



10 December 2012

For the attention of:

Ms. Manal Corwin
Deputy Assistant Secretary (International Tax
Affairs)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Mr. Michael Danilack
Deputy Commissioner (International)
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Mr. Michael Plowgian
Office of International Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Mr. Steven A. Musher
Associate Chief Counsel
(International)
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Mr. John Sweeney
Attorney
Office of the Associate Chief Counsel
(International)
Internal Revenue Service
1111 Constitution Ave, N.W.
Washington, DC 20224

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

**Comments on the Proposed Foreign Account Tax Compliance Act (“FATCA”)
Regulations (the “Proposed Regulations”)**

We, The Hong Kong Federation of Insurers (“HKFI”), Hong Kong Investment Funds Association (“HKIFA”), and Hong Kong Trustees' Association (“HKTA”), have formed a joint industry FATCA working group (the “Working Group”) in Hong Kong to share thoughts, provide education and work together to address issues raised by financial institutions in Hong Kong with respect to FATCA. We appreciate that the drafting process with respect to final FATCA regulations is advanced, but see a pressing need for clarification in such regulations of an issue of significant concern to the asset management industry in Hong Kong and globally. The issue is what FATCA due diligence has to be performed on a longstanding customer of a retail fund house, on whom the fund house has considerable information, who becomes a new account holder with respect to an additional fund, managed by the same fund house, that the customer did not hold before

January 1, 2014 (the presumed effective date of the FFI agreement). We recommend that the FATCA due diligence required to be performed by the newly-added fund on its new account holder, who is a “preexisting account holder” with respect to other funds managed by the same fund house, exclude consideration of documentation that the fund house has collected on the customer by reason of his investment in such other funds or by reason of his historical relationship with the fund house.

We believe this matter has considerable impact on how asset managers prepare for FATCA, and would appreciate it if this matter could be clarified in the final FATCA regulations (or, if there is not sufficient time for inclusion in the final regulations, through a standalone IRS Notice).

HKIFA is the professional body that represents the asset management industry in Hong Kong. In addition to education, the HKIFA acts as the representative and consulting body for its members and the fund management industry generally in all dealings concerning the regulation of unit trusts, mutual funds, retirement funds and other funds of a similar nature.

HKFI exists to promote insurance to the people of Hong Kong, as well as to build consumer confidence in the industry by encouraging the highest standards of ethics and professionalism amongst its members. It enjoys recognition by the Hong Kong government as the representative body of an important financial services industry in Hong Kong.

HKTA works closely with various stakeholders of the pension and regulated funds industries to advance development of the industries overall and to promote higher standards of professionalism and pension or fund governance. HKTA has been active in raising FATCA awareness on the part of retirement plan trustees and other financial market participants in Hong Kong as well as providing education and updates where appropriate.

1. Definition of Preexisting Accounts and New Accounts Under the Proposed Regulations

An investor that holds equity interests in a foreign investment fund prior to the effective date of the fund’s FFI agreement (which we will assume for purposes of this letter is January 1, 2014) is treated as a preexisting account holder with respect to that particular fund under FATCA. However, when the same investor acquires interests in another foreign investment fund, managed by the same fund house, on or after the effective date of the FFI agreement of such other fund, the same investor would become a new account holder with respect to such other fund.¹ Each investment fund is a separate foreign financial institution (“FFI”).

In Hong Kong and in many other jurisdictions, existing customers of a fund manager (which we will use interchangeably with fund house in this letter) routinely invest in other funds offered by the same fund manager. The fund manager’s customer base includes many individuals and entities that add

¹ The investor would separately be treated as a preexisting account holder of investment funds he owns as of December 31, 2013, and be subjected to preexisting account due diligence procedures as applied by such funds.

investment funds that are new to their respective investment portfolios, whether from augmenting monies invested with the fund manager or through switching among different fund products. The addition of a new fund to a customer's investment portfolio can be prompted by the launch of a new fund by the fund manager onto the market, but it could just as readily result from the customer investing in a fund, formed some time ago, that he had not previously chosen.

Prior to FATCA, in Hong Kong a fund manager would typically treat these transactions as investments by an existing customer, and normally would not perform incremental anti-money laundering ("AML") and know-your-customer ("KYC") procedures or other new client onboarding procedures on the customer at the time the customer invests in an additional fund.

