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Le 11 septembre 2024

Robert Demeter
Directeur général
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Objet : Déclarations de fiducie

Monsieur Demeter,

Le présent mémoire présente les commentaires du Groupe de travail sur les déclarations de fiducie (GTDF) du Comité mixte sur la fiscalité de l'Association du Barreau canadien et de Comptables professionnels agréés du Canada (le « Comité mixte ») en ce qui concerne les déclarations de fiducies.

Nous tenons à exprimer notre intérêt continu à participer au processus de consultation, en particulier compte tenu de la date d'entrée en vigueur retardée des paragraphes 150(1.3) et (1.31). Ce délai offre une occasion importante de poursuivre les discussions, et il nous semble essentiel d'utiliser ce temps pour veiller à ce que les préoccupations et les points de vue de toutes les parties prenantes soient pleinement pris en compte. En poursuivant nos consultations, nous pouvons travailler de façon collaborative afin de relever les défis potentiels, apporter des précisions aux dispositions si besoin s'en fait sentir, et ce, en vue de contribuer à une mise en œuvre plus efficace et plus équilibrée des mesures. Nous entendons maintenir le dialogue tout au long de ce délai.

Nous aimerions avoir l'occasion de poursuivre nos discussions et de fournir une rétroaction sur toute modification apportée au cadre législatif actuel, surtout en ce qui concerne les simples fiducies.

Les membres du groupe de travail sur les déclarations de fiducie qui ont participé à la discussion et qui ont contribué à la préparation de ce document :

- Sarah Chiu – Felesky Flynn
- Heather Evans – CTF
- Yves Faguy – ABC
- Ken Griffin – PwC
- Rob Jeffery – Deloitte
- Kenneth Keung – Moodys Tax
- Ryan Minor – CPA Canada
- John Oakey – CPA Canada
- Pam Prior – KPMG

Au sujet du Comité mixte

Par l'entremise du Comité mixte sur la fiscalité, Comptables professionnels agréés du Canada (CPA Canada) collabore avec l'Association du Barreau canadien (ABC) pour offrir au gouvernement fédéral des commentaires sur les lois fiscales. Depuis plus de 70 ans, cette collaboration entre CPA Canada et l'ABC mène régulièrement à la formulation de commentaires à l'intention du ministère des Finances sur des aspects techniques de nouvelles lois fiscales. Nous suggérons également des améliorations pour simplifier et parfaire les lois fiscales actuelles.

Nous tenons à vous remercier de l'attention que vous porterez à ce mémoire. Nous espérons que vous trouverez nos commentaires utiles, mais nous serions ravis d'avoir l'occasion de discuter avec vous, à votre convenance, de ce mémoire et de nos préoccupations.

Nous vous prions d'agréer, Monsieur, nos salutations distinguées.

Carmela Pallotto

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Présidente, Comité sur la fiscalité
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Summary of Issues identified
Technical Amendments Legislation
Trust Reporting

1. Exception under subsection 150(1.2) for express trusts

Paragraph 150(1.2)(a)

Paragraph 150(1.2)(a) excepts express trusts (and certain civil law trusts) that have been in existence for less than three months at the end of the year. This exception includes trusts that were created within three months of the end of the year that continue to exist at the end of the year. We understand that this exception also applies to trusts which were created and wound up within 3 months at any other time in the year, although it would be preferable if the legislation could be amended to clarify this.

An interpretive rule should also be added to clarify that a trust terminates, for purposes of paragraph (a), at the time it is terminated under relevant provincial law.

Recommendation: Amend this exception to clarify that trusts which legally exist for less than three months at any time in the year will qualify for this exception, and add an interpretive rule to clarify that a trust terminates, for purposes of paragraph (a), at the time it is terminated under relevant provincial law.

Paragraph 150(1.2)(b)

We are pleased to see the removal of the specifically listed assets from the de minimis threshold, but the TRWG still recommends that the de minimis threshold be consistent with that used for specified foreign property.

