INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÉRES

November 9, 2010

CC:PA:LPD:PR (NOT-121556-10)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue NW
Washington DC 20224

VIA EMAIL TO: Notice.Comments@irscounsel.treas.gov

RE: Notice 2010-60: Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code

Dear Sirs or Madams:

On March 18, 2010, the *Hiring Incentives to Restore Employment (HIRE) Act* (the **Act**) was enacted, adding new provisions (**Chapter 4** of Subtitle A) to the Internal Revenue Code (the **Code**). The Investment Industry Association of Canada (**IIAC**) has been following the provisions contained within Chapter 4 since their introduction as part of the Administration's 2010 Fiscal Year Revenue Proposals (the **Proposals**). We expressed our concern through written comments on the Proposals, and later in 2009 on the draft Foreign Account Tax Compliance Act (**FATCA**) legislation proposed by the House Ways and Means Committee.

On August 27, 2010, the Internal Revenue Service (**IRS**) released Notice 2010-60: "*Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code*" (the **Notice**), to provide initial guidance with respect to the new requirements under Chapter 4.

The IIAC is writing this letter to the Department of the Treasury (**Treasury**) and the IRS in response to the request to provide comment on the guidance provided in the Notice, and on other issues that should be addressed in future guidance and regulations.

WHO WE ARE

The IIAC is Canada's equivalent to the Securities Industry and Financial Markets Association (**SIFMA**) in the United States, and represents approximately 200 investment

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

dealers across Canada. Our members provide a variety of financial services including, but not limited to, the following:

- Full service brokerage
- Discount brokerage
- Discretionary investment management
- Institutional custody

Most of our larger members (based on number of account holders and assets under administration) are part of global groups of financial institutions that offer a diversified range of services worldwide. Our members manage approximately $900 billion in assets for their clients in 9.8 million brokerage accounts.[1] Products offered by our members include equity securities (common and preferred stock) and debt securities (including bonds, treasury bills, commercial paper and bankers' acceptances), mutual funds, and more sophisticated instruments such as options, futures or other risk management products.

GENERAL COMMENTS

A. Effective dates to be extended appropriately once final regulations released

The Act provides that new Chapter 4 will generally apply to payments made after December 31, 2012. The IIAC and many other organizations had recommended that the effective date be removed from the Act and replaced with a provision giving power to the Secretary to devise a flexible or staggered effective date under the accompanying regulations. The legislated effective date was approved; however, we believe that more scope remains for the Secretary to stagger the implementation of requirements or delay penalties where foreign financial institutions (**FFI**s) are attempting in good faith to comply with the new requirements in a timely fashion.

We recognize that the Notice provides a staggered implementation with respect to the identification of accounts. ***However, our members remain concerned that if detailed regulations and FFI agreements are not finalized until 2012, FFIs will not be in a position to fully assess the costs and risks associated with compliance, and ensure that there are no legal or operational restrictions which would impede the FFI's ability to comply with the terms of the FFI agreement.*** FFIs will not be able to make the final business decision to enter into such an agreement without completing this analysis.

Once an FFI has confirmed that it can and will enter into an FFI agreement with the Secretary, it will require time to make the necessary systems and operational changes to gather and record the information required for the purposes of identifying United States accounts (**U.S. accounts**), including making necessary changes to account opening procedures and training employees to implement these changes, gather and record information for accounts that are excluded from the requirements, and modify systems to

[1] More information and a list of members is available at http://www.iiac.ca.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

be able to produce the necessary reporting information. ***For large-sized FFIs, the minimum period required to make the necessary changes will be at least two years from the release of final regulations.*** Although the proposals to lengthen the implementation dates (the two-year and five-year rules in Section III.B.2 of the Notice) for the identification of accounts will alleviate some pressure on financial institutions, many changes will be required before this identification process can take place.

As such, we recommend that an extension of time be granted to ensure at least 24 months for implementation of system requirements after the release of final regulations (for both new and preexisting accounts) We also recommend that Treasury and the IRS work with industry to review implementation progress and provide a "safe harbour" where financial institutions that make reasonable efforts to comply in time for the effective date will not be subject to claims for under-withholding or penalties. These reasonable efforts could be mutually agreed upon between the IRS and the financial institutions.

B. Leveraging existing information exchange mechanisms

Notwithstanding our comments in this submission on specific areas in which we believe that the Secretary can provide regulatory relief, we maintain our general concerns about the onerous and duplicative information exchange mechanisms created by the requirements of Chapter 4.

