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***By Electronic Delivery (and Express Mail)***

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**Comments of BlackRock, Inc.  
In Response to Proposed Regulations Under Internal Revenue Code Sections 1471-1474**

Dear Ms. Corwin, Mr. Danilack and Mr. Musher,

BlackRock appreciates the opportunity to comment on the recently published proposed regulations to implement the Foreign Account Tax Compliance Act ("FATCA"). We support the Department of Treasury's goal of preventing evasion of US income taxes. We also commend the considerable efforts of the Internal Revenue Service in providing much needed detail which foreign financial institutions require in order to effectively implement FATCA.

BlackRock continues to work very closely with various fund management trade organizations on this issue, in particular, the Investment Company Institute and European Fund and Asset Management Association ("EFAMA"). Accordingly, we support their recent submissions on the proposed regulations, especially in regards to 'qualified collective investment vehicles' ("QCIVs") and 'restricted funds.'<sup>1</sup>

In the interest of brevity, we will not comment in this letter on all of the issues raised and solutions set forth by those trade organizations. Rather, we would like to highlight and amplify three issues that are especially relevant to the United States, investors and the effective functioning of the capital markets.

As background, BlackRock is one of the world's leading asset management firms, managing over \$3.5 trillion on behalf of institutional and individual clients worldwide through a variety of equity, fixed income, cash management, alternative investment, real estate and advisory products. Our client base includes corporate, public, multi-employer pension plans, insurance companies, third-party mutual funds, endowments, foundations, charities, corporations, official institutions, banks, and individuals around the world. Headquartered in New York City, the firm has approximately 9,900 employees in 27 countries and a major presence in key global markets, including North and South America, Europe, Asia, Australia, and the Middle East and Africa.

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<sup>1</sup> Proposed Treasury Regulation Section 1.1471-5(f)(1)(i)(C)and(D).

## 1. US Mutual Funds

As discussed in earlier meetings with Treasury, as an unintended consequence of the FATCA regime, US mutual funds will NOT be competitive with comparable foreign funds. The FATCA regime will wrongly encourage offshore product and capital market innovation at the cost of US jobs and the strength and depth of US capital markets.

Specifically, under the published guidance to-date, US mutual funds are at a perpetual competitive disadvantage relative to comparable non-US-organized funds where the underlying assets of the fund are not comprised of US securities. That is, all US corporations, including US-organized mutual funds,<sup>2</sup> will have a pass thru payment percentage of 100% *regardless* of the funds' mix of US and non-US securities.<sup>3</sup>

The proposed regulations further exacerbate US mutual funds' competitive disadvantage by requiring FATCA gross proceeds withholding to commence in 2015 while non-US funds' investors will not be subject to FATCA gross proceeds withholding until 2017. Again, this is plainly discriminatory to US mutual funds.<sup>4</sup>

Therefore, we strongly support the proposal that US mutual funds be allowed to calculate a pass thru payment percentage that reflects their actual investment mix in a manner similar to non-US funds. Such an approach will allow both US and non-US funds, along with their investors, to be treated equitably. Similarly, FATCA gross proceeds withholding by US mutual funds should not commence until 2017.

If these proposals are not adopted, we are concerned that the result will be significant asset outflows from US-based asset managers to non-US-based firms, as investors attempt to mitigate exposure to unforeseen FATCA withholding consequences. We also want to point out that, under Chapter 3, foreign investors in US mutual funds are, generally, already subject to US withholding taxes on ordinary dividends, so the US could suffer reduced revenues as foreign investors exit US mutual funds.

We understand that Treasury might consider our comments here to be premature since detailed rules regarding pass thru payments have yet to be released.<sup>5</sup> However, just as Treasury clarified in these proposed regulations that debt and equity interests in certain financial institutions will not constitute financial accounts (unless the value thereof is determined primarily by reference to assets that give rise to withholdable payments),<sup>6</sup> Treasury should now expressly state that US mutual funds will be equitably treated under FATCA.

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<sup>2</sup> See Internal Revenue Code of 1986, as amended, Sections 851-855.

