

April 2, 2009

Ms. Monique Jérôme-Forget  
Quebec Minister of Finance  
12, rue Saint-Louis, étage B  
Québec (Quebec) G1R 5L3

**Subject: Commentaries on the Green Paper on “Aggressive Tax Planning”**

Madam Minister,

PricewaterhouseCoopers LLP is pleased to provide our views and recommendations with respect to the recently issued Green Paper (“*Livre vert*”) on Aggressive Tax Planning (“*les planifications fiscales agressives*”)(hereafter the “Green Paper”).

We understand that the Government of Quebec is seeking to improve its ability to detect aggressive tax plans and to discourage taxpayers from undertaking abusive transactions. It has carried out a detailed study of, among other things, tax regimes in other jurisdictions to benchmark how other regimes address these issues.

We believe that an open dialogue between the Government and the relevant stakeholders on this important topic will help ensure that the appropriate measures are adopted to accomplish these objectives. This will assist in achieving the appropriate balance between the Government’s objective of preserving the integrity and fairness of the Quebec tax system and protecting the provincial tax base and taxpayers’ desire of having a reasonable level of certainty as to the tax outcomes of the transactions they enter into on a daily basis and a tax administration that does not impose undue compliance burdens.

PricewaterhouseCoopers believes that in a self-assessment tax system, it is important for the Government to have timely information concerning transactions undertaken by taxpayers, to enable it to discharge its responsibility of administering the *Loi sur les impôts* and ensure that taxpayers are paying the appropriate level of taxes. We also believe it is critical that taxpayers have certainty with respect to the amount of taxes they owe within a reasonable period and

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that they not be subjected to compliance requirements that are unworkable and do not necessarily accomplish the Government's objectives.

Given the fact that taxation is imposed at the federal and provincial levels in Canada, we believe that it is in general not desirable for there to be significant differences between the various taxing regimes.

However, if the province of Quebec proceeds with the measures discussed in The Green Paper, PricewaterhouseCoopers would recommend the following:

1. With respect to mandatory reporting of transactions subject to confidentiality arrangements ("*opérations à caractère confidentiel*"), we believe that a clear distinction needs to be made between advice that is provided to a client on a basis that seeks to ensure that no-one other than the client may rely on the advice, and confidentiality arrangements that are imposed to preserve the adviser's "marketing" advantage or to reduce audit detection risk. The former type of arrangement should not trigger the application of mandatory reporting.
2. There should be no mandatory disclosure ("*divulgation obligatoire*") of arrangements which already involve filings by the taxpayer, for example, of scientific research and experimental development (SR&ED) and indirect tax credit and other similar claims.
3. The mandatory disclosure of transactions should be limited to the facts of the transaction in sufficient detail to permit the Government to identify and understand the transaction and its tax consequences. The prescribed form to be used for this purpose should be released in draft to taxpayers and tax advisers for their review and comments.
4. The required filing deadline of a transaction requiring mandatory disclosure should be at the time the taxpayer is required to file tax returns for the taxation year during which the transaction takes place. As much as possible, the disclosures should be filed with the taxpayer's tax returns so that there is a higher rate of compliance and less chance that a filing will be inadvertently overlooked.
5. Penalties imposed for late or non-filing of transactions requiring mandatory disclosure should be reasonable in relation to the nature of the transaction. For example, it may be that individuals should be subject to lower penalties than corporations, and that further distinctions should be made (for example, small and medium-sized enterprises versus large corporations). A threshold for the dollar amount involved in the transaction before filing is required would also be appropriate. The legislation should provide for waiving or reducing the penalty for inadvertent non-compliance.

6. Any changes to the Quebec General Anti-Avoidance Rule (GAAR) (“*règle générale anti-évitement- RGAE*”) should be prospective, not retroactive.
7. No penalty should be imposed on taxpayers where the GAAR is found to apply to a particular transaction unless the taxpayer has engaged in the transaction with complete disregard for the potential application of the GAAR or for existing case law that is determinative of the application of the GAAR.
8. If penalties are to be imposed on “promoters” (“*promoteurs*”), a clear delineation must be made between tax advisers (“*conseillers fiscaux*”) who are compensated for their advice regarding the tax consequences of a transaction and a person who is compensated for marketing or promoting an arrangement, or referring prospective parties to a promoter of an abusive arrangement.

An analysis supporting these recommendations is found in the Appendix.