The IIAC understands the U.S. government's concerns regarding the use of offshore accounts and entities by certain persons to evade U.S. tax. This is a concern shared by the governments of many countries, and we have observed increased global efforts and inter-governmental cooperation through the inclusion of tax information exchange provisions in many new income tax treaties and protocols to existing treaties, as well as an increase in the number of tax information exchange agreements between countries that do not have income tax treaties in effect.

Now that Chapter 4 has been finalized, the detailed regulatory requirements must strike a reasonable balance between increasing U.S. tax revenue by identifying tax evasion by U.S. persons, and the additional financial burden and operational risks being imposed upon FFIs, in an effort to maximize the continued participation of such institutions in the Qualified Intermediary (**QI**) program and the number of institutions that enter into FFI agreements with the IRS.

We maintain our belief that a more appropriate means to address tax evasion is by the use of international solutions developed through negotiations between governments, not through negotiations and agreements between the IRS and private entities.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

Even if the recommendations made in this letter are adopted, the concern remains that compliance with Chapter 4 will impose a significant level of additional cost and operational risk on FFIs that will be disproportionate to the amount of additional U.S. tax revenue generated. In particular, we are concerned that many FFIs will not find it economically feasible to enter into FFI agreements with the IRS and/or to continue to operate as QIs. On an aggregate basis, our largest members anticipate incurring millions of dollars in compliance costs to identify a very small number of U.S. accountholders. Many smaller institutions are seriously considering disinvesting in U.S. securities and disassociating from counterparties who invest in U.S. securities.

We urge the Treasury and the IRS to engage in a pragmatic, risk-based approach to the implementation of Chapter 4, focusing the administrative requirements on areas of greatest compliance risk, and leveraging existing information sharing agreements wherever possible. The IIAC concurs with the comments made by our colleagues in other jurisdictions that a multi-lateral approach that takes into consideration local laws and requirements would reduce compliance risk, costs, legal complication and conflict and technological complexity.

C. Participating FFIs in Canada may breach Canadian privacy law

There are additional concerns about whether FFIs in Canada will be able to legally enter into an FFI agreement, given federal and provincial privacy requirements. This may ultimately result in FFIs being forced to exit the QI program into which they and the IRS have invested significant resources, and in FFIs considering withdrawal from the U.S. capital markets generally.

i. Privacy Concerns Relating to Documentation

The Office of the Information and Privacy Commissioner in the Canadian province of Alberta has raised serious concerns with respect to the collection of documentary evidence required by the Chapter 3 QI regime. Specifically, the practice of photocopying client identification has been found to be contrary to the provisions of the Alberta *Personal Information Protection Act*. This decision may propagate and be adopted by all other provinces in Canada, as the privacy legislation is substantially similar across the country.

Although we understand that this may already be under consideration, we urge Treasury and the IRS to adopt a single standard of documentation for both the requirements of Chapter 4 and for the QI regime (Chapter 3) that would require either a completed W-8BEN or a process that requires only the recording (by photocopying or by other means as allowable under local privacy laws) of the relevant information to establish non-U.S. status.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

ii. Privacy Concerns Relating to Reporting Requirements

There are also concerns that existing Canadian privacy legislation would prevent our members from entering into an FFI agreement to provide the information required by Chapter 4 with respect to their accountholders. For many of the same reasons listed above in the section dealing with "Privacy Concerns Relating to Documentation", Canadian investment dealers may not be able to disclose personal data relating to an accountholder except as permitted under *Canadian* law. No current provision of Canadian law requires or permits our members to provide the information required under Chapter 4.

We urge Treasury and the IRS to give serious consideration to obtaining the information required by Chapter 4 through the application of the existing exchange of information procedures under the Canada-U.S. Income Tax Treaty. As mentioned previously, the use of these provisions would provide a global approach to information collection, as it could be applied to every country that has a tax treaty with the U.S. These information collection mechanisms are already in operation and could be leveraged to permit the IRS to obtain the necessary information under Chapter 4.

COMMENTS ON NOTICE 2010-60

The IIAC convened a working group of its members to provide comment on the guidance provided in the Notice. Individual members of the IIAC may have additional issues that they will raise with Treasury and the IRS in separate submissions. Although we are mindful of the compressed timeframe for issuing guidance in advance of the effective date, we have identified some issues in this letter that will require further consideration and research and we may provide more recommendations on these particular issues at a later date.