<sup>3</sup> Notice 2011-34, 2011-19 I.R.B. 765, Section II.B.4.

<sup>4</sup> This additional two-year discriminatory window, contrasting US mutual funds' FATCA withholding obligations relative to comparable foreign funds, applies not just to investments in non-US securities but also to investments in US securities.

<sup>5</sup> See *e.g.*, Proposed Treasury Regulation Section 1.1471-5(h).

<sup>6</sup> Proposed Treasury Regulation Section 1.1471-5(b)(1)(iii).

## 2. **Non-US Exchange-Traded Funds, Investment Trusts and other Publicly-Traded Funds (collectively, “PTFs”)**

These types of products face significant practical FATCA compliance problems that have not been sufficiently considered in Treasury’s published guidance. Essentially, these funds are listed and traded on various stock exchanges but are also viewed as mutual funds. Treasury’s current guidance creates inconsistencies among PTFs in different locations where local market practices differ. The current treatment of PTFs, does not, in our view, serve any clear US public policy goal.

### *Background*

In some locations, such as Germany and Canada, all PTF shares, as issued by locally-domiciled funds, are held in a central depository (akin to the Depository Trust Company in the US). In those instances, there are no substantial operational issues arising under FATCA.

However, in other instances, such as Ireland, the United Kingdom and Australia, local regulation requires that investors have the right to be entered directly onto the fund register. For this reason, across over 150 BlackRock-managed PTFs, there are in the aggregate over 60,000 investor entries on fund registers. These investors belong to a broad mix of large institutions, small nominees and private individuals.

### *Practical difficulties*

- As these holdings are acquired only by on-exchange trades, the fund has no legal or practical ability to decline subscriptions. That is, all PTF share purchase and sale transactions are affected through a broker.
- The fund’s register is not kept by a transfer agent, as would be the case with a traditional pooled fund, but by a stock registrar. The latter has less operational infrastructure than a transfer agent, as they would normally only be required to register trades performed by brokers and would not gather full FATCA documentation from investors.
- The PTFs and their service providers have much less latitude to refuse to register *ex post* legitimate on-exchange transactions than a traditional fund has to decline a subscription. This reduces the practical leverage against ordinary investors to obtain FATCA documentation as a condition of investment.
- Furthermore, the time gap between the ex-dividend and pay dates of a distribution can, in the case of a PTF, be quite short.<sup>7</sup> This compounds the problem by reducing the time available for the PTF to obtain FATCA documentation from intermediaries in relation to incoming investors.
- While it can be expected that most PTFs would meet the 10% turnover requirement at Proposed Treasury Regulation Section 1.1471-5(b)(3)(iv)(B), some forms of PTFs may have less turnover of investor interests (albeit all such turnover is conducted on-exchange) and thus may only marginally pass the test at all times. Clearly, substantial compliance difficulties are created if investors are admitted to such a PTF in earlier years in which the test was passed such that their interests are not ‘financial accounts,’ but turnover declines such that the PTF later fails such test and, therefore, presumably FATCA documentation is required.

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<sup>7</sup> Approximately four weeks.

### *Policy goal*

- We note that plainly under the statute, none of these accounts is considered to be maintained by the PTF; hence, none of these registered investor entries is reportable to the IRS as 'US accounts.' Thus, we do not expect the fundamental policy goal – of detecting US tax cheats – will be directly advanced at all as a result of leaving PTFs partially within the FATCA regime.
- Further, the definitions at Proposed Treasury Regulation Section 1.1471-5(b)(i) and -5(g)(2) operate such that these non-US PTFs would not have to withhold against any 'recalcitrant account holders' either. Thus, access by undocumented FATCA parties is sufficiently left to be controlled at the broker, not at the fund, level.
- But, the requirement for PTFs to withhold against nonparticipating foreign financial institutions ("NPFFIs") appears to still exist, albeit in practice this would apply mainly to income distribution payments. That is, sale proceeds in an on-exchange transaction will not be from the PTF itself, but from a broker. Thus, even in relation to this apparent vestigial requirement on PTFs, any real deterrent to NPFFIs is adequately covered within FATCA's treatment of brokers.

