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

March 16, 2009

Stephen Schaeffer
Office of Associate Chief Counsel (Procedure & Administration)
CC:PA:LPD:PR (Notice 2009-17)
Couriers Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington DC 20224

RE: Notice 2009-17: Information Reporting of Customer's Basis in Securities Transactions (the "Notice")

Dear Mr. Schaeffer:

Thank you for taking the time to speak with members of our Qualified Intermediary Committee on March 5, 2009. We appreciate the opportunity to provide further comment on the development of the new cost basis reporting regime, and to outline the complex challenges it will present for reporting foreign intermediaries.

The Investment Industry Association of Canada (**IIAC**) is Canada's equivalent to the Securities Industry and Financial Markets Association (**SIFMA**) in the United States, and represents over 200 investment broker-dealers across Canada. The IIAC QI Committee is responsible for reviewing and commenting on amendments to legislation that would affect the Canadian QI community, and developing positions on practical and conceptual matters surrounding US tax reporting requirements, including audits and QI forms.

Amendments to the Internal Revenue Code, Section 6045

The basis reporting amendments to Section 6045 (the "**Amendments**") of the Internal Revenue Code (the "**Code**") were passed as section 403 of Division B of H.R. 1424, the *Energy Improvement and Extension Act of 2008*. The Amendments require the reporting of a US customer's cost basis in a covered security as part of Form 1099-B, as well as identification of whether a capital gain or loss with respect to the security is long- or short-term. These reporting requirements will apply to securities acquired on or after the applicable date (as defined in the Code) or transferred into the account on or after the applicable date if basis information was provided by the transferor.

Background on Qualified Intermediaries

Revenue Procedure 2000-12, The Qualified Intermediary Agreement (the "**QI Agreement**") has been in effect since January 1, 2001. All foreign intermediaries entering into a QI Agreement are "Qualified Intermediaries" (**QI**s). A QI is a withholding agent and a payor under the Code for amounts that it distributes to its account holders. Except as otherwise provided in the QI Agreement, a QI's obligations with respect to distributions to account holders are governed by Chapters 3 and 61, and Section 3406 of the Code and the related regulations. There are approximately 6,500 QIs worldwide.

Section 8.04 of the QI Agreement sets out a QI's reporting responsibilities for a "reportable payment" other than a "reportable amount". Section 2.44 defines "reportable payment" as it applies to both US and non-US payors. In very general terms, proceeds of disposition realized on the sale of securities are included in the definition of "reportable payment" as follows:

- For a US payor, proceeds from the disposition of US and non-US securities are reportable payments as defined in section 3406(b) of the Code. There are also certain reporting obligations for dispositions by a US non-exempt recipient whose identity and account information is prohibited by law from disclosure as described in section 6.04 of the QI Agreement.

- For a non-US payor, proceeds from the disposition of US securities are reportable payments if sales are effected in the US within the meaning of Treas. Reg. section 1.6045-1(a), and proceeds from the disposition of non-US securities are reportable payments if payment is made in the US within the meaning of Treas. Reg. section 1.6049-5(e).

On this basis, Form 1099-B reporting of proceeds of disposition by a QI that is a non-US payor is generally only required for US non-exempt recipients residing in the US. Most Canadian QIs are non-US payors. As a result of various securities regulations and other compliance requirements, most QIs have a very limited number of accounts for US non-exempt recipients residing in the US. Given the proximity of Canada to the US and the mobility of individuals back and forth across the border, the Canadian QI community likely has a greater number of account holders for which the reporting of proceeds on Forms 1099-B is required than do QIs in other jurisdictions. Nevertheless, initial estimates by Canada's largest brokers indicated that less than 1% of their total accounts require Form 1099-B reporting of proceeds.

General Response to Notice 2009-17

We have had the benefit of reviewing comments already submitted by a number of US organizations in response to the Notice. Rather than reiterate many of the same points contained in these submissions that also apply to QIs, we have provided comments (see

Appendix "A") that focus on issues that relate specifically to the unique challenges faced by the QI community if we are required to comply with the Amendments.

The IIAC has previously provided comments to Tax Counsel of the House, Senate and Joint Committee on Taxation, as well as the Acting Tax Legislative Counsel in the Office of Tax Policy at the Department of Treasury. Although these comments remain applicable, we will not repeat all of them in detail in this submission. We are enclosing our earlier submissions for your reference (see Appendix "B").