The comments below are organized in the same order as the sections of the Notice, and not in order of importance.

A. Grandfathered obligations: clarify non-inclusion of debt instruments

Section I of the Notice states that the regulations will provide that an "obligation" for purposes of grandfathering, will not include any instrument treated as equity for U.S. tax purposes, or any legal agreement that lacks a definitive expiration or term.

We recommend that the draft regulations should clarify that a debt instrument that has a fixed maturity will not be considered to be "treated as equity for U.S. tax purposes".

Withholding agents, FFIs and debt instrument holders should be provided with certainty that the provisions of Chapter 4 will not apply to those instruments if they are re-characterized as equity.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
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It is also stated in the Notice that payments under grandfathered obligations will not be subject to *withholding* under Chapter 4, but the language used does not make it clear that such obligations are also not subject to the *reporting* obligations under Chapter 4.

We recommend that future draft regulations clarify that these grandfathered obligations are not subject to either withholding or reporting obligations under Chapter 4.

B. Definition of Financial Institution under Section 1471(d)(5)(C)

Section II.A.3 of the Notice states that the concept in Chapter 4 of an institution being in the "business or investing, reinvesting or trading" is different in scope and content from the concept of a "trade or business" as used in other sections of the Code. Specifically, the Notice states that "isolated transactions" that might not give rise to a trade or business for other purposes may cause an entity to be engaged primarily in the business of investing, reinvesting, or trading in securities, depending on such factors as the magnitude and importance of the transaction in comparison to the entity's other activities.

This definition will impose considerable compliance and tax risk on financial institutions and withholding agents, by requiring them to make subjective classifications about entities, quite possibly without full information about the entity's business.

We recommend that Treasury and the IRS reconsider this concept, or, in the alternative provide for a mechanism of self-certification whereby the entity in question, with full knowledge of its own business, could make the necessary determination as to its status. FFIs and withholding agents should be able to rely on these certifications without performing additional independent due diligence.

C. Entities with certain identified owners

Section II.B.3 of the Notice states that Treasury and the IRS intend to issue guidance whereby certain foreign entities that are FFIs would be treated as deemed-compliant FFIs. Comments were requested as to whether certain small FFIs should be required, for the purposes of applying Chapter 4, to be treated as NFFEs, regardless of whether withholding agents currently determine the direct and indirect owners of such entities for purposes of complying with local law or regulatory obligations.

Personal trusts (i.e. trusts settled by and for the benefit of private individuals as opposed to business trusts or collective investment vehicles, an interest in which is typically defined by reference to units, which an investor acquires for consideration) should not be treated as FFIs (deemed compliant or otherwise). Many of these types of entities will consist of family and estate and testamentary trusts that are inappropriately included in the definition of "financial institution", and pose a very low risk of tax evasion.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
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With respect to business trusts, investment funds and other "small" entities, we recommend that further guidance be provided with respect to determining the qualification of the entity as "small" (i.e. number of account holders; size of assets under management, etc.).

We are also concerned that any proposed system of identifying "small" entities that shifts the burden onto participating FFIs to make an independent judgment about its "small" FFI clients, or to collect documentation and perform additional due diligence with respect to these clients, places an unreasonable amount of compliance and operational risk on these participating FFIs.

We recommend that the onus for determining the size of the entity be placed upon the "small" entity in question, through a process of self-certification based on clear guidance as to how this determination should be made. Recipients of such certification should be permitted to rely on this certification without performing additional independent due diligence.

D. Classes of persons posing a low risk of tax evasion under Section 1471(f)(4) – retirement plans/other foreign entities

Section II.C of the Notice states that Treasury and the IRS intend to issue guidance providing that certain foreign retirement plans pose a low risk of tax evasion for Chapter 4 purposes, and therefore payments beneficially owned by such retirement plans will be exempt from withholding under section 1471(a). Section II.E of the Notice also requests comments on the treatment of other foreign entities, including foreign charitable organizations.

The IIAC is pleased to see that Treasury and the IRS have taken into account the low risk associated with foreign retirement plans; however, the narrowing of the scope of the exemption by requiring an exempt retirement plan to be "sponsored by a foreign employer" will exclude registered personal retirement plans in Canada from the exemption when they in fact pose very low risks of tax evasion.