### *Proposal*

While PTFs are exempted from FATCA's account reporting and withholding on recalcitrant account holders requirements,<sup>8</sup> they are still ostensibly subject to the requirement that PTFs withhold on NPFFIs. That is, PTFs and their registrars will need to perform extensive procedures and gather inordinate amounts of data to nominally comply with FATCA where no apparent policy goal is served by this extensive effort.

We believe that the clearest and most satisfactory way to deal with these issues is to remove altogether the requirement on PTFs to withhold on passthru payments that represent US fixed, determinable and periodic income. Since PTFs, like other publicly-traded companies, can only be bought and sold through brokers, other FATCA rules will ensure that FATCA information reporting and withholding will occur.

This proposal can be clarified by providing that FATCA withholding only applies to 'financial accounts.' As 'publicly-traded companies' are not 'financial accounts,'<sup>9</sup> PTFs will not have FATCA reporting or withholding obligations. As others have suggested, the proposed regulations' QCIV rules provide a means for all PTFs to secure deemed-compliant status, but that further clarification would be appropriate.<sup>10</sup> Thus, we propose that this clarification confirm that a fund with no 'financial accounts' is automatically eligible to be a QCIV. Alternatively, this proposal may fit into the (currently reserved) definition of a Foreign Passthru Payment at Proposed Treasury Regulation Section 1.1471-5(h)(2).<sup>11</sup>

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<sup>8</sup> In addition, subject to the bilateral agreements contemplated by the Joint Announcement no FATCA withholding is expected to be required for in-country payments.  
(<http://www.treasury.gov/pressreleases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf>)

<sup>9</sup> Proposed Treasury Regulation Section 1.1471-5(b)(1)(iii) and -5(b)(3)(iv).

<sup>10</sup> See EFAMA's submission with respect to suggested language in these regards.

<sup>11</sup> However, as we recommended in the US Mutual Funds section above, we believe that Treasury can either include in the upcoming final regulations or by advance notice, guidance on this matter in order to preclude unnecessary and very time-consuming efforts between fund managers, share registrar's, agents and distributors.

### 3. Retirement Plans

We appreciate Treasury's expansion of the scope of retirement plans that are treated as posing a low risk of tax evasion and are thereby excluded from many Chapter 4 requirements in the proposed regulations. Nevertheless, we are concerned with both the complexity and very US-centric nature of the proposed regulations, especially the onus placed on foreign retirement plans not all that familiar with US law and the numerous conditions that such plans must satisfy to gain appropriate coverage under FATCA.

We believe there are retirement plans utilized in the traditional context of retirement planning in certain jurisdictions which do not create exposure that US persons will evade US income taxes and, thus, should be favorably treated in the final regulations. It is important to recognize that retirement plans around the world, including jurisdictions such as Australia, Hong Kong and Singapore, have different features to meet local country retirement, financial customs and practices. We recommend that the final regulations should contain broad principles to more fully accommodate retirement plans with different features than those of the US as a result of differing local market practices. We do not understand why non-US retirement plans should wholly conform to US legal and market practices when FATCA's only focus is on preventing tax evasion by US persons.

For example, Proposed Regulation Treasury Section 1.1471-6(f)(1) provides that retirement funds need to be 'generally exempt from local tax' for such retirement plan to qualify as an 'exempt beneficial owner.' If we look to the Australian superannuation fund regime, these entities are subject to low tax rates (15%). Thus, we propose that this requirement be amended to reflect that retirement funds can be "tax exempt or concessionally taxed" or "tax favored." More simply, we believe that Treasury should provide that where there is an income tax treaty in force, local retirement plans should be exempt beneficial owners under Proposed Treasury Regulation Section 1.1471-6(f)(1).

