



November 1, 2022

Via email : trevor.mcgowan@fin.gc.ca

Trevor McGowan
Director General, Tax Legislative Division
Department of Finance
90 Elgin St
Ottawa, ON K1A 0G5

Dear Mr. McGowan:

Re: Proposed Notifiable Transaction Rules

On behalf of the Conference for Advanced Life Underwriting (CALU), we are writing to comment on major concerns relating to the new notifiable transaction rules and to request a meeting to discuss these concerns at your earliest opportunity. By way of background, you will recall our previous submission to the Department of Finance (Finance Canada) relating to proposals to amend/expand the mandatory reporting rules dated October 19, 2021, a copy of which is attached.

In this submission we will discuss the negative implications of draft subsection 237.4(6) of the Income Tax Act¹ on employees of the specified financial institutions. Draft subsection 237.4(6) provides as follows:

(6) Subject to subsection (7)², paragraphs 4(c) and (d) do not apply, with respect to a particular transaction, to a particular person that provides services in respect of the transaction as

- (a) a bank carrying on the business of banking, as described under subsection 409(2) of the *Bank Act*;
- (b) an insurance corporation; or
- (c) a credit union, as defined in subsection 137(6).³

Our concern is that where a financial institution relies on this exclusion and does not report a transaction which is subsequently determined to be a notifiable transaction, its employees will not benefit from the provisions of draft subsections 237.4(5) and (14) which provide as follows:

¹ R.S.C. 1985, c.1 (5th Supplement) as amended (herein the Act). Unless otherwise stated all references in this submission are to the Act. Draft subsection 237.4(6) was first introduced in the draft legislation released on August 9, 2022.

² Draft subsection 237.4(7) provides that the exclusion in draft subsection 237.4(6) will not apply if the person knows, or would reasonably be expected to know but for circumstances amounting to gross negligence, that the particular transaction is a notifiable transaction.

³ Herein the "financial institutions."



(5) For the purposes of subsection (4), if any person is required to file an information return in respect of a particular notifiable transaction under paragraph (c) or (d) of that subsection, the filing of an information return by an employer or a partnership, in respect of the notifiable transaction under that subsection in prescribed form and manner in respect of the transaction is deemed to have been made by each employee of the employer, or each partner of the partnership, to which subsection (4) applies in respect of the transaction.

[....]

(14) For greater certainty, if any person is deemed to have filed an information return in prescribed form and manner in respect of a particular notifiable transaction under subsection (5), that person is not liable to a penalty under subsection (12) in respect of the particular transaction.

In particular, we would highlight that by excluding the financial institutions from the reporting requirement, the following implications can arise for employees of those institutions under the notifiable transaction provisions:

- The definition of advisor in draft subsection 237.4(1) is extremely broad and would appear to capture any employee who provides “assistance or advice” with respect to the transaction, whether or not they understood the underlying purpose of the transaction or had knowledge that such transaction falls within the list of prescribed notifiable transactions. The broad application of these rules to employees has been recognized in the draft legislation which provides a narrow exemption to any person solely because the person provided clerical or secretarial services with respect to the planning (draft subsection 237.4(8)).
- The reporting obligation can extend to a transaction or a transaction in a series of transaction that is “substantially similar” to a designated notifiable transaction. In our view, the definition of “substantially similar” in draft subsection 237.4(2) provides significant discretion to both the Canada Revenue Agency (CRA) and the tax courts in its interpretation. It also requires a level of knowledge and understanding of the underlying result of a specific transaction, as well as a relatively high-level of tax expertise, which most employees of financial institutions do not possess.
- Unlike the reportable transaction rules⁴ there is no “fee”⁵ requirement for the notifiable transaction rules to apply. Thus, a salaried employee engaged in his or her regular employment activities, who becomes an advisor with respect to a notifiable transaction at the direction of his or her superiors, would still have a reporting obligation and be subject to penalties for non-reporting.
- Those financial institutions who are exempt from the reporting obligation are in the best position (through their internal governance, compliance, legal and tax departments) to determine if certain transactions that might be undertaken by employees fall in the category of notifiable transactions, and either take steps to ensure employees do not engage in those activities, and/or properly report the transaction so as to relieve the employees of this obligation and potential liability for penalties.
- The amount of the penalty under draft subsection 237.4(12), which in many cases will result in a minimum of \$110,000, could far exceed the annual salaries of affected employees and would put them

⁴ Contained in subsection 237.3 of the Act

⁵ “Fee” for purposes of section 237.4 has the same meaning as in subsection 237.3(1).



in an extremely vulnerable financial position. The amount of penalties that could be assessed against an individual employee could also be exponentially increased by the joint and several liability provided for in draft subsection 237.4(16)) (i.e., the employee could be assessed the penalties that apply for the non-reporting by the taxpayer, other employees, and the taxpayer's other advisors).

- The only recourse that would appear to be available to affected employees of the specified financial institutions would be to rely on the due diligence defence under draft subsection 237.4(17). Court interpretations of the due diligence defence under other provisions of the Act appear to require the person relying on this defence to have taken active steps to ensure compliance with the applicable provisions of the Act. Where the employee has no knowledge of the notifiable transaction rules or is under the mistaken belief that the transaction is not a notifiable transaction, it is unclear whether they will be able to meet the necessary standard to qualify for this defence. In any event, the CRA could take the view that the defence is not available to a particular employee and force an employee to incur the expense of litigating this issue, which means the employee will have the penalty assessment outstanding for an extended period of time without resolution.

Given the above noted issues and concerns CALU is recommending that the exclusion provided to financial institutions under draft subsection 237.4(6) not be part of the final notifiable transaction legislation. This would ensure these financial institutions play a similar role in reporting to the CRA, as compared to other financial and advisory organizations, by ensuring that proper reporting is being provided by the employer in respect any advisory services provided by their employees that relate to a notifiable transaction. Alternatively, the exclusion in draft subsection 237.4(6) should be extended to all employees of these financial institutions, subject to the same limitations set out in draft subsection 237.4(7).

Thank you for your immediate attention to this matter. We look forward to discussing this issue with you at your earliest opportunity and Kevin Wark will be following up with your office this week to arrange a meeting.

Yours truly,

Guy Legault
President & CEO

cc. Robert Demeter, Senior Director, Tax Legislation Division, Department of Finance
Kevin Wark, Tax Advisor, CALU