In Canada, the *Income Tax Act (Canada)* (the **ITA**) permits Canadian taxpayers to open accounts with financial institutions that are registered with and/or monitored by the Canada Revenue Agency (**CRA**) and are designed to provide tax advantages for individuals to increase personal savings generally (Tax Free Savings Accounts or **TFSA**s), for retirement (Registered Retirement Savings Plans or **RRSP**s and Registered Retirement Income Funds or **RRIF**s), for education (Registered Education Savings Plans or **RESP**s) or for disabled individuals (Registered Disability Savings Plans or **RDSP**s). These arrangements are subject to terms and conditions set out in the ITA that are designed to limit the preferential tax treatment provided. In these plans, contributions to the plan might be tax deductible, or income and gains earned within the plan might be tax-exempt or tax-deferred until withdrawn. Under the ITA, these types of tax-assisted savings plans are only generally available to Canadian residents, must be registered with

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

the CRA, and information such as contributions and withdrawals from the plans must be reported to the CRA by the plan administrator. Contributions to the plans are generally limited[2], and excess contributions are subject to penalties.

Given the regulatory restrictions attached to these accounts and the degree of the monitoring by the CRA to which they are subject, the IIAC recommends that they also be excluded from either the definition of FFI or from the definition of U.S. account on the basis that they present a low risk of being used by U.S. persons for tax evasion.

Alternatively, Treasury and the IRS might consider exempting these registered retirement plans and other foreign entities (such as charitable organizations) because of their status as entities exempt from withholding under Article XXI of the Canada-U.S. Income Tax Treaty (the **Treaty**).

The Treaty includes provisions effectively allowing mutual recognition of certain tax-exempt entities. Under Article XXI, income of religious, scientific, literary, educational or charitable organizations exempt from tax in Canada is exempt from U.S. tax provided that such income is not from carrying on a trade or business. Article XXI similarly exempts from U.S. tax dividend and interest income derived by a trust, company, organization or other arrangement that is generally exempt from tax in Canada and that is operated exclusively to administer to provide pension, retirement or employment benefits. It seems appropriate that accounts of registered pension plans, RRSPs, RRIFs, RESPs, RDSPs and non-profit, educational, charitable and religious institutions that are exempt from tax in Canada and the U.S. under the Treaty should be excluded from the reporting and withholding requirements under sections 1471 and 1472.

As such, the IIAC recommends the exclusion from the definition of FFI and/or U.S. accounts all Canadian entities or accounts that are covered by Article XXI of the Treaty.

However, it may also be efficient for Treasury and the IRS to contemplate drafting regulations that would exclude from the definitions of FFI and/or U.S. account, all entities that are similarly covered under the tax treaties that have been negotiated between the U.S. and other countries. This would provide a global approach to the exclusion, as it could be applied to every country that has a tax treaty with the U.S.

[2] Contributions to RRSP accounts are limited to the lower of $22,000 or 18% of the taxpayer's earned income for the previous year. Contributions to TFSA accounts are limited to $5000 per year. RESP accounts are subject to a maximum $50,000 lifetime limit with no annual limits. RDSP accounts are similarly subject to a maximum $200,000 lifetime limit, with no annual limit.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
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E. Reliance on Existing Documentation and Issuance of FFI EINs

Section III.B.1 of the Notice states that participating FFIs will be required to identify other FFIs as participating FFIs, deemed-compliant FFIs or non-participating FFIs. To facilitate this process, Treasury and the IRS contemplate that the IRS will issue employer identification numbers (**EIN**s) to participating FFIs (**FFI EIN**s) and that participating FFIs will use these FFI EINs to identify themselves to withholding agents. It is unclear from this language how a deemed-compliant FFI will be identified and documented and whether they will also be issued EINs by the IRS.

Guidance is requested with respect to how deemed-compliant FFIs will be identified, and also with respect to how participating FFIs should deal with entities that claim to be participating FFIs but do not provide an EIN.

The Notice also states that until withholding agents are able to verify the status of FFIs with the IRS, withholding agents and participating FFIs will be permitted to rely on certifications provided by the FFIs as to their status as participating FFIs, unless the withholding agent or participating FFI knows or has reason to know that the certification provided is incorrect.

We urge the IRS to provide a draft form of certification for participating FFI status as soon as possible or to provide further guidance on what provisions must be included in this form of certification.

