

While the measures are helpful, one widely-used form of ID for remote opening has not been included – use of third party identification management services. In some instances, FIs rely on respected third party ID management services (or products they provide) to verify the identity of an applicant. We recommend that §1.1471-3(c)(5(v) be amended to make express reference to such services for the purposes of FATCA identification, especially in cases where there are no U.S. indicia. This would be consistent with existing U.S. standards for banks which, in the case of

[4] There are other examples as well, such as the Old Age Security Card.

[5] The SIN card is among the list of ID that must be accepted for the purposes of adhering to the *Access to Basic Banking Services* regulation.

remote openings, require an independent verification of the customer's identity through comparison of information provided by the customer with information obtained from a consumer reporting agency, public data base, or other source.[6] If necessary, services could be required to obtain a form of IRS certification to satisfy authorities that they meet an acceptable standard.

b) Electronic Transmission

Section 1.1471-3(c)(6)(iv) provides that a withholding certificate, written statement or other such form that the IRS may prescribe can be transmitted electronically or by facsimile. For this purpose, the term “electronically” is in accordance with the requirements of §1.1441-1(e)(4)(iv). Among other things, these requirements include an electronic system to be established that includes the documentation of all occasions of user access (account holder signs on to a system) and an electronic signature. Given the current reliance on technology by FIs, we recommend that these requirements be broadened to allow for other forms of electronic transmission, and in particular to allow for the transmittal by email of a withholding certificate (in electronic format), written statement or such other forms that are commonly used within the industry and by account holders to transmit information.

Section 1.1471-3(c)(6)(iv) allows for the electronic transmission (including by facsimile) of documentary evidence provided certain conditions are met, including the requirement that the copy be a certified copy or notarized copy. Where account holders open accounts in person, AML rules require that the original document be viewed. Where the original is not viewed, a notarized or guaranteed copy is one of several options that can be used to document the applicant.[7] For all other purposes, the requirement that a copy be a certified or notarized copy should be removed. In addition to electronic transmission, we also recommend allowing copies to be sent by mail.

[6] Source: See 31 CFR Part 103.121.

[7] See the Canadian Bankers Association submission on Notice 2011-34 for a detailed description of the acceptable methods for non-face-to-face identification techniques under Canadian AML legislation.

Recommendations:

Amend §1471-3(c)(5)(iv) to read as follows: *"With respect to an account maintained in a jurisdiction with anti-money laundering rules that have been approved by the IRS in connection with a QI agreement (as referenced in §1.1441-1(e)(5)(iii)), any of the documents other than a Form W-8 or W-9 typically used for identification purposes, including documents referenced in the jurisdiction's attachment to the QI agreement for identifying individuals or entities; and".*

Amend §1471-3(c)(5)(v) to read as follows: *"Any financial statement, third-party credit report, bankruptcy filing, SEC report, a report or confirmation notice from a consumer reporting agency, public data base, or other third party source, or other document identified in the specific payee documentation requirements in paragraph (d) of this section.*

Broaden the requirements in §1.1441-1(e)(4)(iv) to allow for other forms of electronic transmission, and in particular to allow for the transmittal by email (in electronic format) of a withholding certificate, written statement or such other forms that may be prescribed.

Remove the requirements in §1.1471-3(c)(6)(iv) that a copy be a certified or notarized where not required under domestic law and allow copies to be sent by mail.

(iii) Reliance on Domestic Standards and Practices

We are strongly of the view that financial institutions should be able to rely on their existing AML/KYC practices for the purposes of FATCA. We appreciate that the Proposed Regulations are less prescriptive than earlier guidance in this area in an effort to move towards that objective. Indeed, in the Executive Summary to the Proposed Regulations, several references are made to placing greater reliance on FFIs' AML/KYC procedures. Unfortunately, while the intent clearly is to rely more upon existing AML/KYC requirements, in many cases the Proposed Regulations stop short of that and prescribe specific identification and documentation requirements that go beyond current AML/KYC practices. The example above related to documentary evidence standards is one such instance but it is not isolated.

The definition of a "substantial U.S. owner" is another instance where requirements in FATCA deviate from conventional AML/KYC practice for many financial institutions. We appreciate that where U.S. indicia are found, additional information may be required of the client to verify their status, but beyond those rare instances, we believe that there is no need to require additional documentation (or renewal of documentation) beyond that examined or collected for domestic AML/KYC reasons. This is especially true where the FFI is operating in a Financial Action Task Force (FATF) compliant country.

Recommendation:

Provide a general safe harbour provision that where an FFI is operating in a FATF-compliant country, documentation examined or collected pursuant to local AML/KYC regulations is sufficient for the purposes of obtaining documentary evidence under FATCA.

Redocumentation *[§1.1471-3(c)(6(ii)(C)]*

One requirement of the Proposed Regulations that was not in the prior Notices is the requirement to renew documentary evidence in §1.1471-3(c)(6)(ii)(C). While we appreciate the desire to redocument a client when the FFI becomes aware of a change in circumstances that could be indicative of a change to U.S. status, requiring redocumentation of clients every time a piece of documentation expires, or every three years for some documentation, is excessive and impractical for accounts that are inherently low risk since they have already been documented as non-U.S. Many clients, including most individuals, are not redocumented after account opening. In addition, there is no legislative requirement for redocumentation in Canada. As a consequence, requiring regular renewal of documentation is likely to provoke a strong, negative response from clients.

Mandatory redocumentation is also a recipe for creating recalcitrant account holders. The response rate to requests for clients to provide new documents is likely to be very low. As a consequence, redocumentation requirements are likely to create an artificially high number of recalcitrant account holders, which will work against the interest of financial institutions and Treasury and the IRS.

Redocumentation is also expensive. Suppose that the typical redocumentation process starts with outreach by phone (or an outreach by mail with a request to call) followed by a visit to a branch to review the new documentary evidence. According to a Booz & Company study, the typical bank customer call handled by an agent costs the bank $4.[8] That represents the cost of initial outreach. The next, and much larger cost, is the cost of having the client come to an office and present documentation for review. While there are no studies that we are aware of on the cost of documenting a bank client, a reasonable shadow price is the $48 per client documentation cost incurred by Passport Canada[9]. Assuming a client responds to the first contact, it will cost approximately $52 to contact and document a client. There are approximately 67 million bank accounts in Canada. To redocument all of those on a three year basis would **cost nearly $1.2 billion annually**. Some relief is intended to come from the small account exemption. Even in that case, however, the cost of redocumentation remains substantial. On a best case scenario, if every account under $50,000 is exempted (which is unreasonable given that some of these clients will have other accounts with the same institution), that would still leave approximately 2.8 million accounts to document. Ignoring the portion that would be high-value and therefore subject to a much more expensive review, redocumentation on a rolling three year basis would cost Canadian banks an estimated $49 million annually. Similarly, redocumentation costs will be very costly for other types of FIs. For example, it is estimated there are over 18 million individual life insurance and annuity contracts in Canada.

The reality is also that all of the trouble and expense associated with redocumentation is likely to be of little benefit. As a practical matter, an individual's U.S. or non-U.S. status is highly unlikely to change in three years. The only change that is likely to trigger a change in status is if a person moves to the United States and becomes a U.S. resident. That is a change in circumstances that the financial institution is likely to become aware of without the need for regular redocumentation and can be handled using the change in circumstances provisions in the Proposed Regulations.

[8] Booz & Company, *Redefining the Mission for Banks' Call Centers Cut Costs, Grow Sales, or Both*. 2008.

[9] Passport Canada's primary function is to document clients. According to their 2010-2011 Annual Report, they dealt with 4.5 million passport applications, of which 72% were walk-in applicants at their passport centres across Canada. To service those clients, Passport Canada incurred staffing costs of $173 million. According to Passport Canada, 76% of those staffing costs ($131,480,000) were attributable to service delivery (ie. dealing with clients), with the remainder attributable to passport product and delivery. In addition to staff, Passport Canada spent $25.1 million on accommodation and facilities. Therefore, in total it cost Passport Canada $156,480,000 to document 4.5 million clients, or approximately $48 per client.

Recommendation:

- **Remove the requirement in §1.1471-3(c)(6)(ii)(C) to renew documentary evidence except where the financial institution becomes aware of a change in circumstances (as defined in (D)).**

W-8BEN Forms

The three-year expiration date of the W-8BEN form makes it difficult to use this form for documentation. When considering the re-drafting of the W-8BEN form for FATCA purposes, it would greatly assist with the implementation of the requirements of both Chapter 3 and Chapter 4 if Treasury and the IRS remove the three-year expiry date, and simplify the form by creating separate entity and individual W8-BENs.

Recommendation:

Treasury and the IRS should provide for separate W-8BEN forms for individuals and entities and remove the expiry date.

Indicia of U.S. Status *[§1.1471-4(c)(4)(i)(A))]*

Section 1.1471-3(e)(4) outlines indicators that constitute "reasons to know" that a client may potentially be a U.S. person. Among the U.S. indicia identified in §1.1471-4(i)(A) is the existence on file of a U.S. telephone number. While at one time a telephone number was a clear indicator of where an individual resides, in the age of voice-over-internet-protocol phone service (VOIP), that is no longer the case. There are now services that allow clients to select the area code they want to be associated with, typically to manage long distance charges. While we accept that having a primary contact number as a U.S. number may constitute indicia, we strongly question the premise that having any U.S. telephone number on file is a reasonable indicator of U.S. status.

Recommendation:

Either remove the reference to a U.S. telephone number from §1.1471-4(c)(4)(i)(A) or, at a minimum, refer explicitly to the primary telephone number.

4. FFI AGREEMENTS *[§1.1471-4]*

Section 1.1471-4 is in many respects the heart of FATCA because it outlines how the provisions in the Proposed Regulations will be structured in the context of an FFI agreement. While some progress has been made, there are a number of areas where problems persist.

Closing Accounts / Terminating Relationships *[§1.1471-4(a)(5)]*

Much has already been said on the challenges of terminating existing business relationships, both by Canadian financial institutions and others around the world. Terminating business relationships raises a host of public policy questions as well as legal issues under domestic

legislation and/or contract law which have not been repeated in this letter as they have been discussed in detail in previous correspondence.[10] In addition, there are concerns that it may not be possible to close new accounts if a client's circumstances change after the account is opened. For example, in the case of insurance, given the long term protection provided by these policies, we are concerned that regulators may not allow insurance policies to be cancelled since the individual may not be able to get replacement insurance or the price may have increased substantially (due to increased age or illness)[11].

We note that the Proposed Regulations do not include detailed account closure / contract termination provisions. We take that to be a tacit acknowledgement that the issues raised by terminating relationships are complex and still need to be addressed. There is an undeniable reality to the termination issue that is not reflected in the Proposed Regulations, and it is that termination is only feasible in instances where contractual and legal obligations permit the FFI to terminate without breaking the law or breaching a contract. We believe that reality needs to be reflected in the Proposed Regulations.

Recommendation:

Amend §1.1471-4(a)(5) to require closure or termination only in instances where doing so would not put the FFI at risk of violating the law or breaching the terms of a contract / service agreement.

Verification *[§1.1471-4(a)(6)]*

Section 1.1471-4(a)(6) of the Proposed Regulations states that the FFI agreement will specify an FFI's obligation to comply with specified verification procedures. Although details have yet to be finalized, in general, it is proposed that:

- The FFI agreement will require the FFI to:
  - adopt written policies and procedures governing its due diligence procedures for identifying and documenting account holders and its withholding and reporting requirements under the FFI agreement; and
  - conduct periodic reviews of its compliance with these policies and procedures and its Chapter 4 obligations.
- A responsible officer of the FFI will periodically certify to the IRS the FFI's compliance with its obligations under the FFI agreement and may be required to provide certain factual information and to disclose material compliance failures.