The Proposed Regulations are unclear as to what materials have to be reviewed by the new fund into which the longstanding customer of the fund house has invested on or after January 1, 2014. For illustrative purposes, we focus on individual customers in the remainder of this letter, but comparable issues are raised for entity customers. Proposed Treasury Regulations Section 1.1471-4(c)(4)(i) provides, in relevant part, that "a participating FFI is also required to review all information collected with respect to the opening or maintenance of each account, including documentation collected as part of the participating FFI's account opening procedures and documentation collected for other regulatory purposes to determine if an account holder has U.S. indicia."

The key aspect that needs clarification in the final regulations is whether the information that has to be reviewed as part of the FATCA new account holder due diligence performed by a fund on a longstanding customer of a fund manager, where the customer becomes a new account holder with respect to a given fund, is only the information that is **incrementally collected by such fund (or by the fund manager on behalf solely of such fund) at the time that the customer becomes a new account holder**. An interpretation that answers this question in the affirmative would make the FATCA due diligence rules more amenable, in practice, to being implemented, by large retail fund houses with a sizable base of active customers. We respectfully request that Department of the Treasury ("US Treasury") clarify in the final regulations that this interpretation will govern.

The alternative interpretation of the Proposed Regulations is what our Working Group is concerned about and what would impose enormously burdensome FATCA due diligence requirements on FFIs in the asset management industry to the significant detriment of the industry, in Hong Kong and elsewhere, as it seeks to comply with FATCA. Under such alternative interpretation, the fund taking on the account holder that is new to it could arguably be tasked by the Proposed Regulations with searching not only the incremental information on the customer such fund itself collected (or collected by the fund manager on its sole behalf), but also the **historical information on the same customer that such fund's fund manager had collected** on behalf of the fund manager itself or on behalf of other funds managed by the fund manager. Under this interpretation, when the fund as to which the customer is a new account holder does FATCA due diligence, the Proposed Regulations would inappropriately cause the entire history of the customer to have to be searched.

a. Alternative Identification Procedures For Preexisting Individual Accounts That Are Offshore Obligations² May No Longer Be Available

The Proposed Regulations provide certain relief for Chapter 4 identification procedures on preexisting individual account holders. In general, for preexisting individual accounts that do not exceed US\$1,000,000, a participating FFI is only required to perform an electronic search for the seven US indicia. Significantly, the limitation of the search to the electronic option does not apply to new accounts under the Proposed Regulations. Hence, if the Proposed Regulations were interpreted, in the midst of their lack of clarity, to require searching to encompass historical records held by the fund manager with respect to a longstanding customer who becomes a new account holder of a fund, such searching would have to include historical paper files as well as electronic records and could involve review of many prior years' worth of information. The excessive FATCA compliance burdens on fund houses of such an interpretation highlight the need for US Treasury to clarify in the final regulations that such interpretation is uncalled for and the information to be searched by a fund should be considerably more limited in the described factual scenario.

Under the Proposed Regulations, a fund manager is presently left with unsettling uncertainty about whether, with respect to the new account at the added fund held by the longstanding fund house customer, it could arguably be both electronic and full paper searching that would be required on such customer and/or be all of the historical information (collected for purposes of other and distinct funds or for purposes of the fund manager itself) held by the fund manager on the customer that may have to be included in the search. The potentially expansive FATCA due diligence requirements, under Proposed Regulations language that is unclear, create unintended and heavy burdens on the fund manager in performing required FATCA due diligence procedures.

b. Insufficient Time After the Effective Date of the FFI Agreement For Completion Of Preexisting Account Identification Procedures

Another worrisome result of treating a longstanding customer of the fund house as a new account holder of a fund newly invested in by the customer is that in practice, there may be no meaningful window after January 1, 2014 for the fund manager to complete FATCA customer due diligence procedures on the customer. The new account identification procedures apply whenever the customer acquires interests in a new investment fund after January 1, 2014. This may unintentionally eliminate the windows, subsequent to January 1, 2014, that the Proposed Regulations permit for a participating FFI to complete due diligence on preexisting account holders. This effect stems from the ease with which a preexisting account holder of one fund can become, on or after January 1, 2014, a new account holder of another fund managed by the same fund house.