SUMMARY OF RECOMMENDATIONS

1. Exclude QIs from the basis reporting requirements

There are a number of factors which support excluding QIs from the application of the Amendments.

a) Beyond the scope of the QI Agreement

The objective of the QI Agreement is set out in Revenue Procedure 2000-12:

> *The objective of the QI withholding agreement is to simplify withholding and reporting obligations for payments of income (including interest, dividends, royalties, and gross proceeds) made to an account holder through one or more foreign intermediaries.*

The cost basis of securities sold has no impact on the withholding obligations of a QI, nor does it impact the amounts to be reported with respect to income, including gross proceeds. We recognize that it is the right of the US government and the IRS to make changes to legislation. However, in many instances such changes will dramatically affect and alter the intent and scope of the QI contractual obligation. **It is our contention that extending the scope of a QI's information reporting obligation to include cost basis of securities sold is unwarranted and inappropriate without direct consultation with the QI community and an examination of the impact such changes bring.**

b) Excessive costs associated with compliance relative to potential additional tax revenue

As we have indicated above, securities and other compliance requirements limit the extent to which most QIs will have accounts for US residents. The aggregate amount reported on Forms 1099-B by QIs is likely negligible in relation to the amount reported by US paying agents. A review of Forms 1099-B actually submitted to the IRS would probably confirm this assumption.

The US tax rules associated with the calculation, maintenance and reporting of basis information are extremely complicated and must be supported by advanced systems capabilities and/or significant levels of manual record keeping. We understand that many

US brokers already have developed and implemented the necessary systems and process changes to provide some level of basis information and are voluntarily providing such information to account holders as a component of their customer service. Yet despite being further ahead in their ability to report basis information to the IRS, the comments already submitted in response to the Notice provide a clear indication that there are still a significant number of issues to be addressed in the guidance and regulations issued by Treasury and the IRS, for which US brokers will be required to develop further enhancements and modifications.

For QIs to comply with the Amendments, they will largely be starting from scratch, including from the perspective of having to research and become familiar with a new set of highly detailed and technical tax rules that have not previously had relevance to them. Significant systems, process and procedural enhancements would also be required. Those QIs that do currently provide customers with basis information are providing it in accordance with the rules applicable to the majority of their customers, which in Canada is the weighted average cost method. If these QIs are also required to comply with US basis calculation rules, this will be in addition to, rather than in lieu of, the information currently being maintained. All of this will be extremely costly for QIs that have very few accounts to which the rules apply.

The cost associated with developing, implementing and maintaining the capability and capacity to comply with the basis reporting requirements will likely exceed any additional tax revenue to be generated by additional information reporting provided by QIs and we strongly believe that QIs should be excluded from the requirements. If it can be demonstrated that there is in fact a potentially significant tax gap related to these accounts, the IRS and Treasury should consult with QIs to consider alternatives which would provide the IRS with increased information without being excessively burdensome for QIs.

2. If QIs are not excluded from the reporting requirements, defer applicable date

As discussed above, we strongly believe that QIs should be excluded from the basis reporting requirements, as the Amendments go beyond the intended purpose of the QI Agreement and because the cost associated with providing such information will not be offset by sufficient additional tax revenue.

It is clear from the contents of the Notice and the comments that have already been submitted, that there are a significant number of detailed issues that must be addressed by the IRS and Treasury prior to the release of meaningful guidance that will enable US brokers to implement basis reporting by the applicable dates. Deferring the application for QIs will allow the IRS to focus on the issues that impact US brokers reporting for the vast majority of US taxpayers.

If the IRS and Treasury determine that more time and/or information is required to confirm that excluding QIs from the application of the Amendments is the most

appropriate decision, we recommend that the applicable date of these provisions for QIs be deferred until there has been direct consultation with QIs.

REQUEST FOR FURTHER DISCUSSIONS

As mentioned during our call, the staff of the IIAC and members of our QI Committee would greatly appreciate the opportunity to discuss our issues in more detail with the IRS and Treasury, either in person or by conference call. I will contact you in the near future to discuss a convenient time for such a meeting.

In the meantime, if you have any questions or comments regarding our submission, please feel free to contact me by phone at 416-687-5477 or by email at JRando@iiac.ca.