An external audit would be required only if the IRS identifies concerns about the FFI's compliance based on the reporting and certifications provided by the FFI, including cases of suspected patterns of compliance failures. In general, it is not proposed that predetermined or random external audits be conducted.

[10] See prior submissions from the Canadian Life and Health Insurance Association and the Canadian Bankers Association, for example.

[11] There is a strong public policy argument that insurers should not be able to deprive an individual and their family of life insurance merely because of a change in residence. Consider for example, the case of a 60 year old resident of Thailand who bought a life insurance policy from a Thai insurer when he was 30, has now been diagnosed with cancer and has become a resident of the United States to live with his daughter in Florida. It would be unconscionable for the insurer to be required to cancel his policy (and unreasonable to expect an insurance regulator to permit such a cancellation) merely because of his change in residence.

Canadian FIs agree that an internal review and certification process is appropriate for addressing verification of compliance with internal policies and procedures adopted under the FFI agreement. We will provide further comments on this once the draft FFI agreement is available. We also believe that isolated instances of non-compliance should not constitute an "event of default" under an FFI agreement. The FFI agreement should provide a reasonable period of time to cure any incidents of non-compliance.

We propose that the IRS should only require an external audit where patterns of compliance failures are identified, and not as a follow up on an isolated instance of non-compliance. Where an external audit is required, an FFI should be able to designate the external auditor (from an IRS approved list of external auditors), similar to provisions in the QI agreement.

Recommendations:

The IRS should only require an external audit where patterns of compliance failures are identified, and not as a follow up on an isolated instance of non-compliance.

Isolated instances of non-compliance should not lead to an event of default.

Record Retention *[§1.1471-4(c)(2)(iv)]*

Under §1.1471-4(c)(2)(iv), for new accounts, an FFI must retain either an original, certified copy, or photocopy of the documentation collected to determine the Chapter 4 status of its account holders.[12] In Canada, AML rules require an FI that has relied on documentary evidence to ascertain the identity of an individual to retain a record of the type of document, its reference number and the place where it was issued. There is no requirement to retain an actual copy of a document. Therefore many FIs in Canada have implemented policies and procedures, and developed record retention systems, that are based on recording the details of documentation reviewed, rather than obtaining and retaining copies of documentation. The requirements of §1.1471-4(c)(2)(iv) represent a significant departure from Canadian AML requirements and, for many FIs (including most of the large Canadian retail banks), will require significant and costly changes. Not only will significant changes be required at the front line when a new client is being identified, but many FIs will also need to make costly equipment investments to permit the copying and storage of copies of identification.

The proposed requirements for the retention of copies of documentary evidence also present significant uncertainty with respect to potential conflicts with Canadian privacy legislation. Canadian privacy legislation is principles-based. Consequently, there is no specific provision in the Act which directly addresses the issue of photocopying and retaining documentary evidence. Instead, FIs generally look to interpretations of the Office of the Privacy Commissioner of Canada (OPC) of the principles of Canadian privacy legislation through their decisions on consumer complaints made under such legislation, as well as guidance they publish on privacy related matters.

Basic privacy principles extend to any situation where documentary evidence is collected, and include the following:

[12] Additionally, under §1.1471-3(c)(6)(iii), a withholding agent must retain either an original, certified copy, or photocopy of the withholding certificate, written statement, or documentary evidence. Also, with respect to documentary evidence, the withholding agent must also note in its records the date on which and by whom the document was received and reviewed.

1. Collect the least amount of personal information possible to satisfy a legitimate business activity;
2. The collection of personal information must be reasonable, and this is irrespective of the consent of the individual; and
3. If details of or a copy of the ID must be retained, it must be properly safeguarded and retained only for the period of time that is necessary, after which it must be securely destroyed.

Without specific guidance from the OPC and its Canadian provincial counterparts[13], Canadian FIs face significant uncertainty with respect to potential privacy issues that might arise if they were to begin retaining copies of documentary evidence to satisfy FATCA requirements. Although the OPC does not have order making powers or the power to issue monetary penalties, they do have the power to investigate complaints and audit organizations if they have reason to believe there is a systemic privacy issue. As a result of an investigation or audit, they can make a finding against an organization that includes recommendations for changes to be compliant with their interpretation of privacy legislation. If an organization refuses to implement the recommended changes, the OPC can name the organization in their finding publicly (resulting in reputational damage) and/or apply to the Federal Court of Canada for a court order to implement its recommendations.

In addition to the legal and operational issues highlighted above, there are other practical problems with requiring photocopies. For example, photocopying of ID is problematic for client interactions happening outside of a financial institution's branches or offices (e.g. in-home sales, which are prevalent in products such as life insurance, financial planning, and residential mortgages) because there is typically no access to a photocopier. Keeping a record of the information that was presented at account opening is typically sufficient for the purposes of establishing that proper procedures were followed and provides a trail that can be followed for review if necessary.

Recommendation:

§1.1471-4(c)(2)(iv) should be amended as follows:

"A participating FFI must retain either an original, certified copy, or photocopy (including a microfiche, scan, or similar means of record retention) of the documentation collected***, or maintain a record of the documentary evidence examined (including the type of document, any reference number contained in the document and the place where the document was issued),*** to determine the chapter 4 status of its account holders."

Alternative Identification Procedure for Preexisting Offshore Accounts *[§1.1471-4(c)(7)(i)]*

Section 1.1471-4(c)(7)(i) provides that, in the case of a preexisting offshore account, an FFI is deemed to have met its requirement to maintain documentary evidence if it retains a record of the documentation provided at account opening as well as "the name of the employee that reviewed the document." Since keeping a record of the name of the employee who viewed the documentary evidence is not part of Canada's AML/KYC customer identification requirements, many Canadian financial institutions may not have retained that particular field in their records of documents that were reviewed at the time of account opening. This greatly diminishes the value of the exception and may trigger a large number of otherwise unnecessary and unproductive redocumentations. A record of the information reviewed and the date of account opening should be sufficient.

[13] In Canada, the offices of the provincial Privacy Commissioners oversee the activities of provincially regulated securities dealers.

Recommendation:

Amend the last sentence of §1.1471-4(c)(7)(i) to remove the requirement to have retained a record of the name of the employee who reviewed the documentation.

Responsible Officer Certification *[§1.1471-4(c)(10)]*

Section 1.1471-4(c)(10) requires a "responsible officer" of the FFI to certify to the IRS (within one year of the effective date of its FFI agreement) that the FFI has completed the review of all high-value accounts and that the FFI did not have any formal or informal practices or procedures in place from August 6, 2011 (120 days from the release of Notice 2011-34), through the date of such certification, to assist clients in the avoidance of Chapter 4. Additionally, a responsible officer must certify to the IRS within two years of the effective date of its FFI agreement that it has completed the account identification procedures and documentation requirements for all financial accounts that are pre-existing obligations.

We do not disagree with the concept of certification of compliance with agreed upon procedures nor with the certification with respect to formal practices and procedures. However, we believe that requiring attestation with respect to "informal" practices is too vague. We also believe that the responsible officer of the FFI should be given a 90-day period after the one-year and two-year timeframes in the regulations to assess whether the requirements have been met before providing a certification to that effect.

In addition, retroactive certification remains a concern for some FFIs, in particular smaller FFIs that may not have been fully aware of FATCA prior to the publication of the Proposed Regulations. It is difficult for responsible officers in those institutions to certify with certainty to their compliance with rules that they were unaware of at the time. It is more reasonable to request that certification be effective as at the date of the Proposed Regulations (February 8, 2012).

Recommendation:

Amend Section 1.1471-4(c)(10) as follows: "…a responsible officer of the participating FFI must certify to the IRS within ***90 days of the one year anniversary*** ~~one year~~ of the effective date of its FFI agreement that the participating FFI has completed the review of all high-value accounts to the extent described in paragraphs (c)(8)(ii) and (iii) of this section and to the best of the responsible officer's knowledge, after conducting a reasonable inquiry, the participating FFI did not have any formal **~~or informal~~** practices or procedures in place from **February 8, 2012**, through the date of such certification, to assist account holders in the avoidance of chapter 4 of the Internal Revenue Code. Practices or procedures that assist account holders in the avoidance of chapter 4 include, for example, instructing account holders to split up accounts to avoid classification as a high-value account. Additionally, a responsible officer of the participating FFI must certify to the IRS within **90 days of the two year anniversary** ~~two years~~ of the effective date of its FFI agreement that it has completed the account identification procedures and documentation requirements of this paragraph (c) for all financial accounts that are preexisting obligations or, if it has not obtained the documentation required to be obtained under this paragraph (c) with respect to an account, treats such account in accordance with the requirements of its FFI agreement.

Relationship Manager *[§1.1471-4(c)(3)(ii)]*

Section 1.1471-1(b)(53) of the Proposed Regulations defines "relationship manager" (RM) as an officer or employee of an FFI who is assigned responsibility for specific account holders on an ongoing basis, but limits this definition to accounts over $1 million "taking into account the aggregation rules described in §1.1471-4(c)(3)(ii) [*aggregation of entity accounts*] and (c)(4)(iii) [*aggregation of individual accounts*]".

Under §1.1471-4(c)(3)(ii)(B)(2), to determine if the $1 million limit is exceeded, an FFI is required to consider all accounts held by entities maintained by the FFI, or members of its expanded affiliated group (EAG), to the extent that the FFI's computerized systems link the accounts and allow the account balances to be aggregated. Under §1.1471-4(c)(3)(ii)(B)(3), an FFI must also aggregate all accounts (including any accounts held by individuals) that an RM knows or has reason to know are directly or indirectly owned, controlled or established by the same person. Similar requirements exist in §1.1471-4(c)(4)(iii)(B) and (C) for aggregation of individual accounts.

The wording of these sections is causing a great deal of confusion since there appears to be a circular process in the identification of accounts under the Proposed Regulations. We believe that two separate policy objectives have been co-mingled and should be separated for greater clarity. We recommend that the Proposed Regulations be re-drafted to allow FFIs to follow a more streamlined account review process for "high value accounts":

1. The FFI conducts an electronic search to identify accounts over $1 million;
2. The FFI contacts each RM who manages an account over $1 million. The RM reviews the list of accounts, and if the RM knows of any other accounts held by these account holders, those accounts will also be subject to the enhanced review and RM inquiry applicable to high value accounts.

Recommendations:

The "Special Aggregation Rules Applicable to Relationship Managers" in §1.1471-4(c)(3)(ii)(B)(3), §1.1471-4(c)(4)(iii)(C) and §1.1471-4(c)(4)(iv)(B)(3) should be removed from the Proposed Regulations (including cross references to those sections).

Amend §1.1471-4(c)(8)(i) ("Enhanced review for high-value accounts") as follows:
"All preexisting individual accounts not identified as U.S. accounts under paragraph (c)(4)(ii) or (c)(7)(ii) of this section and that have a balance or value that exceeds $1,000,000 at the end of the calendar year preceding the effective date of the participating FFI's FFI agreement, or at the end of any subsequent calendar year, will be treated as a high-value account subject to the additional enhanced review requirements described in this paragraph (c)(8). For purposes of determining the balance or value of an account, a participating FFI must apply the aggregation rules of paragraphs (c)(4)(iii)(B) ~~and (C)~~ of this section. If a participating FFI applied the enhanced review procedures of paragraphs (c)(8)(iii)(A) and (B) of this section to an account in a previous year, the participating FFI will not be required to re-apply such procedures to such account in a subsequent year."