F. Identification by Participating FFIs for Purposes of Section 1471

For most of the IIAC's members, searching previously existing accounts for indicia of U.S. status will be a costly and onerous process, and developing new procedures (if necessary) to identify U.S. accounts on a going-forward basis will require additional time and resources. However, we concur that electronic searches of existing data is the only practical means of identification for preexisting accounts.

In general, we recommend that Treasury and the IRS provide specific guidance in this area as soon as possible to enable FFIs to make the necessary procedural and operational changes.

Specifically, FFIs require detailed information on U.S. indicia and account documentation requirements. In addition to complex systems changes, new procedures and documents will need to be reviewed and approved by compliance officers at participating FFIs. A high level of specification is needed as soon as possible in order for FFIs to be ready by the effective date. This section represents the preliminary comments of IIAC members on the identification procedures described in the Notice.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

i. Preexisting Individual Accounts

Section III.B.2.a (Step 3) states that an FFI shall initially treat an account as other than a U.S. account if the electronically searchable information maintained by the FFI and associated with the account does not include any of the following indicia of potential U.S. status: (i) identification of any account holder as a U.S resident or U.S. citizen; (ii) a U.S. address (whether a residence address or a correspondence address); (iii) a U.S. place of birth; (iv) an "in care of" address, a "hold mail" address, or a P.O. address that is the sole address on file with respect to the account holder; (v) a power of attorney or signatory authority granted to a person with a U.S. address; or (vi) standing instructions to transfer funds to an account maintained in the U.S., or directions received from a U.S. address.

It is also unclear as to what constitutes "electronically searchable information". For example, PDFs of documentation might exist on an FFI's system, but, similar to paper-based information, the capacity to search these documents for text or data on a large scale basis does not exist – it would have to be completed manually.

We recommend that Treasury and the IRS revise Step 3 to clarify that the requirement to search does not extend to all information that is stored in electronic format.

For many rural Canadians, a P.O. address is the only mailing address available to them through Canada Post. Our members have estimated that approximately 4% of their accounts may have only a P.O. address on file, and thus would become "potential" U.S. accounts, requiring the client to provide either a Form W-8BEN or documentary evidence establishing non-U.S. status under Step 4.

We recommend that where the client resides in an area where the P.O. address is the only address available to the client, there should be no requirement, in the absence of any other U.S. indicia, for the FFI to collect any further documentary evidence or documentation from the client.

In the day-to-day experience of our members, the current W-8BEN form is extremely difficult for clients to understand. The three-year expiration date of the W-8BEN form also compounds the difficulties of using the form, making it an unpopular choice among our members for the purposes of documenting their accounts. If Treasury and the IRS can amend the form to make it easier for clients to complete, and remove the expiry date, it would greatly assist with the implementation of the requirements of both the Act and the QI regime (see comments in the section dealing with new individual accounts, below).

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

We recommend that Treasury and the IRS consider revisiting the contents of the current W-8BEN form, to produce a "plain language" version (without an expiry date) that would assist FFIs in the administration of this regime.

Under Step 5, the FFI must request any documentation required by Step 4 from each relevant individual account holder within one year of the effective date of the FFI's agreement. Account holders that do not provide appropriate documentation within one year of this date will be classified as recalcitrant account holders until the appropriate documentation is received. Our members have expressed concern that a system of identification that requires a positive response from Canadian account holders to prove their non-U.S. status (especially with respect to existing accountholders) will create a large number of recalcitrant account holders. There are also concerns about the requirements for FFIs to build systems to track these ongoing requests throughout the various timeframes described in the Notice.

We strongly urge Treasury and the IRS to reconsider its approach with respect to the identification of preexisting account holders by removing the timing requirements described in the Notice with respect to accounts where no U.S. indicia exists, and allowing FFIs to collect information on preexisting accounts in the regular course of communicating with accountholders. Where U.S. indicia exists, an identification process that sets out a clear-end date and allows the FFI flexibility in conducting its due diligence process with respect to identification would be preferable to the proposed process described in the Notice.

ii. New Individual Accounts

Section III.B.2.b (Step 3) requires an FFI to obtain and examine documentary evidence establishing U.S. or non-U.S. status of individual account holders; however the Notice does not provide clarity about the forms of documentary evidence that will be required to establish status. As mentioned above, detailed guidance is required to provide FFIs with clarity on how opening procedures may need to be changed.