The TRWG recommends that the $50,000 de minimis threshold be aligned with the $100,000 threshold used in the definition "reporting entity" in reference to specified foreign property under subsection 233.3(1). The specified foreign property proposals were introduced in 1996 to preserve the integrity of the Canadian income tax base[1] and the de minimis threshold set in 1996 remains today.

Recommendation: We recommend that the de minimis threshold be modified to align with the threshold used for specified foreign property. This would require the following two further amendments:

- **Base the threshold on cost as opposed to fair market value, and**
- **Increase the threshold to $100,000.**

Paragraph 150(1.2)(b.1)

Proposed paragraph 150(1.2)(b.1) provides an exclusion from the requirement to file an annual tax return for an express trust (or certain civil law trusts) that have only individuals as trustees, where each beneficiary is an individual and is related to each trustee, and where the fair market value of the property of the trust did not exceed $250,000 throughout the year and the trust held only assets listed in subparagraph 152(1.2)(b.1)(iii).

[1] Draft Foreign Reporting Requirements, Department of Finance, March 5, 1996

The insertion of subparagraph (i) and (ii) further narrows this asset specific de minimis exception to also be limited to situations where the beneficiaries and trustees are related individuals. Based on the definition of "related" in the *Income Tax Act,* aunts, uncles, nieces and nephews as trustees or beneficiaries would disqualify a trust from this exception. Trust companies, charities, not-for-profit organizations and any other non-individual or non-related person would also disqualify the trust from this exception.

The TRWG appreciates the greater threshold and broader asset classifications contained in subparagraph (iii). The broadened list of eligible assets appears to be missing the following:

- near cash or commonly held assets by trusts, such as: gold coins, silver ingots and other precious metals,
- GICs issued by a Credit Union, and
- interests in a limited partnership the units of which are listed on a designated stock exchange.

Clause (K) includes a right to receive income on property described in clauses (A) to (J). Under subsection 9(3), "income from a property" does not include capital gains from the disposition of that property. Please expand clause (K) to account for capital gains.

Clause 150(1.2)(b.1)(iii)(k) has an "and" at the end of the paragraph. This should be removed.

Recommendation: We continue to recommend that any de minimis threshold be based on cost as opposed to fair market value to avoid complications in determining asset value. We recommend the removal of subparagraphs (i) and (ii) or an expansion of the definition of "related" to also include other non-related family members and common situations (aunts, uncles, nieces, nephews, trust companies, etc.). We recommend the expansion of the asset list to include near cash items, such as: gold coins, silver ingots, and other precious metals, GICs from Credit Unions and limited partnership units which are listed on a designated stock exchange. It would also be very useful if the term "money" was clarified in the Explanatory Notes with specific examples to minimize confusion.

<u>Paragraph 150(1.2)(c)</u>

The revised paragraph 150(1.2)(c) expanded the exception to include a trust maintained as a separate trust for a particular client or clients, as long as the assets held by the trust throughout the year are money with a value that does not exceed $250,000.

The TRWG appreciates the expansion of this exception to provide a de minimis threshold for specific trust accounts. The expansion of this exception still has certain limits that the TRWG would recommend be further amended.

Recommendation: We recommend the following amendments to subparagraph (ii):

- **This exception should be expanded beyond "money" to ensure full coverage of low-risk investments commonly held in trust, such as: bank accounts, term deposits, GICs, treasury bills, money market mutual funds, etc. The right to receive income from these assets should also be included.**
- **We continue to recommend that any de minimis threshold be based on cost as opposed to fair market value to avoid complications in determining asset value.**
- **Many business and real estate transactions require the holding of funds in a specific trust account that exceed $250,000. Although the inclusion of the $250,000 threshold is welcomed, we question if the threshold should be increased to avoid unnecessary reporting of transactions throughout the year.**

Paragraph 150(1.2)(j)

Paragraph 150(1.2)(j) excepts graduated rate estates from trust reporting that are not otherwise required to file. However, a graduated rate estate must be designated through the filing of a trust return, which is contrary to the purpose of this exception.