Another concern relates to contributions to retirement plans being government, employer or employee sourced that are limited by reference solely to earned income.<sup>12</sup> For instance, Hong Kong Mandatory Provident Fund Schemes ("MPFs") will not fit within FATCA's retirement plan exceptions.<sup>13</sup> This is because Hong Kong<sup>14</sup> allows voluntary contributions (i.e., sourced from after-tax income) to be made that are not referenced to earned income. Also, in Hong Kong, employees who leave their employer may continue to make contributions to an MPF. Furthermore, the restriction that no single beneficiary has a right to more than five percent of the entity's assets is unduly complex, as plan participants' relative rights and underlying asset values will frequently vary, thereby placing the retirement plan at-risk as to its FATCA documentation and withholding responsibilities.<sup>15</sup>

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<sup>12</sup> Proposed Treasury Regulation Section 1.1471-6(f)(1)(ii).

<sup>13</sup> Another retirement plan utilized in Hong Kong is Occupational Retirement Schemes Ordinance Plans which, again, suffer from comparable issues as raised here relative to MPFs.

<sup>14</sup> With respect to Hong Kong, it should also be noted that Hong Kong is not itself a "country," but rather a Special Administrative Region of the People's Republic of China. The proposed regulations set forth various tests, and it is noted that some of these tests turn on the relationship that the retirement plan has with the "country" in which it is organized. This is a threshold question for Hong Kong, and as such, Treasury should clarify whether a "special administrative region" or a region that has its own laws and is recognized as such, should be treated analogously to a country under the proposed regulations' retirement plan rules. We would recommend that Proposed Treasury Regulation Section 1.1471-6(f) be amended specifically in this regard (as well as the comparable deemed-compliant rules in Proposed Treasury Regulation Section 1.1471-5).

<sup>15</sup> Proposed Treasury Regulation Section 1.1471-6(f)(1)(ii)(C).

If the retirement plan exempt beneficial owner proposed regulations remains as is, well-respected and much used retirement plans, especially in the Asia Pacific region,<sup>16</sup> will become foreign financial institutions subject to FATCA's substantial documentation and withholding requirements. Thus, we propose these rules be modified to accept retirement plans that are tax-favored, not necessarily tax-exempt, permit both voluntary personal contributions and contributions to be made exclusive of earned income and the 5% constraint of a single beneficiary's interest be increased to a more reasonable figure. For instance, relative to the single beneficiary limitation, we would suggest applying a *greater of* rule, notably 10% of retirement plan ownership (reference can be made to the definition of a 'substantial US owner' in Proposed Treasury Regulation Section 1.1471-5(c)(1)) or \$250,000 (by analogy to what Treasury is apparently comfortable with in Proposed Treasury Regulation Section 1.1471-5(f)(2)(ii)(A)(2)(v)).

## Summary

We commend Treasury in issuing additional, detailed proposed guidance for use by both investors and financial intermediaries. However, we respectfully suggest that further clarifications are necessary, specifically, the following:

- US mutual funds and the need to treat them the same as foreign funds rather than discriminate against US funds;
- Publicly-traded funds and their special challenges due to the inherent exchange-traded features of the funds; and
- Retirement plans and the need to recognize that the US retirement model is not the exact same model used in jurisdictions outside the US.

We strongly recommend that Treasury adopt a risk-based approach that focuses on the greatest potential for abuse while avoiding negative impacts on US companies and on capital market flows.

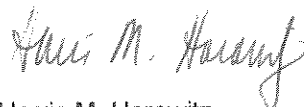
We look forward to engaging with you on these issues as we move forward to live implementation of FATCA.

Sincerely,



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<sup>16</sup> Yet another retirement (or savings) plan that may not meet Treasury's parochial exempt beneficial owner standard (or those relating to retirement or savings plans) is the Singapore Central Provident Fund ("CPF") where a question may be raised as to whether it's an 'entity' under FATCA, where not only contributions outside of earned income are allowed but such scheme further permits sub-accounts to be established for other immediate family members which can be utilized for limited purposes such as to pay for education and medical care. Nonetheless, the CPF is the primary tool to achieve Singapore's social security savings net, and has several defined uses, one of which is to facilitate retirement. While the CPF does have other ancillary purposes, the CPF is still highly regulated, and as such, poses a low risk of tax evasion.

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