May 3, 2012

Timothy Geithner, Secretary
US Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Foreign Account Tax Compliance Act ("FATCA")

Dear Secretary Geithner and Commissioner Shulman:

The following investment funds associations from the Asia Oceania Region welcome the opportunity to provide the United States Treasury Department and the Internal Revenue Service with comments regarding the Foreign Account Tax Compliance Act ("FATCA"), which was enacted into law on March 18, 2010 as part of the Hiring Incentives to Restore Employment Act.

(A) In principle opposed to FATCA

We are sympathetic with FATCA's goal of preventing tax evasion and promoting financial transparency. However, in principle, we are opposed to FATCA and believe that it should be repealed on the following grounds:

1. FATCA is an unprecedented move away from the long accepted practice governing international relations, that of negotiation resulting in mutual bilateral and multinational agreements. FATCA is an attempt by the U.S. to unilaterally super-impose its tax system – arguably the most complex regime in the world - on all of the world's financial institutions: FATCA basically requires all the foreign financial institutions ("FFIs"), and not just those dealing with the U.S., to have a detailed working understanding of the U.S. tax system to implement its procedures. The system is highly costly and onerous. (In particular, the passthru payments system is so complicated,

intrusive and based on such tenuous and indirect connections with the U.S., that it will be unworkable and likely to have significant adverse consequences). Furthermore, the costs will not only be borne by the FFIs, but ultimately by the end investors and retirement/pension scheme members;

2. FATCA unilaterally sets new standards for identifying and verifying the beneficial owners of companies. This undermines the multilateral approach that has all along been adopted by the Financial Action Task Force ("FATF"), the global standard setter for anti-money laundering regulations;

3. It imposes excessive and disproportionate compliance costs on FFIs, especially at a time when institutions have to grapple with a raft of new regulatory changes which have been introduced to increase the robustness of the global financial system. It is envisaged that the aggregate costs will far exceed the additional revenue that FATCA will bring in to the U.S. Treasury. Furthermore, FATCA's effectiveness in furthering the cause of combating tax evasion is highly dubious; FATCA's mechanical approach of flagging a discrete set of simple U.S. indicia is likely to result in tax evaders simply deliberately misrepresenting such indicia. The construction of an elaborate compliance mechanism around such indicia is therefore unlikely to be effective in combating tax evasion;

4. It directly contravenes, in a number of jurisdictions, local data protection/privacy laws and other legal requirements – FFIs will be put in a difficult position of coming up with means to reconcile the conflicting requirements;

5. It inevitably requires modifications to the global, national and regional payments systems to take into account the requirements of FATCA as the current systems do not have such a capability;

6. Apart from ignoring local legal differences, FATCA also fails to take into account the linguistic and social differences of different jurisdictions: Many FFIs and their clients in the Region as well as in other non-English-speaking jurisdictions, will find the U.S. IRS documentations and requirements difficult to understand. What is more formidable is that the process and the ways the forms are crafted are alien and intimidating: they are issued by the IRS, a tax agency that most will have had no prior dealings with, and are to be executed "under penalties of perjury". Consequently, there will be significant difficulties to facilitate compliance; and

7. It will very likely result in reductions in investment choices for U.S. investors and limit the ability of U.S. corporate borrowers to access overseas debt markets.

(B) <u>Proposal – to exempt or at least defer transposition of FATCA to national retirement/pension schemes</u>

We fully understand that the objective of FATCA is to address and tackle offshore evasion of US taxpayers. However, the way the law is crafted is flawed.

We are deeply concerned that non-U.S. regulated funds (including but not limited to unit trusts, mutual funds and other investment funds) would be covered as payments or investments in relation to these vehicles bear little, if not zero, relevance to US taxpayers.

Furthermore, we have grave reservations about the implications of FATCA to national retirement/pension schemes. Despite the fact that FATCA has provided certain exemptions to these schemes in recognition of the fact that retirement/pension funds generally pose low tax risk, the way in which the Rule is drafted will mean that effectively few, if any, schemes will be able to enjoy the exemptions. This outcome is not surprising because each and every national scheme has its own political, economic and social context. And it is impossible for a piece of sweeping legislation to capture all the nuances.

The unfortunate outcome is that all retirement/pension schemes will have to devote a dis-proportionate amount of resources and time to track down a miniscule number of U.S. citizens. (in fact, most schemes have mechanisms to exempt expatriates from their schemes and thus the universe of US citizens that would be covered would be negligible). All of these would undermine the objectives of these retirement/pension schemes as they take up resources which would otherwise be deployed more productively to help build the retirement nest eggs of the scheme members.

In view of the undesirable outcomes and the fact that it simply is not feasible for retirement/pension funds to be in a position to comply with FATCA according to the timeline announced, and given the complexity of the schemes (not least of which is that the option to close accounts for recalcitrant members is incompatible with the retirement laws of many jurisdictions), we would like to propose that the U.S. authorities:

- exempt national retirement/pension schemes from FATCA altogether as they pose a low risk of tax evasion. Each government within the Region can supply the list of its own retirement/pension schemes to the US IRS, say before the end of this year;

- if the aforesaid option is not feasible (which we believe that the U.S. authorities have the onus to explain why it is so), stagger off implementation so that FATCA will only be applied to national retirement/pension schemes on or after 2017.
  Reasons –
  - these schemes are of extremely low-risk as the coverage of U.S. citizens is negligible.
  - the chance of using retirement/pension schemes for tax evasion is remote, but the costs that arise will far outweigh the benefits that can be achieved by the U.S. authorities.
  - transposition to national retirement/pension schemes would unavoidably require each jurisdiction to introduce legislative changes which can be long and protracted.
  - according to the February Regulation, the FATCA implementation timeline would run into 2017 (including the final phase of handling passthrough payments). Even without the complexity of the pension schemes, all parties are already struggling with how to comply with a Law whose details

have not yet been made clear. Thus a more realistic approach is to just focus on the non-retirement/pension space first, and only after this has bedded in should attention be turned to retirement/pensions schemes.

In addition, as implementation of FATCA has on-going resources and costs implications to the interests of non-U.S. investors, as well as the retirement nest eggs of employees in non-U.S. jurisdictions, we believe that a reasoned approach is for the U.S. authorities to defray the costs so as to ensure that investors and members' interests would not be adversely affected.

We welcome the opportunities to explain our stance and elaborate on our concerns. We can be contacted on (852)-2537-9912 (by phone) or by email: hkifa@hkifa.org.hk.

Sincerely,

John Brogden
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Henry Lin
Chairman
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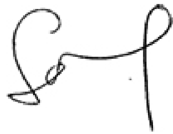

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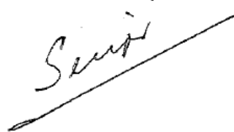

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Appendix 1 – introduction of the five investment funds associations