Recommendation: We recommend this exception be reworded to include a trust that *could have* been designated as a graduated rate estate had it filed a return.

Paragraph 150(1.2)(n)

This paragraph excludes Canadian registered exempt trust accounts, but it does not exclude similar exempt foreign plans (i.e., IRC 529 plans, 401(k)s, Roth IRAs, and other non-US equivalent retirement plans) or exempt retirement compensation arrangements.

This paragraph excludes employee profit sharing plans but not other types of employee benefit plans. We believe employee benefit plans should be excepted from Schedule 15 reporting whether they are Canadian residents or foreign plans with Canadian employees whereby the plan is deemed to be Canadian resident under section 94. If a full exception from Schedule 15 filing is not granted, we propose that Regulation 204.2 be amended as discussed below.

Recommendation: We recommend expanding this paragraph to include similar exempt foreign plans, exempt retirement compensation arrangements, and other types of employee benefit plans.

Paragraph 150(1.2)(q)

Proposed new paragraph 150(1.2)(q) will except a trust that is established for the purpose of complying with a statute of Canada or a province that requires the person or persons acting as trustee of the trust to hold property in trust for a specified purpose. The Explanatory Notes give examples of bankruptcy trustees or provincial guardians.

It is not clear that this exception will cover deemed trusts arising under the *Income Tax Act* and the *Excise Tax Act* (e.g., source deductions, GST/HST).

Recommendation: Amend the wording of this provision to include these deemed trusts or clarify in the Explanatory Notes that this provision covers these deemed trusts.

Other recommended exceptions under subsection 150(1.2)

Internal Trusts

Internal trusts arise when a charity receives property as a gift that is subject to certain legally enforceable terms and conditions. For example, a charity might receive a gift that the donor advises must be spent on a particular program or purpose or invested as an endowment fund.

The CRA has excluded such internal trusts of registered charities from the requirement to file a T3 return. However, we believe that an exception for internal trusts of registered charities should be legislated.

Recommendation: We recommend the legislation of the exception for internal trusts of registered charities. Unless there is a policy reason not to extend this exception to not-for-profit organizations, we also recommend that internal trusts of not-for-profit organizations be included in this legislated exception.

2. Deemed trusts under subsection 150(1.3)

Subsection 150(1.3) deems an express trust to arise where an express trust does not otherwise exist and (i) one or more persons ("legal owners") have legal ownership of property that is held for the use of, or benefit of, one or more persons or partnerships and (ii) the legal owner can reasonably be considered to act as an agent for the persons or partnerships who have the use of, or benefit of, the property.

The TRWG appreciates the amendment of this subsection to provide better clarity on what constitutes a "bare trust" for the purposes of the beneficial ownership reporting requirements, which per the explanatory notes relies upon the existing trust concept of the division of legal and beneficial ownership.

Subsection 150(1.3) is overly broad and may capture leasing, licensing, easements, rights of way or similar arrangements where a third party is entitled to use or benefit from property and there is an agency relationship without that third party being entitled to the property itself. For example, in a landlord/ tenant situation, the tenant has the right to "use" property that is beneficially owned by the landlord and the landlord may commit to carry out certain improvements as agent for the tenant. Similarly, most lease /licensing arrangements involve ownership of property by the licensor that is used by the licensee pursuant to a contract where one party may be considered agent of the other party. In neither situation is the tenant or licensee entitled to profits or gains from the property and, accordingly, in our view, should not be reportable. In order to clarify that this reporting is not required, a new subparagraph should be added to the deemed trust requirements in paragraph 150(1.3)(a) whereby the person or partnership who is entitled to the use or benefit of the property also must be entitled to income and capital of the property.

An additional paragraph should be added to subsection 150(1.3) to address the question as to who (if anyone) would be deemed to be a "settlor" of the deemed trust, or to clarify that nobody is. Alternatively, if it is determined that the deemed trust would not have a settlor in the first place without a rule deeming a person to be one, please indicate in the Explanatory Notes.