PricewaterhouseCoopers believes that our recommendations will achieve the Government’s objective and are an appropriate balance of the Government’s responsibility to maintain the integrity and fairness of the tax system and protect the tax base while permitting taxpayers to plan their affairs in a manner that is in accordance with the law.

We would very much appreciate the opportunity to discuss our recommendations and our analysis in more detail with you and your officials, and to answer any of your questions.

Yours truly,

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**PricewaterhouseCoopers LLP/s.r.l./s.e.n.c.r.l. Comments  
on the Green Paper**

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**Mandatory Disclosure**

The Green Paper proposes to introduce mandatory disclosure with respect to transactions entered into by the taxpayer and an adviser when:

1. the contract between the taxpayer and the adviser includes an undertaking of confidentiality by the taxpayer towards other persons or the tax administration in relation to the transaction; and
2. the adviser's fee is, in whole or in part:
  - a. contingent or dependent on obtaining a tax benefit from the transaction;
  - b. refundable to the taxpayer if the tax benefit does not materialize; or
  - c. acquired after the expiry of the period of limitation applicable to the taxation year or taxations years during which the transaction takes place.

Such a disclosure must be made within 30 days after the transaction begins to be carried out. Failure to meet this disclosure requirement within the prescribed 30-day deadline would result in a minimum penalty of \$10,000 that is increased by \$1,000 for each day of delay, to a maximum of \$100,000.

**PricewaterhouseCoopers' Comment**

PricewaterhouseCoopers agrees that mandatory disclosure of arrangements with these types of features may be appropriate in certain circumstances that are more restrictive in scope than those envisaged in the Green Paper.

We have the following comments with respect to the scope of reportable transactions, the time limit for reporting and the penalties for non-disclosure.

This is the original English draft of the submission which was translated into French for submission to the Quebec Government.
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## ***Reportable Transactions***

### *Confidentiality Undertaking*

Experience in other jurisdictions (for example, the United States) shows that it is often difficult to determine whether professional advice is subject to a confidentiality requirement (“*obligation de confidentialité*”) that should trigger the reporting obligation. For example, it is common for advice to be provided to a client on the basis that it cannot be provided to any other party without consent. These stipulations are normally for the protection of the adviser against potential liability to third parties for whom the advice was not intended.

The rules should make it clear that limiting reliance by third parties on the advice does not constitute an undertaking of confidentiality that would require mandatory reporting.

### *SR&ED tax credit and other similar claims*

Certain types of tax services are done on a contingency or results-based fee arrangement. In particular, this is the case for the preparation of SR&ED tax credit claims and review of indirect taxes, when the adviser’s fee is established as a percentage of the claim or refund amount.

We believe that these types of arrangements are not of the nature of transactions that should fall within the intended ambit of the mandatory disclosure requirement. There is generally no risk these claims will go undetected by the Government because they are already filed or are disclosed separately and are subject to audit. Further, if these arrangements are subject to mandatory disclosure, we believe that the significant number of filings the Government would receive would distract it from arrangements that are more deserving of scrutiny.

### *Timing of Disclosure*

It is proposed that the mandatory disclosure for a transaction must be made no later than 30 days after the transaction begins to be carried out (“*au plus tard 30 jours après le début de l’exécution de l’opération*”).

We believe that such a short reporting deadline is unnecessary.

“Operation” is defined in the broadest possible terms for purposes of the GAAR in art. 1079.9 of the *Loi sur les impôts*. The Tax Court of Canada, in *Copthorne Holdings Ltd. v. The Queen*, [2008] 1 C.T.C. 2001, suggests that the first transaction in a series of

transactions can occur many years before the transaction is assessed under the GAAR. Therefore, many taxpayers could be in a technical default of the 30-day period, and the maximum penalty of \$100,000 often will become the de facto minimum.

We recommend in lieu of a reporting based on the date of implementation of the first transaction or step in a series of transactions that the disclosure should be required to be made by the deadline for filing the tax return of the taxation year in which the reportable event occurs. This would provide the tax administration with sufficient time to review the documentation and take appropriate action. In addition, we believe that a higher rate of compliance (and fewer inadvertent non-filings) would be achieved if the reporting is part of the tax return filing process.

### *Scope of Reporting*

The Green Paper proposes that the content of the disclosure be “sufficiently detailed to provide the tax administration with all the information that would allow it to identify and analyze the transaction” (“*suffisamment détaillé pour fournir à l’administration fiscale tous les renseignements lui permettant d’identifier et d’analyser l’opération*”). A prescribed form would be used for this disclosure.