Replace the proposed §1.1471-4(c)(8)(ii) (Relationship manager inquiry") with the following:
§1.1471-4(c)(8)(ii) Relationship manager inquiry
With respect to all high-value accounts described in paragraph (c)(8)(i) of this section, a participating FFI must identify all accounts to which a relationship manager is assigned ~~(including any accounts aggregated with such account)~~ and ***Any additional accounts that the relationship manager knows or has reason to know are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person shall be treated as a high-value account for purposes of §1.1471-4(c)(8)(i). For any accounts*** for which the relationship manager has actual knowledge that the account holder is a U.S. person, ~~In such case~~, the participating FFI must obtain from the account holder a Form W-9, and a valid and effective waiver as described in section 1471(b)(1)(F)(i), if necessary. A participating FFI must identify such accounts and obtain the appropriate documentation within one year of the effective date of its FFI agreement, or will be required to treat the holder of such account as a recalcitrant account holder as provided in §1.1471-5(g)(3)(i)(B). In order to meet its obligations under the FFI agreement, a participating FFI is also required to implement procedures to ensure that a relationship manager identifies any change in circumstances of an account. For example, if a relationship manager is notified that the account holder has a new mailing address in the United States, the participating FFI will be required to treat the new address as a change in circumstances and will be required to obtain the appropriate documentation from the account holder as described in paragraph (c)(4)(i)(B)(3) of this section.

Expanded Affiliated Groups – Limited Branches and Limited FFI Affiliates *[§1.1471-4(e)(2) and (e)(3)]*

It has been widely acknowledged that there will be some jurisdictions in which compliance is likely to be problematic because of conflicts between FATCA requirements and local laws pertaining to client service, privacy, and other issues. To address this issue, the Proposed Regulations have created a special category of FFI branch or affiliate – a "limited branch" or "limited FFI affiliate" to allow a non-participating branch or affiliate to exist within a participating Expanded Affiliated Group (EAG) [§1.1471-4(e)(2) and 4(e)(3)]. The Proposed Regulations place severe restrictions on the limited entities – they must be treated as non-participating FFIs (NPFFIs) for the purposes

of withholding, they cannot open any U.S. accounts or accounts of NPFFIs, they cannot accept any transfers of U.S. accounts from other affiliates within the EAG, and they must report to the extent permitted under local law. More importantly, the status is transitional – the Proposed Regulations require that limited FFIs either become full PFFIs (or deemed compliant) by the end of 2015 or that they exit the EAG. While we recognize that the hope is that countries will make legislative changes prior to that time or enter into IGAs, we are sceptical that these issues will be resolved within that time frame in all jurisdictions. Given the restrictions placed on the limited affiliates/branches, the risk that they pose for tax evasion would seem to be very limited since they cannot open accounts for U.S. persons, are subject to passthru withholding, and must report whatever information they can on U.S. accounts.

We propose that the Proposed Regulations provide for a transition process as follows:

- Until the end of 2015, EAGs would be permitted to have NPFFIs as members. These would be subject to the business restrictions and reporting obligations outlined in §1.1471-4(e)(2) and 4(e)(3) except that other members of the EAG would not be required to withhold on passthru payments made to them.
- After 2015, if the NPFFI has not become participating, the EAG members would be required to withhold on passthru payments made to these limited FFIs / branches and the business restrictions placed on the limited FFIs / branches would continue.

This would create a clear incentive for EAGs to transition limited FFIs to PFFIs quickly – and gives governments in those jurisdictions a clear incentive to make any necessary legislative changes quickly – but allows a mechanism for the EAG to continue to have a limited member over a longer term without endangering its PFFI status where the EAG is broadly compliant.

Recommendations:

Eliminate the time limitation on limited branches and FFI affiliates in §1.1471-4(e)(2)(vi) and 4(e)(3)(v).

Amend §1.1471-4(e)(2)(v) and 4(e)(3)(iv) to delay intra-group withholding requirements until the end of 2015.

Expanded Affiliated Group – Centralized Compliance Option

Notice 2011-34 indicated that Treasury and the IRS were considering whether a centralized compliance option should be provided for certain collective investment entities that are associated with a common asset manager or other agent. Under this option, the common asset manager or other agent would execute a single FFI agreement on behalf of each member of the group of funds that participates.

We believe that providing such an option would be beneficial not only in the context of collective investment entities but also in other situations where there is common management, oversight and administration. For example, a trust company that provides fiduciary and administrative services to a large number of personal trusts may benefit from this option.

Recommendation:

Provide a centralized compliance option for situations where there is common management, oversight and administration.

5. DEFINITION OF FINANCIAL ACCOUNT *[§1.1471-5(a) and 5(b)]*

The Proposed Regulations make an effort to streamline the types of accounts that are financial accounts for the purposes of FATCA based on risk profiles. However, there are some amendments we believe are necessary to better target the Proposed Regulations and to make the exceptions that have been provided more effective.

Exemption for Accounts Equal to or Under $50,000 *[§1.1471-5(a)(4)(i)(A)]*

Consistent with Notice 2011-34, §1.1471-4(c)(4) exempts pre-existing financial accounts for individuals under $50,000 from documentation, withholding, and reporting requirements. We appreciate and value this measure given the large number of small-value financial accounts in Canada. For example, CBA statistics indicate that 96% of Canadian bank accounts (on a disaggregated basis) are under $50,000 and 65% of Canadian brokerage accounts are under $50,000. While this provision provides relief for a wide variety of small pre-existing financial accounts, the parallel exemption in §1.1471-5(a)(4)(i) for smaller new individual accounts is far more limited – it provides an exception from the definition of "U.S. account" and applies only for depository accounts. Such accounts are also excluded from treatment as recalcitrant under §1.1471-5(g)(2). In a country such as Canada where individual investment accounts are commonplace, a large number of Canadians have smaller brokerage and mutual fund accounts (as witnessed by the figures above) that pose little risk of being sources of U.S. tax evasion. Similarly, in Canada, there are approximately 9 million individual life and annuity contracts with cash values less than $50,000. Extending the $50,000 exception to all types of new financial accounts would reduce the compliance burden of FATCA on FFIs.

Recommendation:

Extend the $50,000 exception for new individual depository accounts to all types of new financial accounts.

In addition to the above, financial institutions should be permitted to elect out of the exception for depository accounts under $50,000 on an account-by-account basis rather having the provision apply on an all-or-nothing basis. For example, a U.S. account holder may have a depository account that qualifies for the exclusion but may also have other accounts under the same client profile which would be subject to reporting. Operationally, it may be easier and less costly for the financial institution to report all accounts rather than make the changes necessary to exclude the depository account.

Recommendations:

Amend §1.1471-5(a)(4)(i) to read as follows: "Unless a participating FFI elects under paragraph (a)(4)(iv) of this section not to have this paragraph (a)(4)(i) apply to an account, the term U.S. account shall not include any account maintained by such financial institution during a calendar year if the conditions of paragraphs (a)(4)(i)(A), (B), and (C) of this section are met."

Amend §1.1471-5(a)(4)(iv) to read as follows: "A participating FFI may elect to disregard the exception described in paragraph (a)(4)(i) of this section, including for an account that would otherwise meet the exception described in that paragraph by reporting such account."

Retirement and Savings Accounts *[§1.1471-5(b)(2) and §1.1471-5(f)(2)(ii)]*

Under the Proposed Regulations, retirement and savings accounts are excluded from treatment as financial accounts (and therefore as U.S. accounts) if they qualify as:

(i) *Government- Registered Accounts* (§1.1471-5(b)(2)(i)(A)(2) and 1.1471-5(b)(2)(i)(B)),
(ii) *Treaty-Referenced Accounts* (§1.1471-5(b)(2)(iii)), or
(iii) *Certified deemed-compliant FFIs - Deemed Compliant Retirement Funds* (§1.1471-5(f)(2)(ii)).

While we applaud the intent and effort in drafting these exemptions, for the reasons discussed below, these provisions are so onerous that most Canadian government-registered retirement and savings accounts will not satisfy the requirements for any of these excluded accounts.

(i) "Government-Registered" Accounts

(a) "Government-Registered" Retirement Accounts

Section 1.1471-5(b)(2)(i)(A)(2) excludes from the definition of "financial accounts" accounts having all of the following characteristics:

- Subject to government regulation as a personal retirement account, or is registered or regulated as an account for the provision of retirement or pension benefits;
- Tax-favoured (ie. contributions must be deductible by, or excluded from the income of, the holder or taxation of investment income must be deferred);
- All contributions are employer, government, or employee and limited by reference to earned income;
- Contributions are limited to $50,000 annually; and
- There are limits or penalties on early withdrawals and excess contributions.

Government-registered retirement plans in Canada ("Canadian Retirement Plans") include Registered Pension Plans (RPPs), Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs) and Deferred Profit Sharing Plans (DPSPs)[14]. We believe that these Canadian Retirement Plans are exactly the type of arrangement this exclusion is meant to address, but unfortunately most, if not all, of these plans would be unable to satisfy all of the requirements listed above since:

- Contributions to a personal plan could be made by a self-employed individual who is not an employee, or by a spouse of the plan beneficiary.

[14] Attached as Appendix B is a summary of the key characteristics of all Canadian government-registered retirement and savings plans.

- Although the maximum annual contribution limits for RPPs and RRSPs are well below $50,000, unused contribution room can be carried forward and used in a subsequent year. Therefore, contributions could exceed $50,000 in a year.
- The only "limit or penalty" that applies to an early withdrawal from an RRSP or an RRIF (except to the extent that amounts in the plan are "locked in" under Canadian pension legislation) or from a DPSP is the imposition of current income tax and the loss of future tax-deferred savings on withdrawals. It is unclear whether that economic cost would constitute a "penalty".

We believe that modest changes can be made that would permit most, if not all, Canadian Retirement Plans to be treated as exempt accounts for Chapter 4 purposes, which would substantially reduce the administrative burden on Canadian FFIs without creating any material risk of U.S. tax evasion.

Recommendation:

Amend the definition of "retirement accounts" (§1.1471-5(b)(2)(i)(A)(2)) to:

- **Revise the wording of §1.1471-5(b)(2)(i)(A)(2)(ii) to read in part as follows: "All of the contributions to the account are employer, government or individual contributions that are limited by reference to earned income of the individual or their spouse under the law …".**
- **Revise the wording of §1.1471-5(b)(2)(i)(A)(2)(iii) to read in part as follows: "Annual contributions (other than form other accounts described in this paragraph (b)(2)(i)(A) or plans described in paragraph (f)(2)(ii) or this section or 1.1471(6)(f), or unused contribution limits carried forward from prior years)…" and "limits or penalties <u>(including the immediate taxation of earnings)</u> apply by law of the jurisdiction in which the account is maintained to withdrawals made before reaching a specified retirement age . . .".**

(b) <u>"Government-Registered" Savings Accounts</u>

Section 1.1471-5(b)(2)(i)(B) exempts from treatment as "financial accounts" accounts that satisfy the following requirements:

- Subject to government regulation as a "savings vehicle for purposes other than retirement";
- Tax-favoured (ie. contributions must be deductible by, or excluded from the income <u>or</u> taxation of investment income is deferred);
- Contributions are limited by reference to earned income;
- $50,000 annual contribution limit; and
- Limits or penalties on early withdrawals and excess contributions.

There are three main types of government-registered, tax-favoured savings plans under Canadian law ("Canadian Savings Plans"): Tax-Free Savings Accounts (TFSA), Registered Education Savings Plans (RESP), and Registered Disability Savings Plans (RDSP). The features of these plans are summarized in Appendix B. As was the case with Canadian Retirement Plans, we believe that each of the Canadian Savings Plans should be excluded from treatment as a financial account for Chapter 4 purposes. However, none of these plans appear to satisfy the specific criteria in the Proposed Regulations, given the following:

- Funding is not limited by reference to earned income.