Sincerely,

Jack Rando,
Director, Capital Markets
Investment Industry Association of Canada
www.iiac.ca

Encl.

cc: Douglas H. Shulman, Commissioner, Internal Revenue Service
Frank Ng, Commissioner, LMSB Division, Internal Revenue Service
Barry Shott, Deputy Commissioner – International, LMSB Division, Internal Revenue Service
Walter Harris, Industry Director, Financial Services, LMSB Division, Internal Revenue Service
Carl Cooper, Senior Counsel of the Office of Chief Counsel – International
Thomas Chillemi, QI Program Manager, LMSB Division, Internal Revenue Service
Eric San Juan, Acting Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury

APPENDIX "A"

BASIS REPORTING REQUIREMENTS – ADDITIONAL CONSIDERATIONS FOR QUALIFIED INTERMEDIARIES

Numerous submissions providing comments in response to the Notice have already been received by the IRS and have set out details with which we are generally in agreement. We have therefore not repeated such comments in this appendix. Instead we have focused on highlighting issues that may be unique or more of a concern to QIs if required to comply with the Amendments.

1. Applicability of Reporting Requirements

a. Account holders that become US persons

As we have noted in this letter, and in our earlier submissions, the accounts for which most QIs are required to provide Form 1099-B reporting represent a negligible percentage of their overall population of accounts. If QIs are required to comply with the Amendments, most will likely rely heavily on the use of manual processes and can only reasonably maintain basis information for account holders for whom Form 1099-B reporting is required. **If an account holder becomes a US person, a QI should only be required to apply the Amendments to securities acquired or transferred into the account with a statement under section 6045A after the QI is notified that the account holder has become a US person. All other securities in the account should be treated as "uncovered securities".**

b. "Applicable person"

The definition of "applicable person" is relevant in the context of defining who is required to provide a broker with a statement containing transfer information under section 6045A. Only securities for which the broker has received such a statement are included in the definition of "covered securities" and therefore subject to the basis reporting requirements.

Several submissions have suggested that the list of applicable persons be expanded significantly to include such persons as transfer agents, investment advisers, trustees, etc., to provide brokers with basis information from a wider range of sources.

If securities are transferred to a QI, unless the transferor is another QI or US broker that also maintained basis information, most other transferors will likely be non-US persons who are unfamiliar with US tax rules and it would be unreasonable to expect them to provide a statement under section 6045A.

The definition of "applicable persons" should exclude non-US persons that were not required to file Forms 1099-B for the account from which the securities are

transferred, such that securities transferred to the broker from such persons will be "uncovered securities" for purposes of basis reporting.

c. Reporting of basis information for "uncovered securities"

In the case of "uncovered securities", a broker may have some basis information available which may have been received from external sources (including the account holder). Such information may or may not have been calculated in accordance with US tax rules. **The guidance should indicate whether or not a broker should provide whatever available basis information they may have for an uncovered security, provided there is no reason to believe that the amounts are unreasonable.** If the IRS would prefer to have whatever information is available, it should be recognized that the amounts are provided for information purposes only and that the broker is not responsible for the accuracy of the amounts provided. Amendments to the Form 1099-B should allow the broker to indicate whether the securities disposed of were covered or uncovered and what method was applied for purposes of calculating basis.

d. Issuer's Classification of Securities

If QIs are subject to the Amendments, it should be recognized the majority of the investments held in customers' accounts will likely be non-US securities. Non-US issuers are generally unlikely to provide information regarding the US taxation of a non-US instrument, including the classification of the security for US tax purposes. Many such securities may also be structured such that there is no US equivalent, further complicating efforts to classify and calculate basis in accordance with US tax rules. **Brokers who are unable to obtain US tax classification information for a security should be permitted to use their best efforts to make a reasonable determination and should not be penalized if it is later determined that the security was incorrectly classified.**

e. Applicable Dates for Covered Securities

If QIs are not be excluded from the new requirements, they should be granted a reasonable extension of the 'applicable dates'.

In addition, for some QIs, the implementation of the new requirements will be further complicated by staggered applicable dates which are dependent upon the classification of the instrument. **We would recommend that QIs have the option of reporting basis for all types of securities from the first extended 'applicable date'.**

2. Basis Method Elections

We share the concerns expressed in the submissions of other organizations that "maximizing" customer flexibility with respect to the selection of reporting options may not be compatible with the goal of minimizing broker burden. For QIs, this burden will

be even more disproportionate to the potential benefits to be derived by customers or the IRS.

As we have indicated in previous submissions, many QIs do not currently have systems that maintain basis information or they provide such information as a customer service only, qualifying the accuracy of the information being provided. Canadian QIs that provide basis information use a weighted average cost method as required for Canadian income tax purposes. Other calculation methods may be used by QIs in other jurisdictions.

