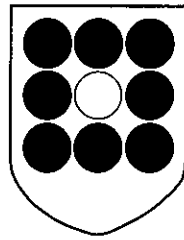


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December 4, 2012

To Whom It May Concern:

Re: Negotiation of an information exchange agreement with the United States

I am writing to register the Canadian Civil Liberties Association's (CCLA) concerns regarding the privacy and human rights consequences that are implicated by the proposed information exchange agreement between Canada and the United States.

The Canadian Civil Liberties Association is a national, non-profit, non-partisan organization with thousands of supporters drawn from all walks of life. The CCLA was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the availability of robust and effective accountability mechanisms for democratic institutions.

Canadians' privacy and the serious consequences of international information-sharing have long been priority issues for our organization. International information-sharing can result in significant privacy and rights violations; one not need look farther than the extensive Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar to find an example of the dire consequences that can flow from a loss of informational control. In the context of the proposed Canada-U.S. Security Perimeter and increased law enforcement co-operation between the two countries, CCLA is urging that commitments to privacy be respected and not lead to domestic rights violations.¹

¹ See, for example, Canadian Civil Liberties Association, American Civil Liberties Association and Privacy International, "12 Core Legal Principles for the Canada-U.S. Security Perimeter" (December 2011), available online <http://ccla.org/12-core-legal-principles-for-the-canada-u-s-security-perimeter/>.

It is our understanding that, pursuant to the United States *Foreign Account Tax Compliance Act* (FATCA), the U.S. is interested in obtaining the personal and financial details of all “US persons” that hold accounts with “foreign financial institutions.” The scope of information that the US government is seeking under FATCA is alarmingly broad. “Foreign financial institutions” is defined in the U.S.’ Internal Revenue Code as any foreign entity that,

- (A) accepts deposits in the ordinary course of a banking or similar business,
- (B) as a substantial portion of its business, holds financial assets for the account of others, or
- (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.²

This definition is expansive enough to include “all chartered Canadian banks, stock-brokers, and virtually any entity engaged in the financial sector in Canada – ‘everyone from financial advisors to pension funds.’”³ This very broad category of institutions and individuals is required to report on most “US persons” holding accounts – a category of individuals that, with some exceptions, is drawn from federal income tax definition. This would encompass not only U.S. citizens, but also many former green-card holders that have permanently left the United States or even individuals who have spent a substantial amount of time in the U.S. over a number of years.⁴ Finally, the information the U.S. government is seeking on all these individuals includes the person’s name, address, account number, account balance, gross receipts and payments from the account and their US taxpayer identifying number.⁵ The proposed financial penalties envisioned for individuals and financial institutions that do not comply with this regime are significant.

CCLA appreciates that the IRS’ Model FATCA Agreement, and the agreement being negotiated currently with the United States, may envision modifications of these reporting requirements.⁶ Our starting point, however, is that Canadians’ privacy should not be invaded without an objectively compelling purpose. And as Minister Flaherty has already publicly stated,

...put frankly, Canada is not a tax haven. People do not flock to Canada to avoid paying taxes. In addition, we have existing ways of addressing these issues with the United States through our

² Internal Revenue Code, ss. 147(d)(4), 247(d)(5). CCLA notes that the definition of “Investment Entity” in the Model Intergovernmental Agreement is narrower than that suggested by the proposed FACTA Regulations.

³ Andrew Bonham, FACTA and the FBAR Reporting by Individuals: Enforcement Considerations from a Canadian Perspective, 60 *Canadian Tax Journal* (2012) 305 at 314, quoting “Scratched by the FACTA,” *The Economist*, November 26, 2011, 86-87, at 86.

⁴ Andrew Bonham, FACTA and the FBAR Reporting by Individuals: Enforcement Considerations from a Canadian Perspective, 60 *Canadian Tax Journal* (2012) 305 at 305; Canada Revenue Agency, *Canadian Residents Going Down South*, P151(E) Rev. 11 (2011) at 9, available online: <http://www.cra-arc.gc.ca/E/pub/tg/p151/p151-11e.pdf>.

⁵ Internal Revenue Code, s. 147(1)(c).

⁶ <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-to-Implement-11-14-2012.pdf>.

Bilateral Tax Information Exchange Agreement. As I said, we share the same goal of fighting tax evasion and we already have a system that works.

To rigidly impose FATCA on our citizens and financial institutions would not accomplish anything except waste resources on all sides.⁷

This should be the Canadian government's starting point as well. Privacy-invasive collection and disclosure of personal information should only be done when necessary. Under the Canadian government's own assessment, that threshold has not been met in this case.

The CCLA therefore urges the Canadian government to stand up for its citizens and residents and resist invasive, unnecessary, foreign-imposed violations of individual privacy. Given that negotiations with significant privacy consequences are ongoing, we suggest that at a minimum the Privacy Commissioner of Canada be fully involved in the discussions.

Sincerely,

A handwritten signature in black ink, appearing to read 'NDR', with a long horizontal flourish extending to the right.

Nathalie Des Rosiers

General Counsel, Canadian Civil Liberties Association

⁷ Open letter from Finance Minister Jim Flaherty, reprinted in Suzanne Steel, "Read Jim Flaherty's letter on Americans in Canada," Financial Post, Sept. 16, 2011, available online: <http://business.financialpost.com/2011/09/16/read-jim-flahertys-letter-on-americans-in-canada/>.