- Contributions can theoretically exceed $50,000 per year, although other contribution limits exist. In the case of TFSAs, there is an annual contribution limit of $5,000 but unused contribution space carries over to future years, and withdrawals create new contribution room in future years, so an individual could in theory contribute more than $50,000 in a given calendar year. In the case of RDSPs and RESPs, they are subject to lifetime contribution limits rather than annual limits.[15]
- It is not clear that a TFSA satisfies the literal "tax-favored" requirements under §1.1471-5(b)(2)(i)(F), as contributions to a TFSA are not deductible, and the income earned by a TFSA simply is never taxed, rather than being subject to deferred taxation. While Canadians certainly view funds in such accounts as being tax-favoured, technically the tax-favoured status is associated with the income earned on contributions.
- It is not clear that the "limit or penalty" requirement is satisfied as no limits or penalties apply to early withdrawals from a TFSA, and the only "penalty" applicable to a withdrawal from an RDSP or RESP is the current taxation of the earnings component of that withdrawal. (A surtax is imposed on a withdrawal from an RESP by the contributor, unless the contributor rolls the withdrawal over into an RRSP.)

We believe that technical changes would permit Canadian Savings Plans to be treated as exempt accounts for Chapter 4 purposes, which, as is the case for Canadian Retirement Plans, would substantially reduce the administrative burden on Canadian FFIs without creating any material risk of U.S. tax evasion.

[15] In the case of RESPs, although there is a lifetime contribution limit of C$50,000, it is possible to set up a family plan, in which case the contributions to the plan in any year could exceed $50,000 because of the inclusion in the plan of multiple beneficiaries (for example, a grandparent could set up a family plan for all of his or her grandchildren).

Recommendation:

The definition of "savings accounts" in §1.1471-5(b)(2)(i)(B)) should be revised as follows:

- **Revise the annual contribution limit to permit additional contributions in any year to reflect unused prior year contributions and allow the annual contribution limit not to apply if the fund has a $500,000 or less lifetime limit.**
- **Provide an exception to the stated contribution cap for accounts with multiple beneficiaries established for the purpose of funding higher education expenses.**
- **Delete the earned income requirement since, in some of these arrangements, the express policy intent is to encourage savings for certain persons who may not have earned income but have clear future expenditures that will need to be addressed. (In this regard, we note that United States section 529 plans have no similar limitation.)**
- **Revise §1.1471-5(b)(2)(i)(B)(3) to read as follows: "Limits or penalties (including the immediate taxation of earnings) apply on withdrawals from the account; and".**
- **Provide that the "limits or penalties" requirement does not apply to savings plans with an annual contribution limit (subject to a rule permitting "catch-up" contributions) of $10,000 or less.**
- **Revise §1.1471-5(b)(2)(i)(F) to read as follows: "For purposes of this paragraph (b)(2), an account is tax-favored if contributions to the account that would otherwise be subject to tax under the laws of the jurisdiction where the account is maintained are deductible or excluded from gross income of the account holder or if the taxation of investment income from the account is deferred (or such income is not subject to tax) under the laws of such jurisdiction, or both."**

(ii) Exempt Beneficial Owners - Treaty-Referenced Retirement Funds

Section1.1471-5(b)(2)(iii) excludes from the definition of "financial accounts" accounts "held solely by one or more [specified] exempt beneficial owners" which includes a "fund" that is:

- established in a country with which the United States has an income tax treaty;
- "exempt from income taxation" in the country in which it is established;
- "operated principally to administer or provide pension or retirement benefits"; and
- entitled to benefits with respect to U.S.-source income under the treaty as a resident of the country that satisfies the treaty's limitation on benefits requirement (§1.1471-6(f)(1)(i)).

As described in detail in the Appendix B, some Canadian Retirement Plans, including RPPs, RRSPs, RRIFs, and DPSPs are eligible for treaty benefits[16]. Moreover, each of those plans should also satisfy the requirements of clauses (A)-(D) of §1.1471-6(f)(1)(i).

[16] The technical explanation to the Treaty specifically references RRSPs and RRIFs as treaty-eligible arrangements. Several IRS private letter rulings have concluded that RPPs, DPSPs, and certain other Canadian retirement arrangements also are covered by the Treaty.

Although some Canadian Retirement Plans take the form of true trusts that hold investment assets, other Canadian Retirement Plans merely consist of those assets. For example, in the context of an annuity contract issued by a Canadian life insurer, a Canadian Retirement Plan may be i) a trust that owns the contract or ii) it may just be the contract itself. (Similar results occur in the case of investment assets like certificates of deposit (CDs).) We do not believe that the intent of the regulation is to provide preferential treatment for one form of registered account holding versus another given that both pose an identically low risk of being used as a tool for U.S. tax evasion.

Recommendation:

Add a specific exception to §1.1471-5(b)(2) that would treat as an exempt financial account any pension or retirement plan or arrangement entitled to treaty benefits under the principles of §1.1471-6(f)(1)(i).

(iii) Deemed Compliant Retirement Funds

Under the Proposed Regulations in §1.1471-5(f)(2)(ii), certain types of retirement funds may qualify as certified deemed compliant FFIs and are not required to register with the IRS. The requirements for the types of deemed-compliant FFIs contemplated by those provisions (each of which must be organized to provide retirement or pension benefits (collectively, "Deemed Compliant Retirement Funds") are as follows:

Large Deemed Compliant Retirement Funds[17]

- All contributions (other than allowable rollovers)[18] are employer, government, or employee contributions limited by reference to earned income.
- No single beneficiary has the right to more than 5% of the fund's assets.
- Contributions are deductible or excludible from the beneficiary's income, taxation of the fund's income is deferred, or 50% or more of the contributions to the fund (other than certain rollovers) are from the government and the employer.

Small Deemed Compliant Retirement Funds[19]

- The fund has fewer than 20 participants.
- The fund is sponsored by an employer.
- Contributions (other than allowable rollovers[20]) are limited by reference to earned income.
- Fund participants who are not residents of the country in which the fund is organized are not entitled to more than 20% (or more than $250,000) of the fund's assets.

Based on the characteristics of Canadian Retirement Plans, if those plans are implemented through trusts that do not constitute grantor trusts, it appears that many of the plans could qualify

[17] See §1.1471-5(f)(2)(ii)(A)(1).

[18] The permissible rollover sources are not entirely clear. Compare the parenthetical language in §1.1471-5(f)(2)(ii)(A)(*1*)(*i*) with that in §1.1471-5(b)(2)(i)(D). **We urge that you clarify the sources from which permissible rollovers may be made in respect of these categories of deemed-compliant FFIs.**

[19] See §1.1471-5(f)(2)(ii)(A)(*2*).

[20] The same ambiguity regarding permissible rollover sources that applies to Large Deemed Compliant Retirement Funds also applies to Small Deemed Compliant Retirement Funds.

as either Large Deemed Compliant Retirement Funds or Small Deemed Compliant Retirement Funds. However, a plan could not qualify as a Small Deemed Compliant Retirement Fund if it has 20 or more participants or is not sponsored by an employer, and it could not qualify as a Large Deemed Compliant Retirement Funds if any participant has the right to more than 5% of the plan's assets. Although we recognize Treasury's apparent goal of not treating as deemed-compliant retirement plans those plans that either are not sponsored by employers or that give one or more individuals a large a portion of the trust's assets, we believe that the 5% asset limitation applicable to Large Deemed Compliant Retirement Funds is excessively small and is not necessary to advance the purposes of Chapter 4. As an example, in an employer-sponsored plan with even 50 participants, the 5% limit easily could be exceeded by a few participants if they were more senior or had worked longer than the other participants.

Recommendations:

Permit any single beneficiary of a Large Deemed Compliant Retirement Fund to have the right to no more than 10% of the fund's assets (§1.1471-5(f)(2)(ii)(A)(1)(ii)).

Clarify the sources from which permissible rollovers may be made in respect of these categories of deemed-compliant FFIs. (§1.1471-5(f)(2)(ii)(A)(1)(i) and §1.1471-5(b)(2)(i)(D).)

(iv) Authorization for IRS to Issue Exclusion Guidance

Our comments above focus on existing Canadian retirement and savings plans. We note, however, that Canada is considering, and may adopt in the future, other forms of government-registered retirement or savings plans that may depart from the technical requirements in the final regulations. We also note that the same is likely to be true for other jurisdictions. In some cases, it may be clear that the differences between the terms required or permitted by those plans and the terms or requirements applicable to exempt retirement or savings plans in the final regulations are not material and that, from a policy perspective, the new plans also should be exempt.

Recommendation:

The IRS should be given the express authority under the regulations to exclude government-registered plans that are consistent with the principles underlying §1.1471-5(b)(2)(i).

6. DEEMED COMPLIANT FFIS *[§1.1471-5(f)]*

Local Banks and Local FFIs *[§1.1471-5(f)(1)(i)(A) and 1.1471-5(f)(2)(i)]*

We welcome the decision by Treasury and the IRS to provide a deemed compliant category for FFIs with an almost-exclusively domestic client base. However, we believe amendments are required to make the provisions more effective in capturing the financial institutions that, from a risk perspective, should fit into this category.

- As currently drafted, to qualify as a local bank, a deposit-taking institution can have no more than $175 million in assets (or $500 million on a consolidated basis if it is part of a group). That threshold is exceptionally low. In Canada, of the 23 domestic banks, only 4, all of which are branchless, would meet this size limitation notwithstanding that most of the 23 operate almost exclusively in Canada (see Appendix D). Moreover, the threshold is so low that a large proportion of Canadian credit unions would not qualify, even though

their charter restricts them from operating outside the province in which they are chartered. The average credit union in Canada has assets of CDN$368 million, which is far in excess of the US$175 million threshold[21]. It takes very little domestic market share to exceed the $175 million threshold as this equates to only 1,750 mortgages of $100,000 each (out of a Canadian residential mortgage market of over $1 trillion) or 87,500 credit cards with a balance of $2,000 each (out of a Canadian market of 68 million credit cards). A more realistic threshold would be $1 billion, which would represent 0.1% of the Canadian residential mortgage market.[22] That would expand the number of potentially eligible banks in Canada to 10 while still leaving 13 above the threshold, including all that are international. In addition, it would greatly expand the number of potentially eligible credit unions.

- Both the local bank and local FFI deemed compliant categories require that the FFI "not advertise the availability of U.S. dollar denominated accounts" on its website. By virtue of Canada's proximity to the U.S., a large number of individual Canadians maintain U.S. dollar accounts to avoid incurring foreign exchange charges every time they go to the U.S. for cross-border shopping or a short vacation. For example, 18% of Canadians – or approximately five million Canadian adults – said they intended to cross-border shop in the U.S. over the most recent Christmas season.[23] As a consequence, most deposit-taking institutions in Canada, large and small, offer U.S. dollar personal accounts. Therefore, the blanket restriction on advertising the availability of U.S. dollar accounts is unreasonable in the Canadian context and is unnecessary given the requirement that substantially all of a local bank client base be domestic. Accordingly, the requirement preventing advertising the availability of U.S. dollar denominated accounts should be eliminated.

- Under the Proposed Regulations, to be a "local FFI", a bank needs to have at least 98% of its accounts held by residents. Our understanding from discussions with Treasury and IRS staff is that the 98% figure is somewhat arbitrary and is intended to ensure that any local FFI has substantially all of its accounts held by residents. We appreciate the value of a hard threshold, however, we have two concerns that we believe can be easily rectified while still remaining true to the policy objective:
    - Our research suggests that 98% may be too high in some circumstances. For example, CBA data suggests that in aggregate 98% of major banks' Canadian domestic bank accounts are held by Canadian residents (the remainder being former Canadian residents). However, since this is an average, some Canadian banks would be slightly above that threshold, and some slightly below, even though all are domestically-focussed. Therefore, a slightly lower threshold, such as 95%, would be more practical.
    - There should be a general provision that "substantially all" of the accounts are held by residents in addition to a safe harbour provision with the hard figure contained therein. That would provide a mechanism for institutions that are domestically focussed to meet this criterion notwithstanding the fact that they may fall slightly below the fixed threshold.