We believe that disclosure should be limited to the facts of the transactions sufficient to permit the Government to identify and understand the transaction and its tax consequences. This would achieve the Government’s objective of detecting transactions that should be scrutinized on audit. To require disclosure of additional information at the time of the mandatory disclosure would simply result in advance submissions by taxpayers so voluminous that they would fail to be a meaningful way for the Government to filter transactions that truly warrant detailed scrutiny. With the suggested background information on the transactions, the Government would be able to identify in advance the relevant documents it wishes to review on audit of the taxpayer.

We recommend that the prescribed form to be used for disclosure of these transactions be released to taxpayers and tax advisers in draft for their review and comments.<sup>1</sup>

### *Penalties*

To the extent that the required reporting is to be made in the annual income tax return, we believe it is appropriate for a penalty to be imposed for non-disclosure.

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<sup>1</sup> For example, the government could consult with the Tax Executives Institute and the Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants.

However, we suggest that consideration be given to introducing a *de minimis* rule (for example, no reporting would be required by taxpayers if the amount of taxes is less than a certain amount, which might vary depending on whether the taxpayer is an individual, a small or medium-sized enterprise or a large corporation). Alternatively, the penalty should be graduated and reduced accordingly if the amount of taxes involved is less than a threshold amount.

As well, a mechanism should be provided for permitting late filing or an amended filing, with waiver of penalties, if the non-filing or any error made in an original filing was inadvertent.

To ensure a fair administration of these proposals, a review mechanism should be considered that is similar to the federal committees that deal with the application of the GAAR and transfer pricing penalties.

## **Proposals Relating to Extension of Limitation Period and Application of Penalties where GAAR Found to Apply**

The Green Paper proposes certain measures that would apply if a transaction does not meet the criteria for mandatory disclosure, but when the GAAR (as modified in accordance with the discussion in the Green Paper) is found to apply nevertheless.

### **PricewaterhouseCoopers Comments**

PricewaterhouseCoopers supports modifications to the Quebec GAAR provision to bring the conditions for its application in line with the federal GAAR and analogous provisions of other provinces. However, we strongly urge that any changes to the GAAR be made only on a prospective (rather than a retroactive) basis.

Below, we address three additional proposals found in the Green Paper in this area:

1. Extended limitation period for GAAR assessments;
2. Proposed penalty where the GAAR is found to apply; and
3. Preventive disclosure provisions.

The background against which our comments should be considered is that while we understand that tax authorities worldwide are increasingly concerned with aggressive tax

planning that some may consider unacceptable, abusive behaviour on the part of a few taxpayers should not lead taxing authorities to adopt measures that impose unreasonable compliance burdens or reassessment risks on taxpayers doing business in that jurisdiction or that expose honest and diligent tax advisers to undue risk.

Quebec, acting in a unilateral fashion, will contribute to a business and legislative climate that makes it less attractive from a business perspective. In light of the competitive world economy in which Quebec evolves, these proposed measures could decrease the attractiveness of Quebec. Because this burden is not uniform for all Canadian taxpayers, Quebec taxpayers could be put at a distinct disadvantage within Canada as well.

Although we respect the right of Quebec to act unilaterally on this issue, we believe that an approach developed by all Canadian taxation authorities (federal and the provinces) through consultation and consensus would be preferable.

In summary, we believe that a balance should be struck between a taxation authority's perceived difficulty in obtaining information on a timely basis, and the practical impact on taxpayers and their advisers.

#### *Extended limitation period*

The Green Paper argues that the current limitation period of three years or four years is too short for the Ministère du revenu to thoroughly examine tax returns filed by taxpayers, detect complex transactions and, when necessary, to assess taxpayers if the GAAR is at issue. Consequently, it is concluded that the Minister requires additional time to enable an assessment to be made based on application of the GAAR.

We are concerned that this proposal if acted upon will create an incentive for the Quebec tax authorities to turn to the GAAR as a standard assessment tool rather than recognizing that it is the primary responsibility of the tax authorities to examine and audit taxpayers' returns within an established re-assessment period and assess in accordance with the law. The GAAR is, as the legislators and the courts have said on many occasions, a provision of last resort. In the *Lipson*<sup>2</sup> decision, even the majority of the Supreme Court of Canada, finding against the taxpayer, emphasized that the GAAR is "neither a penal provision nor a hammer to pound taxpayers into submission."