Most QIs currently have no systems in place for providing information calculated in accordance with a single acceptable US method, let alone providing customers with the option of selecting different methods, not only at the account level, but also for selected securities within their accounts.

It is our recommendation that QIs, if not excluded from the Amendments, should be permitted to report cost calculated in accordance with the method already in place, or such other method as is commonly used in their jurisdiction. The onus should be on the customer to reconcile the amounts reported by the QI with the amounts to be reported on their US tax returns, using transaction and other statements that the QI provides on a regular basis. These statements should also be sufficient to permit the customer to identify capital gains as long or short-term. However, even this type of reporting would require implementing changes to systems for the sake of reporting on a very small number of accounts and we feel the more appropriate conclusion would be to totally exclude QIs from cost basis information reporting.

If QIs are not excluded from the Amendments and are not permitted to calculate basis using a method already being applied or most commonly used in their jurisdiction, **they should only be required to calculate using a default method deemed acceptable by the IRS, and they should not be required to offer customers the option of electing alternative methods.** If customers wish to apply an alternative method, they should be responsible for providing a reconciliation between the amount reported by the QI and the amount reported on Schedule D of their Form 1040 return.

3. Dividend Reinvestment Plans

If QIs are not excluded from the Amendments, it must be recognized that in Canada, mutual funds are generally structured as trusts and are very popular investment vehicles. Many investors arrange to have distributions automatically reinvested to acquire additional units. **The description of arrangements qualifying as dividend reinvestment plans should be broadened to include arrangements available in foreign jurisdictions that are similar to DRIPs.**

4. Reconciliation with Customer Reporting

Again, we concur with the opinions expressed by our colleagues in the US, namely, that it is not feasible or practical for brokers to take on the responsibility of ensuring consistency between broker reporting on Form 1099-B and customer reporting on Schedule D of Form 1040. Reporting brokers can provide additional communications and instructions as to how information can be used and maintained by customers, but should not be responsible for reconciliation. **The onus should be on the customer to reconcile the amounts reported on Forms 1099-B with the amounts to be reported on their US tax returns, using the transaction and other statements provided by their brokers on a regular basis.**

5. Special Rules and Mechanical Issues

A number of comments have already been provided in other submissions in regards to points under "Special Rules and Mechanical Issues". QIs will also encounter additional issues as a result of their holdings in non-US securities that may include post year-end and other basis adjustments. ***De minimus*** **thresholds should be introduced to remove the requirements to adjust basis for smaller amounts, particularly when amounts are not determinable until after the initial reporting deadline. QIs should not be penalized if reasonable efforts are made to determine the impact of such adjustments on US tax basis.**

6. Transfer Reporting

We understand that US brokers have the benefit of uniform broker-to-broker information standards (ACTS) and the Cost Basis Reporting System (CBRS) maintained by DTCC to facilitate the transfer of basis information between brokers. It is unlikely that electronic reporting will be an option for most QIs. Because of the low volume of accounts that will likely transfer during a year, and because transfers may also involve QIs in different jurisdictions, it is unlikely that standard processes for transferring information will develop. The transfer of information in these situations will likely depend on manual procedures. **Delays in the transfer of information should not be subject to penalties if the transferring QI has made best efforts to provide details in a timely manner.**

7. Issuer Reporting

As noted above, the majority of securities held by most QIs are likely to be issued by non-US entities. Non-US issuers will generally not provide information regarding the US tax consequences of corporate actions. **We reiterate the point made above that QIs should not be penalized if reasonable efforts are made to determine the impact of corporate actions on basis if no information is provided by issuers.**

8. Broker Practices and Procedures

Although information contained in the Administration's Fiscal Year 2009 Revenue Proposals indicates that, under regulations, a broker would not be penalized for failure to accurately report items of information that the broker is unable to obtain with "reasonable efforts", it is not clear what will be considered a "reasonable effort" in any particular instance. While administrative relief is welcome, we believe that the term "reasonable efforts" should be clearly defined under the regulations. **We recommend that there should be transitional relief from reporting penalties for at least two years after the reporting requirements take effect, and that the IRS should generally exercise discretion when imposing any penalties for failure to comply with the new basis reporting rules.**

APPENDIX "B"

PREVIOUS IIAC SUBMISSIONS

(not attached to online version)