[21] Canadian and US dollars are trading approximately at par so Canadian and US dollar figures are used interchangeably in this document.

[22] Using U.S. domestic banks as a guide for appropriate asset size is not a good benchmark for an asset-based size test because U.S. banks typically sell off residential mortgages to securitizers such as Fannie Mae. By contrast, banks in Canada and other countries hold more loans on the balance sheet.

[23] Bank of Montreal News Release, "BMO Economics: Weaker Dollar Won't Stop Cross-Border Shopping". November 24, 2011.

Recommendations:

Amend §1.1471-5(f)(1)(i)(A)(5) to state that "substantially all accounts" (or similar wording) maintained by the FFI must be held by residents, and include a further sentence stating that "for greater certainty, entities with 95% of accounts held by residents are deemed to have met this test."

Amend §1.1471-5(f)(1)(i)(A)(3) and 1.1471-5(f)(2)(i)(C) to remove the restriction on advertising the availability of a U.S. dollar account.

Amend §1.1471-5(f)(2)(i)(D) to state that a local FFI can have no more than <u>$1 billion</u> in assets on its balance sheet and, if the FFI is a member of an EAG, the group may have no more than <u>$2 billion</u> in total assets on its consolidated balance sheet.

Status of Sub-Funds under FATCA:

There are certain fund structures in Canada and other countries where a single legal entity (e.g., a corporation or a trust) may be comprised of two or more separate funds. The single legal entity is commonly referred to as the "umbrella fund" and the separate funds are referred to as "sub-funds". This structure is described in more detail below. In some jurisdictions (e.g., the U.S.), each sub-fund may be treated as a separate taxpayer whereas in other countries (e.g., Canada) the umbrella fund files a single tax return reporting the financial results of all its sub-funds.

It would be desirable to treat each sub-fund of a particular umbrella fund structure as a separate fund for certain purposes under FATCA. First, each sub-fund should be a separate "foreign financial institution" or FFI. The definition of FFI in §1.1471-5(d) or the definition of "entity" could be amended to treat sub-funds within a particular legal entity as being separate FFI's. Second, for the purposes of §1.1471-5(f)(1)(i) (Registered Deemed Compliant Qualified Collective Investment Vehicles and Restricted Funds) in the context of an Umbrella Fund structure, it would be desirable to apply the conditions for deemed compliant status at the sub-fund level.

In a typical Umbrella Fund/Sub-Fund Structure, the investable assets are owned by an Umbrella Fund, which is usually an incorporated entity, but are allocated in the books and records of the Umbrella Fund to the various Sub-Funds and are held in separate custodial accounts. The Sub-Funds are treated as separate funds typically filing separate offering documents such as a prospectus. The Umbrella Fund issues shares of a class or series that are "linked" to the assets of the Umbrella Fund allocated to a particular Sub-Fund. The Sub-Funds have distinct ownership from each other and generally have different investment portfolios. The Umbrella Fund structure is used to reduce set-up costs and legal, accounting and other fees. The purposes for the Sub-Funds are varied. Sub-Funds will have different investment mandates and restrictions. In some cases, Sub-Funds may impose restrictions on the types of investors that may invest in them.

The last example is particularly relevant in the context of FATCA because a Sub-Fund could prohibit U.S. persons, NPFFIs and passive NFFEs with one or more substantial U.S. owners holders as contemplated by §1.1471-5(f)(1)(i)(D)(3) from investing in the Sub-Fund in order to be eligible to qualify for deemed compliant status. On the other hand, another Sub-Fund within the Umbrella Fund that does not meet the criteria for deemed compliant status could be a PFFI or owner documented FFI. The ability to have Sub-Funds that prohibit U.S. investors treated separately from Sub-Funds that permit U.S. investors even though they are within a single legal entity will permit significant implementation benefits to the asset manager, and other third party service providers to the fund group, without increasing the risks of non-compliance.

If deemed compliant status were only available if all of the Sub-Funds within the Umbrella Fund met the conditions for deemed compliant status, it would substantially reduce the number of low risk investment vehicles that could take advantage of this relief. In addition, applying the conditions for deemed compliant status at the Sub-Fund level will allow investment fund promoters to target fund sales in a way that more closely aligns with the objectives of the Proposed Regulations. Rigorous procedures would be put into place to ensure that only eligible investors were permitted to invest in a registered deemed compliant Sub-Fund. Ineligible investors would invest in separate Sub-Funds that would become subject to full due diligence procedures.

The concerns described above with respect to deemed compliant status may be addressed if each Sub-Fund were treated as a separate FFI, In any event, there may be other administrative benefits to having each sub-fund be a separate FFI.

Recommendation:

Treat individual sub-funds included within a single legal entity as being separate FFIs by making appropriate amendments to the definition of "FFI" and/or the definition of "entity" and ensuring that such separate status is included for the purpose of applying deemed compliant conditions and status.

Restricted Funds *[§1.1471-5(f)(1)(i)(D)]*

Our interpretation of the "Restricted Funds" deemed compliant category is that it is designed to recognize that mutual funds marketed solely in their country of origin and sold solely to residents thereof are inherently of little risk of being used as tools for tax evasion by U.S. persons. However, there are some significant issues that would likely prevent many Canadian mutual funds from qualifying for Restricted Fund status, even though they would come within the spirit of the exception. Most notable is the requirement in §1.1471-5(f)(1)(i)(D)(3) that restricted fund agreements must stipulate that interests in the fund cannot be sold to U.S. persons (other than interests which are both distributed by and held through a participating FFI). For regulatory, tax and business reasons, including the regulatory regime in foreign countries like the U.S., the distribution of Canadian mutual funds is typically limited to persons who are physically resident in Canada (e.g., have a mailing address in Canada). However, some of those persons to whom mutual funds can be legally sold in Canada may be "U.S. persons" as that term is defined, such as a U.S. citizen who is resident in Canada for tax and other purposes. As a practical matter, it would be virtually impossible to be certain that no purchaser of units of a Canadian mutual fund is a U.S. person given the number of Canadian residents who may have that status. Given that a restricted fund is required to implement the documentation standards in 1.1471-4(c), it is unclear what would be accomplished by including such a provision in the terms of the agreement. We believe language similar to that in the Local FFI deemed-compliant FFI provisions could be used in (D)(3), specifically a prohibition on the distribution or sale of debt or equity interests to persons "outside its country of incorporation or organization".

Another challenge is that some of the provisions in the restricted funds category do not align with conventional market practices of mutual funds. Particularly problematic is §1.1471-5(f)(1)(i)(D)(2), which restricts distribution options to participating FFIs, deemed compliant FFIs, local banks, or "restricted distributors". The definition of "restricted distributor" in (f)(4) suggests that a restricted distributor must be part of a domestic-only financial group and be relatively small in size. This would rule out funds that distribute products through the financial planning arms of major banks and insurers as well as large third party distributors, which often have operations in several countries. In practice, a large numbers of Canadians obtain their financial planning advice, and buy financial products, through these channels. They are still domestic-only funds

marketed within Canada and only to Canadian residents so they are at a low risk of being used for U.S. tax evasion, but it happens that the distributor is part of a larger financial group.

Recommendations:

Modify §1.1471-5(f)(1)(i)(D)(3) to state that agreements must prohibit sales to U.S. residents rather than U.S. persons (and others) outside the fund's jurisdiction of incorporation/organization (similar to the local FFI regulation).

Modify the restricted distributor definition by removing §1.1471-5(f)(4)(iii) that prohibits them from being part of an international group and remove the size cap in §1.1471-5(f)(4)(v).

Deemed Compliant Insurers

Foreign life insurers and their branches should be able to qualify as registered deemed-compliant FFIs if they:

- implement procedures to preclude sales of life insurance and annuities to U.S. persons, who do not reside in the jurisdictions in which the insurer operates, and
- otherwise limit their sales to non-residents of those jurisdictions.

Establishment of a deemed-compliant insurer category would substantially reduce:

- the likelihood that members of insurance EAGs would fail to qualify as participating FFIs after January 1, 2016, when the "limited FFI" relief provision expires,
- the administrative burden on life insurers, very few of whom sell (or are even able to sell) life insurance and annuity contracts to non-residents of their local jurisdictions.

The Proposed Regulations indicate consideration is being given to a deemed-compliant FFI category for life insurers with requirements analogous to those of local FFIs. We believe that some of the local FFI rules need to be modified to address the unique nature of life insurers and insurance products as follows:

(i) As long as an insurer is licensed and regulated by the country in which it operates, we believe that it is not relevant to the purposes of Chapter 4 or the interests of Treasury or the IRS how that country taxes the policyholder or what type of reporting, if any, is required to be made to the local tax authority.

(ii) Because many life insurers that are licensed and operate in one country have a licensed branch in another jurisdiction, the deemed-compliant rules that apply to life insurers should treat such branches as separate entities for purposes of those rules. Otherwise, if the "no fixed place of business outside its country of incorporation or organization" rule in §1.1471-5(f)(1)(i)(A)(*2*) with respect to local FFIs applies for deemed-compliant life insurers, many insurers would be unable to satisfy that rule.[24]

(iii) It is critical that, in the event a policyholder subsequently becomes a U.S. resident, the insurer is not obligated to terminate that policyholder's contract. Insurance and annuity contracts are different from other types of financial accounts. Following the issuance of a life insurance contract, for example, a policyholder may become uninsurable or the cost of insurance may rise to an unaffordable level. It would be unreasonable to require the insurer to cancel that contract just because the policyholder had become a resident of the United States.

Accordingly, we propose that an additional category of deemed compliant FFI be created - registered deemed-compliant insurer FFIs, which would include any licensed insurance branch.

[24] In that event, their entire EAGs could fall out of compliance with Chapter 4.

The requirements for this category would directly target the concerns underlying Chapter 4, while at the same time reducing the administrative burdens on insurers and allowing them to have Chapter 4-compliant EAGs, irrespective of the conflicts of law issues and other limitations that may preclude some insurance members of those EAGs from becoming and remaining participating FFIs.

Recommendation:

Add a deemed compliant category for insurers (which would include any licensed insurance branch) that meet the following criteria:

- **Licensed and regulated by the foreign jurisdiction in which it is organized.**
- **The relevant foreign jurisdiction is FATF-compliant within the meaning of Prop. Treas. Reg. §1.1471-1(b)(22) or the insurer complies with FATF requirements.***
- **Has no fixed place of business outside the relevant foreign jurisdiction, treating a branch as a separate entity for this purpose.****
- **Does not solicit account holders outside of the relevant foreign jurisdiction.**
- **95% of all accounts are held by residents of the relevant foreign jurisdiction. (For this purpose, we propose that the final regulations specify that this percentage be satisfied as of the prior year end before the company or branch registers as a deemed-compliant FFI and as of the prior year end before it renews its certification as a deemed-compliant FFI (i.e., every three years). We also propose that the final regulations specify that this percentage be based on the number of total accounts, regardless of value or nature, and that it be calculated based on the residency of policyholders as of the date of issuance of their contracts.)**
- **Has policies in place to prevent account openings by U.S. persons who are not residents of the country, nonparticipating FFIs, or entities controlled or beneficially owned by U.S. persons (as determined under AML due diligence procedures).**

*The Office of the Superintendent of Financial Institutions in Canada requires subsidiaries of Canadian financial institutions to comply with FATF requirements even if the country in which they operate is not FATF-compliant.