The period for re-assessment is already extended in certain circumstances, and is unlimited when a taxpayer has made a misrepresentation. In addition, the *Loi sur les*

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<sup>2</sup> *Lipson v. The Queen*, 2009 SCC 1

*impôts* already provides in sections 1010.0.2 and 1010.0.3 for an extended time limit for assessing consequential on an assessment made federally or by another province.

If the Quebec authorities do not consider that they are adequately resourced to examine and audit tax returns within the normal re-assessment period as extended by the existing provisions, there are alternative solutions, including seeking waivers from taxpayers where an audit is in progress but not complete. However, to extend the limitation period to permit only GAAR-based reassessments will have the predictable result of increasing the number of such reassessments, subjecting taxpayers and the tax authorities to the costs and uncertainties of litigation, including being subjected to collection action while the matter is under dispute. When taken together with the proposal that penalties apply when the GAAR is found to apply, we are concerned that the direction of the Green Paper is indeed to make the Quebec GAAR a “hammer to pound taxpayers into submission” (“*un instrument de soumission du contribuable*”).

We are also concerned that the provincial courts neither have the resources nor, at this point, the experience to deal with the increased number of taxation appeals that will inevitably follow from increased assessments that rely solely on the GAAR.

Furthermore, we are concerned that the Green Paper does not outline in any detail the manner in which such assessments will be dealt with. Federal assessments dealing with the GAAR or the penalty provisions under transfer pricing legislation are subject to a review by committees that comprise various representatives of the government to ensure that assessments under such provisions are appropriate. We believe that an appropriate mechanism should be put into place to determine when the GAAR should be imposed.

#### *Application of Penalties where GAAR Applies*

##### *Taxpayer Penalty*

Of greater concern is the proposal that, should the GAAR be found to apply in a particular situation, Quebec would be permitted to assess a penalty on the taxpayer equal to 25% of any additional tax arising from the application of the GAAR. A separate penalty is proposed with respect to fees earned by any promoter.

We note that whereas tax evasion carries with it a 50% penalty, the proposed GAAR penalty would be 25%. This amounts to characterizing transactions found to be subject to the GAAR as deserving of a weighty penalty, although at a lesser rate than the penalty that applies to tax evasion.

Again, we note repeated statements that the GAAR is a provision of last resort and not a penal provision. In the seminal Supreme Court of Canada decision in *Canada Trustco*, that Court said:

*The GAAR was enacted as a provision of last resort in order to address abusive tax avoidance, it was not intended to introduce uncertainty in tax planning.*<sup>3</sup>

When the federal GAAR was first presented in the White Paper on Income Tax Reform in 1987, it also stated that proposed subsection 245(1) “applies as a provision of last resort” after the application of the other provisions of the Act.<sup>4</sup> The White Paper also mentioned that the possibility of a penalty would be “explored” and that one option was for a penalty to be levied that was a specified percentage of the amount of tax deferred, avoided or reduced as a consequence of the avoidance transaction. However, a decision was made not to proceed with a penalty, presumably because it was considered inappropriate both for the tax consequences of transactions to be recharacterized and a penalty to be exacted. We believe that a further reason for not proceeding with a penalty was the recognition of the inherent uncertainty as to when the GAAR applies and that imposing penalties would be unfair, because the application of the GAAR, being a provision of “last resort,” would be uncertain (in most cases, if not all) until there was a significant body of case law interpreting it.

The GAAR was introduced a little more than twenty years ago and has begun to receive considerable analysis by the Courts. However, only three Supreme Court of Canada cases deal with the GAAR. The first two, *Canada Trustco and Kaulius*,<sup>5</sup> were unanimous decisions of that Court. On the other hand, the third case, *Lipson*, was a decision of a deeply divided court in which a bare majority (4 of 7 judges) found the GAAR to apply and there were strong dissenting opinions. This illustrates of how reasonable people may differ in their views concerning what constitutes abusive tax planning and of the inherent uncertainty as to the circumstances in which the GAAR will be applied by any particular court. Indeed, if the decisions at the Tax Court of Canada level are examined, it is also possible to point to different approaches to the GAAR among the judges of that Court. As the Supreme Court of Canada stated in *Canada Trustco*:

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<sup>3</sup> *The Queen v. Canada Trustco Mortgage Co.*, 2005 SCC 54, paragraph 21.

<sup>4</sup> White Paper on Income Tax Reform, Annex 1, page 7-135.

<sup>5</sup> *Kaulius v. The Queen (sub nom Mathew v. Canada)*, 2005 SCC 55.