2. Recommendations

- a. We recommend that the final FATCA regulations address the definition of preexisting and new accounts in a case where business relationships are at the fund

² Proposed Treasury Regulations Section 1.1471-1(b)(40).

manager level rather than the investment fund level. We suggest that US Treasury and the Internal Revenue Service (“IRS”) consider modifying the definitions of preexisting and new accounts in the final regulations to provide that, with respect to all investment funds managed by the same fund manager, a “preexisting account holder” of any such fund will be treated, if such account holder becomes a new account holder (before applying this sentence) of any other investment fund so managed by such fund manager, as a preexisting account holder (and not a new account holder) of such other fund.

- b. If the final regulations continue to define preexisting and new accounts at the investment fund level rather than at the fund manager level, we recommend that the final FATCA regulations clarify the customer information that needs to be reviewed when a preexisting account holder of an investment fund becomes a new account holder of another investment fund managed by the same fund manager on or after January 1, 2014. We suggest that US Treasury and the IRS indicate that the information required to be reviewed when a “preexisting account holder” of a fund (e.g., Fund I) becomes a new account holder of another fund (e.g., Fund II) managed by the same fund manager is only any incremental information that Fund II collects from such customer at the time he invests in Fund II, and excludes any information that Fund I or the fund manager may have collected on the customer prior to the customer’s investment in Fund II.

3. Concluding Observations

We believe that the issue described in this letter presents a very significant challenge for fund managers in Hong Kong and elsewhere in the world to comply with FATCA, and would appreciate your attention to this issue. We base our recommendations above on the following supporting reasons:

- a. The preamble to the Proposed Regulations³ indicates that FFIs can generally rely on their existing AML/KYC procedures when implementing FATCA new customer onboarding. Relevant rules in the Proposed Regulations were drafted with the intent of minimizing the potential implications to FFIs’ existing account opening and documentation procedures. It is common in the asset management industry for fund managers to perform AML/KYC procedures on customers at the fund manager level and not at the investment fund level. A reading of the Proposed Regulations that results in the imposition of very heavy FATCA due diligence requirements when a longstanding fund house customer adds new funds on or after January 1, 2014 appears to be inconsistent both with existing AML/KYC practices in the asset management industry and with the intent of the drafters of the Proposed Regulations that FFIs can generally rely on existing AML/KYC procedures in complying with FATCA due diligence requirements.
- b. Since the Proposed Regulations provide certain relief (e.g., the electronic search option) on the due diligence procedures for preexisting accounts, the potential for very significant FATCA implementation burdens highlighted in this letter cannot have been contemplated by the drafters of the Proposed Regulations. Under certain interpretations of the Proposed Regulations discussed above, fund houses

³ Sections 1.B.1.b and V.C. of the preamble to the Proposed Regulations.

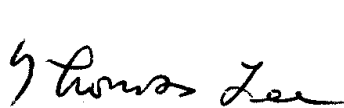
would effectively be precluded from accessing any such relief with respect to preexisting customers in their funds.

- c. The issue discussed in this letter could discourage fund managers from selling additional fund products (including interests in new funds they launch) to their longstanding customers. There is no policy reason for such discouragement.
- d. The sizable potential FATCA implementation burdens discussed above would have lesser implications on fund managers that distribute their fund products mostly through third party distributors that act as nominees to hold fund interests on behalf of the distributors' underlying clients. The use of distributor nominees is a common practice in the Asia Pacific region, among other regions of the world. This would substantially increase the FATCA implementation burdens on fund managers with more direct investors in their funds and produce an outcome that has no policy justification.

We look forward to engaging with US Treasury and the IRS on dialogue on this issue, as you consider appropriate. We very much hope that you would consider this issue before finalizing the regulations. If you have any questions, please do not hesitate to contact us through:

Mr Lennard Yong	Lennard.Yong@ing.com.hk
Ms Sally Wong	hkifa@hkifa.org.hk
Ms Ka Shi Lau	lau.kashi@bcthk.com

Very truly yours,



Mr. Thomas Lee,
Acting Chairman
The Hong Kong Federation of
Insurers

Mr Lieven Debruyne,
Chairman
Hong Kong Investment
Funds Association

Ms Ka Shi Lau,
Chairman
Hong Kong Trustees'
Association

cc:

- Mr. Mark Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, DC 20220
- Mr. Jesse Eggert, Office of International Tax Counsel, U.S. Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, DC 20220
- Ms. Tara Ferris, Office of the Associate Chief Counsel, Internal Revenue Service, 1111 Constitution Ave, N.W., Washington, DC 20224
- Ms. Danielle Nishida, Office of Associate Chief Counsel (International), Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, DC 20224