**These rules would have to take into account the special character of the EU.

Non-Reporting Members of Participating FFI Groups [§1-1471-5(f)(1)(i)(B)]

The general "all-or-nothing" rule of FATCA poses challenges for EAGs which intend to be compliant, but have an affiliate that cannot comply because it operates in a jurisdiction where there are legal impediments. We appreciate the efforts of the Treasury and IRS to alleviate this problem by providing such an FFI with the option of being a nonreporting member. As drafted, the section presents some technical issues and we have made recommendations to address these in the technical appendix. However, notwithstanding our technical recommendations and the best efforts of an FFI, it should be recognized that legal impediments within a country could still prevent an FFI from meeting the requirements of section §1.1471-5(f)(1)(i)(B). We recommend that where an FFI demonstrates that it is using best efforts to comply with the requirements of the section but legal impediments prevent full compliance, there should be provision that the EAG will not be penalized with loss of its participating status.

Recommendation:

Amend §1.1471-5(f)(1)(i)(B) to state that where an FFI demonstrates that it is using best efforts to comply with the requirements of the section but legal impediments prevent full compliance, the EAG will not be penalized with loss of its participating status.

Application for Deemed Compliant Status

Invariably there will be institutions that are among those intended to be captured by the deemed compliant categories but for some reason do not meet one or more of the criteria set out in the Proposed Regulations such as:

- banks or other FFIs that are inherently local but do not meet the strict criteria set out in the Proposed Regulations;
- banks or other FFIs that demonstrate a clear effort to meet the requirements for a nonreporting member of an EAG but are encountering some legal impediments to doing so;
- investment funds that are domestic in nature but may not meet all of the terms of the “restricted funds” category;
- other forms of financial services providers that do not fall neatly into any of the deemed compliant categories but can make a very strong case that they are local in nature and are of low risk of being used for U.S. tax evasion.

These entities should be given an opportunity to make their case for deemed compliant status.

Recommendation:

Add a provision to §1.1471-5(f) permitting FFIs to make application to the IRS to be registered deemed compliant.

7. PAYMENT REPORTING

Special transitional reporting by participating FFIs [§1.1474-1(d)(2)(ii)]

Section 1.1474-1(d)(2)(ii) provides transitional rules on reporting of payments made to NPFFIs. While we understand the objective to provide the IRS with information regarding the number and size of accounts for NPFFIs, the requirements set out in the Proposed Regulations are unclear and overly burdensome.

The Proposed Regulations specify that “the participating FFI shall report with respect to each such nonparticipating FFI …”. This wording has left uncertainty as to whether the reporting is to include the name of each NPFFI. In most cases, general client confidentiality provisions within the terms and conditions of account agreements will prohibit PFFIs from reporting entity names without first obtaining client consent. It is likely that such consent would not be forthcoming for a large proportion of these accounts. As this information is unlikely to provide any meaningful additional information to the IRS, if such reporting is required, the Proposed Regulations should be amended to clarify that reporting of the name of the entity is not required.

The Proposed Regulations are also exceedingly burdensome for PFFIs in that they create a new basis for reporting (i.e., “foreign reportable amounts”) that only applies for a two-year period. If

reporting is to be required, we propose that the amounts to be reported be the same as the amounts to be reported on a U.S. account.

We also note that the current wording in §1.1474-1(d)(2)(ii) requires the PFFI to report "the aggregate amount of all such payments made **to** the participating FFI …". We believe that the intention was to have payment made **by** the participating FFI reported. This should be clarified in amendments.

Recommendation:

Amend §1.1474-1(d)(2)(ii) to clarify that PFFIs:
- **are not required to report the name of the non-participating FFIs;**
- **report payments on the same basis as required for a U.S. account; and**
- **report payments made by the PFFI.**

8. INTERGOVERNMENTAL AGREEMENTS (IGAs)

We were very pleased to see the Joint Statement by the United States and five European countries ("the Joint Statement") regarding negotiations of bilateral IGAs to implement Chapter 4, and we have been further encouraged by subsequent statements made by Treasury representatives concerning the IGA negotiations underway between the United States and other countries. We believe that IGAs or comparable bilateral tax information sharing agreements are the best way of dealing with the conflicts of laws and other concerns that have been raised in regard to complying with Chapter 4.

As a general proposition, each IGA should be consistent with the terms of the Joint Statement. Accordingly, we would expect that the IGA would provide that account identification and reporting generally would parallel the requirements of the Proposed Regulations, but that reporting would only be to the local taxing authority. We also would expect that the IGA would eliminate a PFFI's obligation to withhold on passthru payments (or on payments to holders of Recalcitrant Accounts) or to close accounts.

We also believe that IGAs should be used in other ways to advance the purposes of Chapter 4, while simultaneously minimizing unnecessary compliance burdens on FFIs. For example, given the difficulty of developing a universal exclusion from financial account treatment for retirement and savings plans (see section "Retirement and Savings Accounts" above), IGAs are the best way of allowing the United States and each IGA counterparty to identify accounts in that country that have low associated U.S. tax risk and that therefore should be excluded from treatment as U.S. accounts. Similarly, IGAs could be used to integrate the account identification processes already used in foreign countries with those contemplated by Chapter 4, allowing FFIs in those countries to minimize the changes needed in their account opening procedures. IGAs should provide that the identification documentation required by Chapter 4 be based on local AML/KYC rules and that FFIs in those jurisdiction would not need to obtain additional information from account owners absent the presence of U.S. indicia.

In cases where IGAs are being negotiated with a country, we urge Treasury to consider issuing guidance allowing for extended transitional relief during the negotiations. Such measures could include extended implementation dates, or other guidance that would allow those FFIs to avoid implementing Chapter 4 compliance procedures that would be unnecessary under the IGA.

While we are fully supportive of the IGA process, we would also like to underscore the need for a global approach that would minimize the differences in compliance for global FFIs operating in

various countries with different bilateral IGAs as well as in countries without IGAs. This view is echoed in the Joint Statement, which calls for work to be undertaken through organizations such as the OECD to develop a common model for automatic information exchange.

Recommendations:

IGAs should be used to:

- **deal with the conflicts of laws that have been raised in regard to complying with Chapter 4;**
- **identify accounts and entities in that country that have low associated U.S. tax risk and that therefore should be excluded from treatment as U.S. accounts; and**
- **provide that the identification documentation required by Chapter 4 is based on local AML/KYC rules.**

While IGAs are being negotiated with a country, we urge Treasury to issue guidance as necessary allowing for extended transitional relief during the negotiations.

ATTACHMENT C

Technical Comments on Proposed Regulations

§1.1471-2 (b)(2)(iv) Material modification - Our understanding is that a material modification means a change to the terms and conditions of the contract, rather than a change in the terms and conditions of the agreement as specified in the contract caused by external changes referenced in the contract (e.g. changes in benchmark interest rates, changes in credit rating, etc.) Please confirm. In addition, please clarify that adjustments in a floating rate credit facility does not constitute a modification.

§1.1471-3(c)(3) Requirements for validity of certificates - Assuming that the PFFI does not provide the additional information with respect to the non-PFFIs, it seems that the Forms 1042-S would be issued to the PFFI and it seems unnecessary for the FFI withholding statement to include more information than allocation of the payment between the portion that is subject to Chapter 4 withholding and the portion that is not subject to Chapter 4 withholding. **We recommend that the Proposed Regulations reduce the amount of detail to be provided on the FFI withholding statement.**

§1.1474-1(d)(iv) provides that a PFFI shall file Forms 1042-S in accordance with paragraph (d) except as otherwise provided in the FFI agreement. The FFI Agreement should permit PFFIs to report on a pooled basis to any recipients that are not specified US persons. Preferably we would not be required to report pooled amounts paid to each class of payees. Recipient specific reporting is not generally required for non-US persons under the QI agreement (subject to certain exceptions) and if required for FATCA purposes, PFFIs would need to consider the need to obtain client consent. **We recommend that the Proposed Regulations permit Pooled Form 1042-S reporting by PFFIs under the terms of the FFI Agreement.**

For the initial years, Form 1042-S will largely be restricted to PFFIs that are QIs. When and if foreign passthru payments are added in 2017, PFFIs that are not currently familiar with Form 1042-S reporting will be expected to report. A simplified alternative that leverages their existing reporting capabilities should be provided. **We recommend that the IRS create a simplified alternative to Form 1042-S reporting for PFFIs that do not report withholdable payments.**

§1.1471-3(e)(4)(i) and (ii) Indicia of U.S. Status - Section 1.1471-3(e)(4) outlines indicators that constitute "reasons to know" that a client may potentially be a U.S. person. Among the indicia outlined in the Proposed Regulations are the presence of a P.O. box as a client's primary address As noted in prior submissions by many organizations, P.O. boxes are used commonly in a number of instances such as rural communities where no other street address exists. Our understanding from Notice 2011-34 is that Treasury and the IRS had accepted this argument and therefore opted to refrain from classifying a non-U.S. P.O. box address (as the sole address on file) as U.S. indicia. We were therefore surprised and troubled to see that it has been included in this section as an indicator that triggers a requirement to obtain additional documentary evidence from clients that are already documented as non-U.S. While we understand that §1.1471-4(c)(2)(ii) is meant to provide an exclusion from this provision for PFFIs (as well as a mirror provision that pertains to U.S. telephone numbers), the example in §1.1471-4(c)(2)(iii) seems to be inconsistent with the exclusion since, in the example, a U.S. telephone number triggered the need for a PFFI to redocument a client. At a minimum, clarification is in order. **Clarify the example in §1.1471-3(e)(4)(iii) to make it consistent with the intent of (e)(4)(ii).**

§1.1471-3(e), 3(f), and 4(c) Presumption of U.S. or foreign status of recalcitrant account holders with U.S. indicia - §1.1471-3(f)(3)(iii) provides that a payment to an individual or entity is presumed to be made to a foreign payee if the payment is made outside of the United States with respect to an offshore obligation and the withholding agent does not know or have reason to know that the payee is a US person. §1.1471-4(c)(2)(ii) provides that, in the case of an individual

account, the standards of knowledge in §1.1471-3(e)(4)(i)(B)(1) and (ii)(B) will not apply for a PFFI. However, the Proposed Regulations do not make it clear what standards a PFFI should instead apply, if any.

While it is clear that an individual holder with indicia of U.S. status who fails to provide the necessary documentation to establish their U.S. or non-U.S. status is recalcitrant, there is significant confusion and disagreement among FFIs as to whether there are any circumstances in which such an account holder would be considered to be a U.S. person. Given the requirements to close a U.S. account if a PFFI is prevented from reporting the account to the IRS, it is important that the Proposed Regulations provide clear direction in this regard.

<u>§1.1471-4(a)(8) FFI agreement - Requests for additional information</u> - Our expectation is that the obligation to supply additional information refers to additional information already in the possession of the FFI and only with respect to specified U.S. persons; however, the current language could be construed to mean otherwise. In addition, in the case of U.S.-owned foreign entities, the information should only be in respect of the U.S. owner rather than the entity itself. **We recommend that the first sentence of the section be reworded to read as follows: "The FFI agreement will specify the participating FFI's obligation to comply with requests by the Secretary for additional information with respect to any U.S. account maintained by such institution that is already in the possession of the FFI. In the case of individual accounts, this obligation shall be in respect of the U.S. account maintained by the institution. In the case of U.S.-owned foreign entities, this obligation shall be limited to information with respect to any substantial U.S. owners."**

<u>§1.1471-4(b)(4) FFI agreement - Dormant accounts</u> - We recommend that if a dormant account is transferred to a government agency then any funds held in escrow can be transferred to the account or to the government agency.

<u>§1.1471-4(c)(4)(iii)(A) FFI agreement - Account threshold</u> - In the case of a fixed-term product without an early redemption feature, we recommend that FFIs be permitted to use either book or market value for the purposes of valuation.