*The GAAR draws a line between legitimate tax minimization and abusive tax avoidance. The line is far from bright.*<sup>6</sup>

Therefore, we do not believe that anything has changed to the point that it has become justifiable to impose a penalty on a taxpayer because a determination is ultimately made that the GAAR applies to particular tax planning, certainly not unless, when the transaction is undertaken, a court has found the GAAR to apply in a case dealing with substantially identical tax planning.

Elsewhere, the Canada Revenue Agency (CRA) suggests that in areas where there is a legitimate basis for an honest difference of opinion, the imposition of a penalty is not appropriate. For example, in the CRA Audit Manual, Chapter 28.0, dealing with Penalties, the CRA states:

*Cases involving under-valued inventories and accounts receivable usually present difficulty in distinguishing between an honest difference of opinion and a deliberate attempt by the taxpayer to reduce income tax payable. Penalties should not be levied in such cases unless the tax involved is substantial and there is clear evidence that the taxpayer intentionally understated reported income.*

This is consistent with case law, such as *Marall Homes Ltd. v. The Queen*, 1995 CarswellNat 359 (TCC, Informal Procedure) where the Court stated:

*I have also concluded that no penalty should be assessed. This is a valuation case where difference of opinion is expected. To levy a penalty in a valuation case is, in my opinion, inappropriate unless the taxpayer's initial filing was demonstrably wrong and made without any attempt to determine market value. The difference in the two appraisals discussed amply demonstrates this point. Here, the appellant filed on time and made various inquiries to determine value. He also had been through an identical experience respecting a prior project and was sufficiently aware of what was both required and expected.*

### *Due Diligence Defence*

The Green Paper proposes that a taxpayer be permitted to present a due diligence defence that would permit a taxpayer to escape penalties. However, no elaboration is provided of what would constitute such a defence.

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<sup>6</sup> Paragraph 16.

The criteria for use of this defence in the tax context are not particularly well-defined. In most cases in which the due diligence defence has been raised, the issue has been whether a penalty is payable with respect to an amount that was not remitted, due to a calculation error or where the taxpayer has acted on incorrect information. In these cases, taxpayers have been held to a high standard. The position of the CRA in regard to the due diligence defence in the context of the *Excise Tax Act* is set out in Policy Statement P-237 and is summarized as follows:

*The CRA's acceptance of a due diligence defence requires that a person make a sincere and demonstrable attempt that a reasonably prudent person in similar circumstances would be expected to make in order to comply with the requirement to pay or remit the amount when required, or the requirement to file a return when required. Persons will be considered by the CRA to have exercised due diligence where it can be clearly demonstrated that they have to the best of their ability taken reasonable care in ensuring that the correct amount was remitted or paid when required, and/or that the return was filed by its due date.*

*The CRA may accept a due diligence defence in a situation where a person remits or pays an amount that is less than the amount actually owed where that amount was arrived at after having made an incorrect assumption based on genuine uncertainty regarding the application of the ETA. In addition, in a situation where a person is a recipient who fails to report and remit the tax on a self-assessment situation and this failure can be attributed to an incorrect assumption based on genuine uncertainty over the application of the ETA, a due diligence defence may be accepted by the CRA. Also, the CRA may accept a due diligence defence where a person believed on reasonable grounds in a non-existent fact situation, which if it had existed, would have made the person's actions or omission innocent; that is, the person relied on a reasonable but erroneous belief in a fact situation. In any case, for a person to be duly diligent it must be clearly evident that despite making an incorrect assumption, or having an erroneous belief in a fact situation, all reasonable care has been taken to the best of the person's ability in ensuring that the correct amount was remitted or paid, and the return filed, when required.*

It is not obvious that the concept of a due diligence defence, as it has been developed judicially and administratively in other fiscal provisions, is readily transportable into the GAAR arena. At the very least, if the penalty proposal is proceeded with, the scope of the due diligence defence must be made clear and no penalty should be exigible if the taxpayer can demonstrate good faith reliance on the opinion of a reputable tax adviser.

Summary – GAAR Penalties on Taxpayers

The provisions of taxing statutes are complex and it is an accepted tenet that taxpayers undertaking transactions are not obliged to carry them out in a tax-inefficient manner. Therefore, the potential application of the GAAR is a factor present in most transactions with an element of tax planning.

Honest differences of opinion will arise between the taxing authorities and tax advisers as to whether the GAAR should apply in particular facts and circumstances. Indeed, honest differences of opinion frequently exist even among tax advisers. However, unless a taxpayer has engaged in a transaction with complete disregard for the potential application of the GAAR or for existing case law that is determinative of the application of the GAAR, PricewaterhouseCoopers firmly believes that it is highly inappropriate for a penalty to apply.