We recommend that the documentary requirements under Chapter 4 remain consistent with the documents listed in the current QI Attachments for each country, which are based on the know-your-client (KYC) and anti-money laundering (AML) rules in each jurisdiction. In this way, FFIs in every jurisdiction will be able to rely on the documentary evidence that they routinely obtain as part of the account opening process.

As mentioned above, we strongly recommend that Treasury and the IRS redraft the W-8BEN form (and its associated instructions) into plain language to assist FFIs in the administration of this regime.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
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We also recommend that the requirement to renew W-8BENs every three years be removed and replaced with a requirement to review and revise the form only when a change in status is reported by the account holder.

Once an account has been adequately documented, there should not be an unnecessary ongoing requirement to re-document where there has been no indication of a change in status.

With respect to accounts that are not identified as U.S. accounts by obtaining and examining documentary evidence establishing U.S. or non-U.S. status, Step 4 requires FFIs to examine all other information collected in connection with the new individual financial account (e.g. for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements) to identify indicia of potential U.S. status.

In addition to the concerns already mentioned with respect to the indicia listed, our members have concerns about the level of due diligence that is being proposed in Step 4. The requirement to review correspondence implies an ongoing and active investigation by FFI staff and the use of the word "suggests" connotes a subjective decision to be made without guidance. It also seems unlikely that a significant number of U.S. accounts will remain unidentified after completing Steps 1 through 3 of the process.

The IIAC recommends that Treasury and the IRS remove the subjective language and the requirements to expand the review beyond standard account opening (KYC/AML) documentary evidence by removing Step 4 from Section III.B.2.b.

G. Identification by Participating FFIs – Financial Accounts Held by Entities

In general, our members have expressed concern that the procedures described in the Notice are too onerous and complex to be implemented effectively by front-line staff at FFIs. The timeframe in which existing accounts must be reviewed, and in which procedures will need to be developed for identifying new accounts is too short, especially given the number of requirements for the FFI to obtain responses and documentary evidence from account holders. As with individual accounts, the request for positive responses will likely result in a high number of recalcitrant accounts.

i. Ownership Thresholds for Entities

The Notice makes no reference to the threshold of beneficial ownership to which FFIs will have to adhere to identify non-financial foreign entity (**NFFE**) accounts as United States accounts. Although it might be presumed that the legislative thresholds would apply, this omission could be read as expanding reporting to every specified U.S. person that is an owner of the entity, instead of just to "substantial U.S. owners" (more than 10% ownership, as provided in Chapter 4).

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

We strongly urge Treasury and the IRS to clarify that FFIs are required to identify substantial U.S. owners at the 10% ownership level described in Chapter 4. However, we continue to ask Treasury and the IRS to also consider whether they have the authority to require FFIs to identify U.S. persons that are beneficial owners of entity accounts at levels that are based on local AML/KYC requirements.

For example, Canadian AML rules require a financial institution to identify and to verify the identity of the beneficial owners of an entity that own more than *25%* of the shares. Similar requirements exist in many other jurisdictions.

ii. Preexisting Entity Accounts

The requirements described in steps 3(a) to 3(c) of Section III.B.3.a are extremely complicated, and require multiple information requests to be made to accountholders.

Similar to the recommendations made with respect to individual accounts, we strongly urge Treasury and the IRS to revise these steps to create a simplified process for identifying accounts, and to limit the number of information requests made to accountholders.

In particular, the requirement to examine the entity's account file for evidence that the entity is engaged in an active trade or business (other than FI business) described in Step 4 would likely require an FFI to engage in a manual search of the entity's account file, as much of this information is not available in an electronically searchable format. It would also require the FFI to make a subjective decision with respect to the evidence and whether it indicates that the entity is engaged in an "active trade or business".

To this end, we recommend that Treasury and the IRS consider developing a form of W-8BEN or other form of self-certification to be used by entities, written in plain language and suitable for relatively unsophisticated investors. This would also assist with new accountholders, who would be able to self-certify status, instead of forcing the FFI to determine the accountholder's status.

H. Reporting on U.S. Accounts

i. Need for reporting form to be released for review and comment

If Treasury and the IRS do not decide to use the information exchange provisions under the Treaty (as described above in section C.ii of this submission), we urge Treasury and the IRS to present a draft version of the reporting form to be released for review and comment by FFIs as soon as possible.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

ii. Each jurisdiction to report in local currency

Section IV.B states that the account balance and value must be reported in U.S. dollars and that future guidance will provide the appropriate method for currency translation.