<u>§1.1471-4(c)(8)(iii)(A) FFI agreement - Additional Enhanced Review for high-value accounts</u> - We believe the reference to documents should be "paragraphs (c)(8)(iii)(A)(1) through (5) of this section" rather than (c)(8)(iii)(B)(1) through (5). Please confirm.

<u>§1.1471-4(d)(3)(ii) Reporting of accounts under section 1471(c)(1) - Accounts held by specified U.S. persons</u> - Read literally, this would seem to require that the information of all U.S. persons be provided, even those that are recalcitrant and have therefore not consented. Since separate provisions are made for those instances, this exception should be referenced in this subsection.

<u>§1.1471-4(d)(4)(iii)(a) Reporting of accounts under section 1471(c)(1) - Account balance or value</u> - In the case of a fixed-term product without an early redemption feature, we recommend that FFIs be permitted to use either book or market value for the purposes of valuation. Fixed-term products such as index-linked deposits or principal-protected notes are assumed to be held to maturity, so their value prior to maturity is not tracked, and they typically have no secondary market reference price.

<u>§1.1471-5(b) Exceptions to the Definition of Financial Account</u> - In addition to the exceptions to the definition of "financial account" already included under §1.1471-5(b), **we believe there are other categories of financial accounts that, by their nature pose a low risk of being used for U.S. tax evasion and should be excepted.**

- *Estate Trust Accounts* – Estate trust accounts are established upon the death of an individual and used to hold the assets of the estate temporarily until the executor

disburses them to the bequeathed. These accounts are temporary in that assets are placed in at inception and then are drawn down, eventually to nothing. Such accounts do not pose a risk of being used for U.S. tax evasion since their purpose is not to build or manage wealth but rather simply to hold assets for disbursal in an orderly fashion.

- *Lawyers' Trust Accounts* – In most jurisdictions, lawyers (including law firms) open trust accounts to hold client funds related to the provision of legal services. The use and operation of these accounts is generally governed by rules or guidelines issued by the governing professional body. In many jurisdictions, these accounts cannot be used for purposes not related to the provision of legal services and lawyers have an obligation to take steps to ensure that clients do not attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. Most often these accounts are used to hold funds received from:

  - a client to be paid to another party;
  - other parties to be paid to a client
  - clients for future legal services or disbursements;

  The most common type of lawyer trust account is a pooled trust account, being an account that holds funds for more than one client. In certain situations, a trust account will be opened to hold the trust funds of a single client. In many jurisdictions, any income paid to a pooled trust account must be paid to the governing professional body and income paid to a trust account established to hold the funds for a single client is attributed to the client. In jurisdictions where such accounts are subject to restrictions regarding the funds that can be held in the account (i.e., must be related to the provision of legal services), we propose that these accounts should be excepted.

- *Employee Benefit Accounts* – In Canada, employers are allowed to set up different employee benefit plans such as employee benefits plans, employee profit sharing plans, health and welfare trusts, employee trusts, retirement compensation arrangements and employee savings plans. Employers generally make contributions to a trust or a custodian and under which one or more payments will be made to or for the benefit of their employees and former employees. Employees are allowed to make contributions to some of these plans. The purpose of these plans is to provide certain benefits to the employees or former employees. In addition, the majority of the employees are Canadian residents. Such accounts do not pose a risk of being used for U.S. tax evasion. Therefore, we propose that these accounts should be treated as excepted.

- *Foreign Insurance Trust Accounts* – The Office of the Superintendent of Financial Institutions (Canada's prudential regulator for banks and insurance companies) requires non-Canadian insurance companies to provide pledged assets as collateral in order to operate an insurance or reinsurance business in Canada. These assets are required to be held by a financial institution in Canada. The purpose of these accounts is to provide pledged assets in relation to operating a business in Canada. Such accounts do not pose a risk of being used for U.S. tax evasion. Therefore, we propose that these accounts should be treated as excepted.

§1.1471-5(e)(2)(i) Definitions - Banking or similar business - The defining characteristic of the business of banking is the acceptance of deposits. The other activities are services often provided by banks as part of the business of banking. There are entities that only perform one or more of the activities listed in (B) through (H); however, these are not banks but rather finance and leasing companies, including the finance arms of major manufacturers. These types of entities are not involved in wealth management and would therefore pose no risk of being used as mechanisms for tax evasion. **Therefore, the definition should be that an FI is engaged in (A) and one or more of (B) through (H).**

§1.1471-5(e)(4) Definitions - In the business of investing, reinvesting, and trading - An entity is considered to be engaged primarily in the business of investing, reinvesting or trading if the entity's gross income attributable to such activities equals or exceeds 50% of the entity's gross income during the shorter of (1) the three-year period ending on Dec 31 of the year in which the determination is made, or (2) the period during which the entity has been in existence. **Period (1) should be changed to the three-year fiscal period ending immediately prior to the date on which the determination is being made.** FFIs will be unable to make the determination for a period that includes a portion of the year that has not yet happened, and not all entities have calendar year-ends and the entities should be able to base the calculations on gross income as reported in financial statements.

§1.1471-5(f)(1)(i)(B) Deemed-compliant FFIs – Non-Reporting Members of Participating FFI Groups - Paragraph (2) requires that FFIs seeking to be nonreporting members of participating FFI groups commit to transferring or closing any U.S. account, that was opened prior to the date the nonreporting member implements the policies and procedures described in paragraph (3), within 90 days. Clients seeking to challenge the FFI's ability to terminate service or transfer accounts may be able to use the courts to extend this process well beyond the 90 day threshold. **We recommend that the requirement be modified to state that "the nonreporting FFI must enter into an FFI agreement, or commence action to transfer the account to an affiliate that is a participating FFI or U.S. financial institution or commence action to close the account within 90 days and thereafter use best efforts to conclude the actions expeditiously."** We also note that the procedures described in paragraphs (3) and (4) do not provide a nonreporting FFI the option of closing an account should the nonreporting FFI identify a U.S. account after it has implemented the procedures described in paragraphs (3) and (4). This may be an oversight. Instead, the FFI is only permitted to transfer such an account to an affiliate that is a participating FFI or a U.S. financial institution. In both cases, these entities will likely be offshore and the non-reporting FFI would need the customer's consent to such transfer. Also, local laws may prevent such a transfer for legal or privacy reasons. It may be easier for the non-reporting FFI to simply close the account. **We recommend that the policies and procedures described in paragraphs (3) and (4) include the option to close the account. For the same reasons noted above in connection with paragraph (2), we also recommend that paragraphs (3) and (4) be similarly amended to require the commencement of action within 90 days, not its completion.** Notwithstanding the recommendations just made and the best efforts of an FFI, it should be recognized that legal impediments within a country could still prevent an FFI from meeting the requirements of section 1.1471-5(f)(1)(i)(B). **We recommend that where an FFI demonstrates that it is using best efforts to comply with the requirements of the section but legal impediments prevent full compliance, there should be provision that the EAG will not be penalized with loss of its participating status.** This would be counter productive to the aims of FATCA.

§1.1471-5(f)(2)(i) Deemed-compliant FFIs - Non-registering local bank - Our interpretation is that local bank includes other forms of local deposit-taking institutions (eg. credit unions). Please confirm. Also, the regulation stipulates that a local bank can only serve "retail customers". The term is not defined in the Proposed Regulations. We believe that is intended to refer to any customer being served through the retail (ie. branch) channel, including individual, commercial and family trust customers; however, for greater clarity, we recommend that the word "retail" be removed.

§1.1473-1(7)(b)(1) Definition of Substantial U.S. owner - Threshold set in Proposed Regulations is still set to 10% ownership, but global AML standard is 25%. **Recommend moving to the AML standard for consistency with global standards.** This change would reduce the compliance burden without creating any additional material risk of tax evasion.

§1.1474-1(d)(4)(ii)(B) Method of reporting - nonparticipating FFIs that act as intermediaries - We believe the reference to 1.1471-3(c)(2)(iii) should be 1.1471-3(c)(2)(ii). Please confirm.

APPENDIX A

Participating Associations

Canadian Bankers Association

The Canadian Bankers Association (CBA) works on behalf of 53 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 267,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The Association also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

Canadian Life and Health Insurance Association

Established in 1894, the Canadian Life and Health Insurance Association (CLHIA) is a voluntary trade association that represents the collective interests of its member life and health insurers. The Association's membership accounts for 99% of the life and health insurance in force in Canada and administers more than two-thirds of Canada's private pension plans. The industry helps 26 million Canadians protect themselves and their families against the financial risks that can come with life situations such as illness, retirement and premature death. Canadian life insurers have extensive international operations – about 45% of the industry's total premiums are generated abroad and three of our member companies rank among the top 15 largest life insurers in the world.

Investment Funds Institute of Canada

The Investment Funds Institute of Canada (IFIC) is the voice of Canada's investment funds industry, including fund managers, distributors and industry service organizations. IFIC proactively advances the industry's issues and interests with all sectors of Canada's public policy framework, while keeping our members well-informed on new and emerging regulatory and legislative requirements. IFIC provides a consistently high level of service to enable dealer and manager members to work together in a cooperative forum to enhance the integrity and growth of the industry and strengthen investor confidence.

Investment Industry Association of Canada

The Investment Industry Association of Canada (IIAC) is a member-based professional association with over 180 members representing 95% of IIROC registered organizations (IIROC is the national self regulatory organization which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada). IIAC advances the growth and development of the Canadian investment industry, acting as a strong, proactive voice to represent the interests of our members and the investing public.

APPENDIX B

Retirement and Savings Accounts Registered under the Canadian Income Tax Act

A. Registered Pension Plan (RPP)

Product description:

- Employer-sponsored pension plan.
- Generally a group plan but employer can sponsor an individual pension plan.
- May be structured as a Trust or as a group annuity contract issued to employer with employees as plan “members”.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA.
- Subject to provincial pension legislation.
- All contributions and withdrawals must be reported to the CRA.
- Amount of withdrawals limited by pension legislation.

Contribution Limits and Taxation:

- Limits on allowable contributions, based on employment income and comprehensive retirement savings system limits. Contributions are limited either by need based on actuarial certification (defined benefit plans) or by annual contribution limits (defined contribution/money purchase plan).
- Maximum contribution to a money purchase RPP is $22,970 for 2011; contribution to a defined benefit RPP is the amount required to fund a maximum annual benefit of $2,552 per year of service.
- In addition, there is a comprehensive limit in the Income Tax Act on amounts contributed to registered retirement plans by or on behalf of a member, so a contribution to an RPP will reduce or eliminate available contribution “room” under those other plans.
- Contributions must be made by employer; employee contributions may also be allowed, depending on the plan.
- Additional restrictions are imposed on individual pension plans.
- Contributions are tax deductible.
- Penalty tax applies to contributions that exceed the regulated limit.

Growth Taxation:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawal Limits and Taxation:

- Generally lump-sum withdrawals are not allowed under pension legislation.
- All withdrawals are subject to withholding tax at source and are fully taxed in year of withdrawal.
- Withdrawal amounts will be governed by provincial pension legislation, the Income Tax Act, and the terms of the plan.
- Withdrawal/pension income received by a Canadian resident is reported to CRA and member on form T4A – includes full amount of withdrawal and amount of tax withheld in the year.
- Withdrawal/pension income received by a non-resident is reported to CRA and member on form NR4 – includes full amount of withdrawal and amount of tax withheld.

B. Registered Retirement Savings Plan (RRSP)

Product description:

- Personal/individual retirement savings vehicle.
- Individual plans, but may be offered in a group plan arrangement to allow for employer contributions.
- May be offered as a deposit account, an annuity contract, an investment contract, or a trust for the contributor which holds qualified investments.
- Plans (both individual and group arrangement) must be registered with CRA at the individual plan "member" level.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA at the individual level.
- All contributions and withdrawals must be reported to the CRA.

