



March 10, 2014

Tax Policy Branch
Department of Finance
140 O'Connor Street
Ottawa, Ontario
K1A 0G5

BY E Mail: IGA-AIG@fin.gc.ca

Re: Consultation on FATCA Intergovernmental Agreement

Dear Minister Flaherty,

I am writing to you in response to the consultation your ministry is running on the Intergovernmental Agreement (IGA) negotiated by your government to allow extra-territorial application of the American *Foreign Account Tax Compliance Act (FATCA)* in this country.

We oppose this agreement on a number of grounds, but will restrict our comments to the large scale infringement of privacy rights that will inevitably result from the implementation of this IGA. This infringement includes not just federal and provincial privacy laws, but also the Constitution, specifically sections 7, 8 and 15 of the *Charter of Rights and Freedoms*.

Who is affected by the IGA?

This IGA does not just affect Americans who happen to be living in Canada, not does it just affect the wealthy.

It will also affect various financial institutions which will have the obligation of reporting on their own clients to a foreign government, with the Government of Canada acting as intermediary/post box. These institutions are subject to either federal or provincial privacy laws and have obligations regarding the collection, use and disclosure of personal information.

In fact, we have obtained information through freedom of information that the provincial regulator of financial institutions is of the view that credit unions "...could be left in a tough spot to comply with the US/Canada agreement and meeting privacy rules."

[http://fipa.bc.ca/library/Released through FOI/FATCA%20Release.pdf](http://fipa.bc.ca/library/Released%20through%20FOI/FATCA%20Release.pdf)

The Canadian financial institutions, as defined in the IGA, are obliged to carry out the following search:

1. **Electronic Record Search.** The Reporting Canadian Financial Institution must review electronically searchable data maintained by the Reporting Canadian Financial Institution for any of the following U.S. indicia:

- a) Identification of the Account Holder as a U.S. citizen or resident;
- b) Unambiguous indication of a U.S. place of birth;
- c) Current U.S. mailing or residence address (including a U.S. post office box);
- d) Current U.S. telephone number;
- e) Standing instructions to transfer funds to an account maintained in the United States;
- f) Currently effective power of attorney or signatory authority granted to a person with a U.S. address; or
- g) An "in-care-of" or "hold mail" address that is the **sole** address the Reporting Canadian Financial Institution has on file for the Account Holder. In the case of a Preexisting Individual Account that is a Lower Value Account, an "in-care-of" address outside the United States or "hold mail" address shall not be treated as U.S. indicia.

Canadian 'snowbirds' who winter in the United States would be affected by this measure, as would Canadians who have a secondary residence in the US for other reasons, as well as any Canadian who leaves a US telephone number as a contact. If any of this information is on file with a Canadian financial institution, it makes any account with more than \$50,000 (or insurance policy over \$250,000) reportable to CRA, and therefore to the IRS.

The IGA provides that account holders can rebut the presumption of 'American-ness', but that is the obligation of the account holder. It does not appear that there is any obligation on financial institutions to investigate the circumstances surrounding why these indicia are present in their electronic records. Similarly, the obligation to inform clients that they are liable to be reported to American tax authorities appears to flow from federal or provincial privacy legislation, rather than directly in the IGA.

That is unacceptable as it infringes on the privacy rights of Canadians]

Privacy laws:

Both the federal and provincial private sector privacy laws operate on the principle of consent of the individual to the collection, use and disclosure of their personal information, subject to certain limited exceptions (eg. law enforcement, investigations etc)

It appears to us that Canadian financial institutions have an obligation to obtain that consent before sending the required information to the CRA/IRS. If they send the

information without obtaining that consent, they will be violating these laws, which also contain tests for reasonableness and necessity.

There is also the obligation to notify individuals whose personal information is being used for different purposes than those for which it was originally collected.

Your government, which will be disclosing the personal information to be collected and forwarded to the federal government by the financial institutions, is subject to the *Privacy Act*. Although that legislation is seriously outdated in many ways, it still imposes obligations regarding collection, use and disclosure, which your government would be forced to comply with.

For example, it could be argued that collecting financial information solely to pass it on to a foreign government for that country's tax purposes would not satisfy the requirements specified under s.4 of the *Privacy Act*; that the information be required either for an operating program or an activity of the government doing the collecting.. Other arguments can be made regarding the use and disclosure of the information collected from the financial institutions.

You may be able to use enabling legislation to undermine the rights contained in *PIPEDA* or the *Privacy Act*, but that would not be the case for substantially similar provincial privacy laws. Undercutting the privacy protections in those laws would require legislative action by the governments Alberta, British Columbia and Quebec.

Jurisdictional issues:

The federal government has exclusive jurisdiction over banks and banking in this country, but the provincial governments have jurisdiction over other financial institutions such as credit unions and insurance companies. We do not see how an intergovernmental agreement to provide extra territorial application of a foreign country's tax laws would get around this roadblock. This means that 'Canadian financial institutions' that are regulated by the provinces may not be subject to federal implementing legislation, meaning some financial institutions and their clients may be subject to being reported to the IRS, while others would be spared because of which level of government regulates their activities.

Charter of Rights and Freedoms:

Noted Canadian constitutional scholar Peter Hogg, Q.C., the dean emeritus of the Osgoode Hall law school, has already written to you about the numerous constitutional problems with any proposed legislative implementation of the IGA.

http://www.greenparty.ca/sites/greenparty.ca/files/attachments/peter_hogg_fatca.pdf

In his letter dated February 12, 2012, he states that there are numerous potential conflicts between implementing legislation and the *Charter*, including s. 7 (Life, Liberty and Security of the Person), s.8 (search and seize/privacy rights) and s. 15 equality rights.

He also expresses doubt about the government's ability to justify these breaches under s.1 of the Charter as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

This is in addition to his stated concerns about how *FATCA* and any proposed IGA would “..present significant conflict of laws, privacy, human rights, federal-provincial and other issues.”

We agree with Professor Hogg’s concerns, and await the introduction of the implementing legislation to provide a detailed critique of its constitutionality.

Conclusion:

As set out above, there are considerable difficulties involved in any attempt to implement the *FATCA* IGA in this country, and these will almost certainly result in extensive litigation and damage to people and institutions which are in no way connected to tax evasion either in this country or the United States.

Therefore, we urge you not to proceed with this wholesale infringement of the constitutionally guaranteed privacy rights of Canadians.

We would be pleased to provide you with additional information if you require it.

Sincerely,



Vincent Gogolek
Executive Director
BC FIPA