We recommend that it will be more appropriate for each jurisdiction to report in its own currency.

iii. Reporting of gross receipts and withdrawals

We reiterate our comments from previous submissions that the requirements to report gross receipts and gross withdrawals and payments is too onerous and is unnecessary given the information that would already be provided to the IRS.

Discretion has been given to the Secretary to make exclusions from the requirement to report gross receipts and withdrawals, and we urge Treasury and the IRS to provide the requested relief to FFIs by excluding these reporting requirements.

I. Elections by FFIs

In Section IV.D, Treasury and the IRS request comments regarding whether and in what circumstances a participating FFI should be permitted to make an election with respect to a subset of its accounts without making the election for all of its accounts (for example, whether a participating FFI should be permitted to make the election with respect to accounts held by individuals without requiring that the FFI make the election with respect to accounts by entities).

We recommend that Treasury and the IRS leave open the option of an FFI making the election on a subset of accounts.

As provided in the Notice example, one circumstance would be to elect full reporting for individuals and only 1471(c)(1) reporting for U.S. owners of foreign entities. Another example would be to separate a subset of accounts where the accountholder requests to be reported under one method or the other for privacy reasons.

We also recommend that Treasury and the IRS consider adopting rules allowing participating FFIs to make and revoke this election without filing a form with the IRS. FFIs should be able to communicate these changes to their upstream withholding agents in a similar fashion as under the Chapter 3 QI regime .

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

J. Elimination of Duplicative Reporting

Section IV.E of the Notice states that Treasury and the IRS intend to issue regulations providing that in the case of a participating FFI that maintains an account of another participating FFI, only the participating FFI that has the more direct relationship with the investor or customer will be required to report the required information.

As mentioned earlier in this submission, while IIAC members support the limiting of reporting requirements where they would be duplicative, there are concerns about the implications that the proposed regulations will have in situations where financial entities already have existing relationships with respect to reporting requirements. The IIAC intends to provide more specific recommendations in a subsequent submission with respect to these requirements.

K. Treatment of Passthru Payments

In Section V.B of the notice, comments are requested as to methods that a participating FFI could use to determine whether payments it makes are attributable to withholdable payments, including any associated information reporting that may be necessary, and which take into account the administrative burden imposed by any such approach.

We have concerns that IIAC members that are participating FFIs and that are directly connected to clients may not have the necessary information to determine whether a received payment (or a portion of a payment) should be treated as a "passthru payment".

As such, we recommend that Treasury and the IRS review the concept of passthru payments and provide further guidance ensuring that a payment only be considered to be a passthru payment where there is a identifiable link between the account holder and the withholdable payment.

L. Sanctions with Respect to Recalcitrant Account Holders

In Section V.D of the Notice, comments are requested on what measures should be taken to address long-term recalcitrant accounts, including whether, and in what circumstances, Treasury and the IRS should consider terminating FFI agreements due to the number of recalcitrant accountholders remaining after a reasonable period of time. As mentioned previously in this submission, we have serious concerns that the methods proposed for identifying U.S. accountholders will create a large number of recalcitrant accounts. It is also likely that most of these accounts will remain recalcitrant for an unknown period of time – until the account holder makes contact with the FFI in response to the FFI's request for information, and actually provides the necessary information to the FFI. It seems unreasonable for the IRS to consider terminating an FFI agreement because of circumstances beyond the FFI's control, and it would also seem to defeat the intent behind the regime – to identify and collect information with respect to U.S. accountholders.

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca

We recommend that Treasury and the IRS define the minimum requirements that an FFI must take with respect to recalcitrant account holders, provide flexibility for FFIs to carry out these defined requirements, and to only contemplate termination of an FFI agreement where there has been an act of default on the part of the FFI without reasonable remediation.

CONCLUSION

The IIAC appreciates the opportunity to provide you with these comments and would very much like to meet with your staff to discuss our position and recommendations. To arrange a meeting, please contact the undersigned or Andrea Taylor (Director) at 416-687-5476 or ataylor@iiac.ca.

Yours sincerely,

"Ian Russell"

Ian Russell,
President and CEO
Investment Industry Association of Canada
www.iiac.ca

11 King Street West, Suite 1600, Toronto, ON M5H 4C7
Tel: 416-865-3036 Fax: 416-364-4861 irussell@iiac.ca / www.iiac.ca