Promoter Penalty

Our comments above apply equally to the proposed promoter penalty.

Moreover, we are concerned that the Green Paper is extremely unclear on what is meant by a “promoter” in this context. The Green Paper refers to a person who market or promotes and abusive avoidance transaction or otherwise encourages its growth or the interest it arouses. It is unclear whether, for example, a professional adviser (a lawyer or accountant) that provides tax advice to a client would be considered to have “encouraged” the growth of an avoidance transaction.

Whereas the circumstances in which the penalties for failure to make a mandatory disclosure are relatively well-defined due to the proposed “hallmarks” for such transactions (i.e. a confidentiality undertaking or a contingency or success-based fee arrangement), the language that has been used to identify promoters for the purposes of the GAAR penalty is extremely vague.

We strongly submit that if a “promoter” penalty is to be imposed in circumstances described in the Green Paper, a clear delineation must be made between tax advisers who are compensated for their advice regarding the tax consequences of a transaction and a person who is compensated for marketing or promoting an arrangement, or referring prospective parties to a promoter of an abusive arrangement. To subject tax advisers to penalties for simply advising on a transaction or planning strategy that may subsequently be determined to be subject to the GAAR will subject honest and diligent tax advisers to an inappropriate degree of risk.

As noted above, to ensure a fair administration of these proposals, a review mechanism should be considered that is similar to the federal committees that deal with the application of the GAAR and transfer pricing penalties.

#### *Preventive Disclosure Provisions*

The Green paper proposes that an extension of the limitation period and the GAAR penalty can be neutralized through the taxpayer filing, by the due date for the return of income for a taxation year in which a transaction or series of transactions takes place, a complete and detailed description of the facts (including a description of the transaction or series of transactions, its objects and effects and a copy of all relevant documents). The disclosure requirements are onerous – that is, they are essentially those that would apply if the taxpayer were to apply for an advance income tax ruling, which is also suggested as an alternative.

We submit that to require disclosure in the form suggested with respect to any transaction that could potentially be subject to a GAAR assessment is unreasonable.

First, the proposal would subject taxpayers to significant additional compliance costs and burdens. Second, it is doubtful that the tax administration can deal with the amount of documentation that would be submitted under the preventive disclosure system. Taxpayers enter into complex transactions in a relatively short period. We believe that it is unlikely that the Ministère du revenu will have sufficient amount of qualified resources to provide advance income tax rulings on a timely basis.

Should Quebec determine that it should proceed with the GAAR penalties, the preventive disclosure mechanism should be much more limited in scope and much less onerous. Consistent with our recommendation above with respect to mandatory disclosure, the required level of disclosure that should be limited to the facts and a description of the transactions.

#### *Alternative Approaches*

PricewaterhouseCoopers suggests that if the Government wishes to proceed with some form of penalty provision accompanied by a preventive disclosure mechanism (“*mécanisme de divulgation préventive*”), systems adopted in other jurisdictions, and the practical experience of the tax administration and taxpayers operating under those systems, should be much more carefully evaluated. The Green Paper discussed a number of approaches that have been adopted in other jurisdictions, but it is not clear why Quebec rejected features of the systems in place elsewhere.

Under the proposed Quebec approach, the onus is on the taxpayer to “self-identify” transactions that may be of interest to the tax authorities, at the risk of facing what is essentially an automatic penalty in the event that it is subsequently determined that the GAAR applies. We suggest that a more balanced approach would be one under which the tax administration itself is required to identify categories of transactions that require a taxpayer to comply with disclosure requirements. For example, certain transactions with hallmarks of “loss trading” or provincial income tax elimination could be identified as categories of transactions requiring disclosure.<sup>7</sup> It could also be useful to set a threshold for disclosure. Adoption of these measures would in fact assist in ensuring that the volume of material received does not actually impede the administration’s ability to detect abusive arrangements.

Under this more restrictive approach, it would be appropriate for a taxpayer to be subject to a longer re-assessment period and to a penalty in the event that such a transaction was not disclosed and it is later found to be subject to the GAAR. We submit that under this restricted approach, no promoter or adviser who had advised a taxpayer that the transaction was disclosable should be subject to any penalty.

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<sup>7</sup> One would also expect that transactions that are of a type that are substantially similar to a transaction to which the GAAR has actually been found to apply would also be identified as disclosable.