Similarly, an additional paragraph should be added to subsection 150(1.3) to address the question as to who (if anyone) would be deemed to be a "controlling person" of the deemed trust or clarify that nobody is.

Additional paragraphs should be added, or clarification should be provided in the Explanatory Notes, to address what happens in common situations involving a bare trust:

a) A change in the beneficial ownership of property held by a bare trustee. Does the former bare trust cease to exist, and a new bare trust get created or is there merely a change in the beneficiary of an existing trust?
b) A change in the trustee of a bare trust relationship? Does the former bare trust cease to exist, and a new bare trust get created or is there merely a change in the trustee of an existing trust?

Recommendation: We recommend the following modifications:

- **a paragraph should be added whereby the person or partnership who is entitled to the use or benefit of the property also must be entitled to income and capital of the property, and**
- **a paragraph should be added, or explanatory notes should be provided, to clarify the following:**

- **the question as to who (if anyone) would be deemed to be a "settlor" of the deemed trust, or to clarify that nobody is.**
- **the question as to who (if anyone) would be deemed to be a "controlling person" of the deemed trust or clarify that nobody is.**
- **the question of what happens as a result of a change in the beneficial ownership of property.**
- **the question of what happens as a result of a change in the trustee of a bare trust relationship.**

The TRWG is also looking for clarification regarding the following situation:

- The coming-into-force for arrangements that may constitute express trusts under the general meaning of that expression and are also described in subsection 150(1.3) is unclear. For example, in the case of specific client trust accounts for lawyers and other regulated professionals or persons, these trusts may be considered express trusts or may be deemed express trusts under new subsection 150(1.3). Clarification of the coming-into-force for arrangements which may be considered an express trust and a deemed express trust will be important because subsections (1.3) and (1.31) only apply to taxation years that end after December 30, 2025.

Recommendation: We recommend the following:

- **Clarification that any arrangement that is deemed to be an express trust under subsection 150(1.3), and which may also be considered an express trust under the general term is afforded the delayed coming-into-force date of taxation years that end after December 30, 2025.**

3. Deemed trust exceptions under subsection 150(1.31)

Subsection 150(1.31) overrides subsection 150(1.3) so situations described in paragraphs (a) through (g) of subsection 150(1.3) do not result in deemed express trusts (and related filing obligations). Deemed express trusts may still benefit from the exceptions contained in subsection 150(1.2).

The TRWG appreciates the list of exceptions to the deemed trust rule under subsection 150(1.3). Based on our review of these exceptions, we have the following comments:

Paragraph 150(1.31)(a)

Paragraph 150(1.31)(a) applies where each deemed beneficiary is also a legal owner and there are no legal owners that are not deemed to be beneficiaries. The Explanatory Notes state "this would provide certainty that subsection 150(1.3) would not apply in circumstances where individuals hold the property both for their own use and benefit and for that of another person, such as where family members hold a joint bank account."

In our July 19, 2024 submission, we recommended an exception for bare trusts where all the beneficial owners have legal ownership of the property throughout the year. The exception provided in paragraph 150(1.31)(a) implements our recommendation with the following additional criterion "*and there are no legal owners that are not deemed to be beneficiaries*". This additional criterion is unnecessary if the objective is to ensure transparency of beneficial ownership when there is a separation of legal and beneficial ownership.

The TRWG would also like to point out the following situations that could arise where this exception seems to be inappropriately unavailable:

Death of a co-owner
This paragraph does not seem to apply once a legal (and beneficial) owner dies. When such an owner dies and legal ownership of the property transfers to the estate, this exception would not seem to apply unless perhaps the estate trustees are also deemed beneficiaries.

Sawdon or Pecore arrangements
Trusts are often created by operation of the common law in estate situations. In a "Sawdon" arrangement, individuals with legal ownership may not acquire beneficial ownership until the passing of someone (e.g., a parent). Similarly, in a "Pecore" arrangement, the transfer of legal ownership might create a resulting trust in favor of the transferor with the transfer of beneficial ownership occurring on the death of the transferor.