Contribution Limits and Taxation:

- Annual contribution limits are based on earned income from employment and self-employment and comprehensive retirement savings system limits as well as unused contribution room in respect of prior years.
- Maximum contribution to an RRSP is $22,450 for 2011: contribution to an RRSP will not be allowed to the extent of contributions to other registered retirement plans under the comprehensive retirement savings system limits in the Income Tax Act.
- Penalty tax imposed on excess contributions.
- Contributions may be made by individuals and/or their employer.
- Contributions are tax-deductible.

Growth Taxation:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawal Limits and Taxation:

- No limits/restrictions on withdrawals.
- All withdrawals are fully taxed in year of withdrawal and are subject to withholding tax at source.
- Plan must be converted to a retirement income plan by the end of the calendar year in which the individual attains age 71.
- Withdrawals by a Canadian resident are reported to CRA and holder on form T4RSP – includes full amount of withdrawal and amount of tax withheld if a lump-sum payment.
- Withdrawals by a non-resident are reported to CRA and holder on form NR4 – includes full amount of withdrawal and amount of tax withheld.

C. Registered Retirement Income Fund (RRIF)

Product description:

- Retirement income vehicle arranged between a carrier and an individual that must pay out a minimum amount each year.
- May be a deposit account, an annuity contract, an investment contract or a trust for the contributor/annuitant which holds qualified investments.
- Created with transfers from other registered plans.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA.
- All withdrawals must be reported to the CRA.

Contribution Limits and Taxation:

- Contributions restricted to transfers from other registered retirement plans (most generally RRSPs, but transfers from RPPs and other registered retirement plans are allowed) – no "new money" contributions allowed.

Growth Taxation:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawals:

- No limits/restrictions on withdrawals.
- Minimum annual withdrawal required based on age and fund balance at beginning of year.
- All withdrawals are fully taxed in year of withdrawal
- Withdrawals by a Canadian resident are reported to CRA and holder on form T4RIF – includes full amount withdrawn and any amount of tax withheld (withholding tax required where withdrawals exceed the prescribed minimum withdrawal).
- Withdrawals by a non-resident are reported to CRA and holder on form NR4 – includes full amount of withdrawal and amount of tax withheld (withholding tax required on all withdrawals).

D. Pooled Registered Pension Plan (PRPP) - Proposed

Product description:

- Group pension plan intended to provide benefits of grouped plans to employees of small employers, self-employed individuals and employees of non-participating employers
- May be structured as a Trust or as a group annuity contract with individuals as plan "members".

Government Regulation:

- A PRPP will be subject to income tax legislation and will be required to be registered with the CRA.
- A PRPP will be subject to federal or provincial pension legislation.
- All contributions and withdrawals will be required to be reported to the CRA.
- Amount of withdrawals will be limited by pension legislation.

Contribution Limits and Taxation:

- Annual contribution limits are based on earned income from employment and self-employment and comprehensive retirement savings system limits as well as prior unused contribution room.
- Maximum contributions will be integrated with the RRSP contribution limits ($22,450 for 2011): contributions to a PRPP will not be allowed to the extent of contributions to other registered retirement plans under the comprehensive retirement savings system limits in the Income Tax Act.
- Penalty tax will apply on excess contributions.
- Contributions may be made by individual plan members and/or employers.
- Contributions are tax-deductible.

Growth Taxation:

- No current tax on income earned/accrued within the plan.
- No reporting of deferred income earned.

Withdrawal Limits and Taxation:

- Generally lump-sum withdrawals will not be allowed under pension legislation.
- Withdrawal amounts will be governed by federal or provincial pension legislation, the Income Tax Act, and the terms of the plan.
- All withdrawals will be subject to withholding tax at source and will be fully taxed in year of withdrawal.
- Withdrawal/pension income received by Canadian residents and non-residents, and amount of tax withheld, will be reported to CRA and the member.

E. Deferred Profit Sharing Plan (DPSP)

Product description:
- Employer-sponsored benefit plan.
- Generally a group plan but employer can sponsor an individual plan
- Must be structured as a trust.

Government Regulation:
- Subject to income tax legislation and must be registered with the CRA.
- All contributions and withdrawals must be reported to the CRA.

Contribution Limits and Taxation:
- Contributions determined with reference to employer profits.
- Annual limits on the amount contributed on behalf of each employee, based on employee earnings and comprehensive retirement savings system limits.
- Maximum contribution to a DPSP is $11,485 for 2011: contribution to a DPSP will reduce available RRSP contribution room under the comprehensive retirement savings system limits under the Income Tax Act.
- Contributions must be made by employer, no employee contributions allowed.
- Contributions are tax deductible to employer.

Growth Taxation:
- No current tax on income earned/accrued within the trust.
- No reporting of deferred income earned.

Withdrawal Limits and Taxation:
- Withdrawals do not have to be deferred until retirement or paid as a life pension.
- Plan must require withdrawal of a member's vested interest by the end of the calendar year in which the individual attains age 71.
- All withdrawals are subject to withholding tax at source and are fully taxed in year of payment.
- Withdrawals received by Canadian residents are reported to CRA and resident on form T4A – includes full amount of withdrawal in the year and amount of tax withheld.
- Withdrawals received by non-residents are reported to CRA and non-resident on form NR4 – includes full amount of withdrawal and amount of tax withheld.

F. Tax Free Savings Account (TFSA)

Product description:

- Personal/individual savings vehicle
- Contributor must be a Canadian resident who is 18 years of age or older.
- Individual plans but may be offered in a group arrangement.
- May be a deposit account, an annuity contract, or a trust for the contributor which holds qualified investments.
- Plan is registered with CRA at the individual plan "member" level.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA.
- All contributions and withdrawals must be reported to the CRA.

Contribution Limits and Taxation:

- Contributions limited by the Income Tax Act.
- Annual contribution limit is $5,000 per year plus unused contribution room from prior years plus the amount of any withdrawals from the plan in prior years.
- Contributions may be made by individuals only. Penalty tax imposed on excess contributions and contributions made while non-resident.
- Contributions are NOT tax-deductible.

Growth Taxation:

- No current tax on income earned/accrued within the plan.
- No reporting of income earned.

Withdrawal Limits and Taxation:

- No limits/restrictions on withdrawals.
- No income tax in year of withdrawal.
- Withdrawals reported to CRA annually

G. Registered Education Savings Plan (RESP)

Product description:

- Plan to promote savings for post-secondary education usually for children and grandchildren
- Plan may be for one individual or it may be a family plan with multiple related beneficiaries. Group plans are also available.
- Beneficiary must be a Canadian resident in year of contribution
- Some government grants available to plan.
- The plan must be structured as a trust.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA.
- All contributions and withdrawals must be reported to the CRA.

Contribution Limits and Taxation:

- Lifetime limit of $50,000 per beneficiary – contributions only allowed until age 21 of beneficiary.
- Government grants to a maximum of $7,200 may be available and are not taxed in year of contribution.
- Contributions are not tax deductible.

Growth Taxation:

- Earnings grow tax-deferred within plan.
- Limited deferral period (generally a maximum of 35 years).

Withdrawal Limits and Taxation:

- Withdrawals to beneficiary permitted to fund expenses supporting the costs of post-secondary education
- Withdrawal of original contributions not taxable.
- Amounts representing growth in plan and government grants are taxed upon withdrawal in the hands of the student who is enrolled in a qualifying post-secondary program.
- Taxable portion of withdrawals reported to the student on Form T4A.
- If student does not attend a qualifying post-secondary program, plan must be collapsed and growth can be returned to contributor where it will be taxed as normal income with a 20% additional tax imposed, or it can be transferred into the contributor’s RRSP if he/she has available contribution room up to a $50,000 lifetime limit.

H. Registered Disability Savings Plan (RDSP)

Product description:

- Savings intended for parents and others to save for the long-term financial security of a disabled individual.
- Individual plan
- Beneficiary must be Canadian resident in year of contribution and qualify for the disability tax credit (i.e. loss of activities of daily living).
- The plan must be structured as a trust.
- Some government income-tested matching contributions available to plan.

Government Regulation:

- Subject to income tax legislation and must be registered with the CRA.
- All withdrawals must be reported to the CRA.

Contribution Limits and Taxation:

- Contributions permitted until the end of the year in which the beneficiary attains age 59.
- No annual contribution limit, but $200,000 lifetime limit in respect of a particular individual.
- Government matching contributions excluded from taxable income in year of contribution.
- Contributions are not tax-deductible.

Growth Taxation:

- No current tax on income earned/accrued within the plan
- No reporting of deferred income earned

Withdrawal Limits and Taxation:

- Payments must begin by the end of the year in which the beneficiary attains age 60.
- Maximum withdrawals based on age and life expectancy.
- Government matching contributions and investment income earned in the plan included in income for tax purposes when paid to the beneficiary.
- Payments to Canadian residents reported on T4A.

APPENDIX C

Grandfathered Obligations (Capital Markets Recommendations):

We believe that steps should be taken to implement the following recommendations as soon as possible, in order to alleviate potential disruption and increased risk to international capital markets:

1. The Proposed Regulations should be amended to provide for symmetry in the application of Chapter 4 to FFIs and United States Financial Institutions (USFIs) with respect to passthru payments (if and when it is determined that passthru payments are necessary for successful implementation of FATCA).

2. The Proposed Regulations should be amended to identify types of payments under Master Agreements that are excluded from the scope of the passthru payment definition in §1.1471-5(h). This could alleviate Participating FFIs (PFFIs) from the need to re-negotiate such Master Agreements or to terminate transactions. At a minimum, we recommend that payments made through transactions in certain financial products, such as notional principal contracts[25] , derivatives, securities lending and sale/repurchase (repos), where the financial products clearly do not have (and payments are not thus not derived from) U.S. referenced assets, be entirely excluded from the definition of "passthru payment".

3. All accounts that hold collateral pledged under an ISDA Credit Support Annex (CSA) should be excluded from the definition of "financial account" in §1.1471-5(b) as they pose a very low risk of being used for tax evasion purposes. CSAs are not used as investment vehicles; rather they represent amounts pledged to secure a derivative investment.

4. We recommend that Treasury exercise its general authority for rulemaking under Chapter 4 to release expedited guidance advising that the grandfathering date is extended until July 1, 2014 (or some later date, taking into account the timing of the release of final Regulations), to allow FFIs a reasonable amount of time after the effective date of their FFI agreements to assess the status of regulations and IGAs implementing FATCA, and to redocument their Master Agreements appropriately.

[25] Note that this would not include "specified notional principal contracts" under section 871(m) of the Code.

APPENDIX D

CANADIAN DOMESTIC CHARTERED BANKS BY ASSETS

Name of Institution	Assets ($000)
1. Royal Bank of Canada	826,246,023
2. The Toronto-Dominion Bank	764,078,734
3. The Bank of Nova Scotia	637,104,579
4. Bank of Montreal	542,981,843
5. Canadian Imperial Bank of Commerce	399,830,811
6. National Bank of Canada	188,217,103
7. Laurentian Bank of Canada	29,927,054
8. Manulife Bank of Canada	20,237,975
9. Canadian Western Bank	15,452,855
10. Dundee Bank of Canada	7,934,863
11. Canadian Tire Bank	4,496,969
12. Bridgewater Bank	3,269,790
13. President's Choice Bank	2,261,775
14. Pacific & Western Bank of Canada	1,539,204
15. HomEquity Bank	1,302,799
16. General Bank of Canada	408,792
17. Bank West	337,847
18. First Nations Bank of Canada	280,780
19. CS Alterna Bank	179,501
20. Citizens Bank of Canada	110,445
21. DirectCash Bank	40,809
22. Jameson Bank	31,064
23. MonCana Bank of Canada	30,273