Recommendation: We recommend the removal of the criterion "*and there are no legal owners that are not deemed to be beneficiaries*" and that this rule be modified to accommodate changes in legal ownership resulting from the death of a legal (and beneficial) owner and situations where individuals have legal ownership but where beneficial ownership vests later.

Paragraphs 150(1.31)(b) and (c)
Paragraphs 150(1.31)(b) and (c) excepts deemed express trusts from reporting where the trusts hold only real property and a hypothetical principal residence test is met.

Paragraph (b) applies when the legal owners are individuals that are "related persons", the property is real property that would be the principal residence of one or more of the legal owners for the year if those legal owners had designated the property for the year under the definition "principal residence". The Explanatory Notes state "*this would exclude arrangements such as where a parent is on title to allow a child to obtain a mortgage*."

Paragraph (c) applies where the legal owner is an individual, the property is real property that is both held for the use of, or benefit of, the legal owner's spouse or common-law partner during the year, and would be the legal owner's principal residence for the year if the legal owner had designated the property The Explanatory Notes state "this would include circumstances where spouses jointly occupy a family home, but only one spouse is on title".

Narrow application of paragraphs (b) and (c)
These paragraphs apply to very specific situations, which could negate relief from subsection 150(1.3) for other similar, but not exact, scenarios. For example, a grandparent, aunt or uncle with their name solely on title would be excluded from this exception. A child's name solely on title for the benefit of their parents or grandparents would also be excluded from this exception. A spouse's name solely on title for the sole benefit of the other spouse where the legal title spouse has no beneficial ownership would also be excluded. This exception may also not apply to certain commonly used alter-ego or joint spousal/partner trusts. The 2018 Federal Budget stated that the need for beneficial ownership reporting was because "*Authorities require sufficient information in order to determine taxpayers' tax liabilities and to effectively counter aggressive tax avoidance as well as tax evasion, money laundering and other criminal activities*". The personal tax system already contains reporting mechanisms to provide CRA with sufficient information regarding the disposition of an individual's principal residence allowing it to determine a taxpayer's tax liability. The existence of a principal residence seems low risk with regards to money

laundering and other criminal activities. We believe these paragraphs should be broadened to ensure that diverse ownership situations of a principal residence are not inadvertently excluded from the exceptions.

The hypothetical principal residence exception
Both exceptions apparently rely on the availability of the principal residence exception. Based on the current wording of both paragraphs, the TRWG is not sure if this exception would apply if another property had been designated as the legal owner's principal residence in the year or in a subsequent year? This test should be rephrased to cover situations where the principal residence exception *could have* been designated in respect of the year but for the fact that another property was already designated.

Recommendations: We recommend the following:

- **Combine paragraphs (b) and (c) and broaden the scope while accomplishing both specific situations through the wording of a single paragraph, and**
- **Revise the principal residence exception test to a hypothetical test that can apply to one or more legal owners or beneficial owners. For example:**
    - **either a legal owner or a beneficial owner could have claimed the principal residence exception but for the fact that another property was already designated.**

Paragraph 150(1.31)(d)

Paragraph (d) exempts property held for a partnership where, among other things, the property is held throughout the year for the partnership, the property is legally owned by a partner (other than a limited partner) of a partnership and the partners are required to file information returns (subject to de minimis administrative waiver of such requirements under subsection 220(2.1)).

We suggest that the requirement that the property be held throughout the year for the partnership is unduly restrictive and that property acquired for the partnership part-way through the year should not be disqualified from this exception. Also, given the requirement that the partners be required to file information returns (subject to the de minimis administrative waiver of such requirements), the additional requirement that the property be legally owned by a partner that is not a limited partner does not appear necessary as the same information will be reported for all significant partnerships irrespective of whether the legal owner is a partner or a limited partner. In any event differentiating between property that is legally owned by a general partner from property that is legally owned by a limited partner does not appear to be necessary.

Recommendation: We recommend that the "throughout the year" requirement in subparagraph 150(1.31)(d)(i) be removed and the requirement set out in proposed subparagraph 150(1.31)(d)(ii) be removed, or, if not removed, be modified to remove the bracketed exclusion for property legally owned by a limited partner.

Paragraph 150(1.31)(f)
Paragraph 150(1.31)(f) excludes deemed express trusts where the property is "Canadian resource property" (CRP) that is held solely for the use of, or benefit of, one or more persons or partnerships, each

of which is essentially a publicly listed company (listed on a designated stock exchange), or a controlled subsidiary or partnership of such company.

Based on the current wording of subparagraph (i), Canadian controlled private corporations (CCPC) would not be eligible for this exception regardless of their involvement in Canadian resource property. The TRWG is inquiring if this exclusion of CCPC's was intentional?

We also recommend using the threshold "all or substantially all" in place of solely to ease the administrative burden of immaterial situations negating access to this exception.

These arrangements that hold CRP also hold other non-CRP used directly or indirectly with the CRP, such as gas processing facilities and pumping stations.

Recommendation: We recommend using the threshold "all or substantially all" in place of solely, and expand the concept of property to also include non-CRP that is used directly or indirectly with the Canadian resource property.

Unforeseen situations

The TRWG applauds the efforts of Department of Finance to draft proposed amendments providing exceptions to identified unintended situations.

The difficulty with these proposed amendments is identifying, in advance, all the unintended situations. Trusts and arrangements can result from ordinary commercial dealings or family situations that have yet to be identified and may fall outside the exceptions provided in subsections 150(1.2) and (1.31).

The TRWG encourages the implementation of an additional exception under subsections 150(1.2) and 150(1.31) that allows the Minister to add additional exceptions as further unintended situations are identified.

Recommendation: We recommend the addition of a new paragraph to both subsections 150(1.2) and 150(1.31) for "a prescribed trust".

4. Additional information reporting under regulation 204.2

Beneficiary definition

Clarify that beneficiary is based on the definition in subsection 108(1) which includes the broader definition "beneficially interested".

Employee ownership trusts and other employee trusts

These employee trusts can have numerous employee beneficiaries (hundreds or thousands of employees) making the annual reporting requirements extremely onerous. These employee trusts usually have a well-documented strict governance model dictated by provincial or federal regulations (i.e. Employee ownership trusts) along with detailed descriptions of beneficiary classes.

Recommendation: We recommend an exception from the reporting requirements in subsection 204.2(1). If a full exception from reporting is not desirable, then we recommend a modified reporting obligation be added to subsection (2) to eliminate the reporting of detailed beneficiary information and instead "*provide a sufficiently detailed description of the class of beneficiaries to determine with certainty whether any particular person is a member of that class of beneficiaries" or instead only*

require reporting for those Canadian resident beneficiaries (not foreign resident) who receive a distribution from the trust in a particular year.

Alter-ego trusts and joint partner/spousal trusts
Alter-ego trusts and joint partner/spousal trusts are commonly used as will substitutes and should retain the same level of privacy. Consider relief from Schedule 15 reporting for contingent beneficiaries of alter-ego trusts and joint partner/spousal trusts in recognition of the fact that beneficiaries of a will do not become aware of their entitlement until death.

Recommendation: We recommend relief from Schedule 15 for alter-ego trusts and joint partner/spousal trusts

Club, society or association described in paragraph 149(1)(l)
A non-profit organization that is a club, society or association described in paragraph 149(1)(l) is excluded under paragraph 150(1.2)(e) and therefore not required to report beneficial ownership information under regulation 204.2**.** However, certain of these organizations have deemed trusts under subsection 149(5).

Recommendation: We recommend that subsection 204.2(2) exclude the reporting of beneficiary information for trusts deemed under subsection 149(5) that relate to organizations excluded under paragraph 150(1.2)(e).