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Voluntary Disclosures Program
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Comments on Proposed Changes to the Canada Revenue Agency's Voluntary Disclosures Program

Dear Sir or Madam:

On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to comment on the proposed changes to the Canada Revenue Agency's ("CRA") Voluntary Disclosures Program ("VDP") outlined in *Draft Information Circular – 1C00-1R6 – Voluntary Disclosures Program* ("Draft Circular") and *Draft GST/HST Memorandum 16.5 – Voluntary Disclosures Program* ("Draft Memorandum").

The Draft Circular and Draft Memorandum substantially limit the relief available to sophisticated taxpayers under the income tax VDP and GST/HST VDP, respectively. Moreover, the Draft Circular excludes corporations with gross revenues in excess of \$250 million from the income tax VDP altogether. These changes, as well as general confusion regarding application of provisions in the Draft Circular and Draft Memorandum, undermine the CRA's goal of providing fair relief while not appearing to reward non-compliance. TEI welcomes the opportunity to meet with the CRA to discuss these concerns before the Draft Circular and Draft Memorandum are finalized.

About Tax Executives Institute

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 56 chapters in North and South America, Europe, and Asia, including four chapters in Canada. Our approximately 7,000 members represent 2,800 of the largest companies in the world, many of which either are resident or do business in Canada.

Canadians constitute nearly 15 percent of TEI's membership, with our Canadian members belonging to chapters in Calgary, Montreal, Toronto, and Vancouver. TEI members must contend daily with the planning and compliance aspects of Canada's business tax laws. Many of our non-Canadian members (including those in Europe and Asia) work for companies with substantial activities and investments in Canada. These comments reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

As the preeminent association of business tax professionals worldwide, TEI has a significant interest in encouraging the uniform and equitable enforcement of tax laws, and reducing the cost and burden of tax administration and compliance to the benefit of taxpayers and government. TEI is committed to maintaining a system that works—one that builds upon the principle of voluntary compliance, is consistent with sound tax policy, is easy to administer, and is efficient. The diversity, professional training, and global viewpoint of our members enable us to bring a balanced and practical perspective to the issues raised by the draft guidance discussed herein.

Comments on the Draft Circular and Draft Memorandum

A. Summary of the Proposed Changes to the VDP

1. The Income Tax VDP

The Draft Circular establishes two tracks for income tax disclosures: a General Program and a Limited Program. Under the General Program, taxpayers are generally entitled to 100-percent penalty relief and 50-percent interest relief for the preceding three years. Under the Limited Program, taxpayers are entitled to relief only from the gross negligence penalty and are not entitled to interest relief. Sophisticated taxpayers are eligible to participate only in the Limited Program. Corporations with gross revenue in excess of \$250 million for at least two of the last five tax years are ineligible to participate in either program.

2. The GST/HST VDP

The Draft Memorandum creates three tracks for disclosures related to GST/HST registrants based upon the type of non-compliance being remedied. Track One applicants are entitled to 100-percent penalty and interest relief. Track Two applicants are entitled to 100-percent penalty relief and 50-percent interest relief. Track Three applicants are entitled to relief only from the gross negligence penalty and are not entitled to interest relief.

The Draft Memorandum also specifies different look-back periods where a registrant previously provided inaccurate, incomplete, or underreported information regarding their tax affairs. Specifically, Track One applicants must address the prior four years, Track Two applicants must address the prior six years, and Track Three applicants must address all relevant years. Sophisticated taxpayers are eligible to participate only in Track Three.

B. General Comments

TEI appreciates the opportunity to provide the CRA with comments on this important matter of tax policy. This opportunity is especially significant because fairness, consistency, and certainty are vitally important to all taxpayers.

The CRA's stated purpose for the VDP is to promote compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward and correct any previous errors or omissions in their tax affairs. The CRA acknowledges that an important principle of the VDP is to provide relief that is fair and not considered to reward non-compliance. Another is to follow "principles of procedural fairness," which require decisions under the VDP to be "made in good faith, in a manner that promotes the objects of the relevant legislation, without discriminating between applicants on the basis of irrelevant considerations." Draft Memorandum at ¶ 18; *see also* Draft Circular at ¶ 11.

In 2016, the Minister of National Revenue ("Minister") established the Offshore Compliance Advisory Committee ("Committee") to provide advice to the Minister and the CRA regarding administrative strategies to deal with offshore compliance. The Committee made its recommendations with respect to the VDP in a 2016 *Report on the Voluntary Disclosures Program*.

In that report, the Committee noted the Organisation for Economic Co-operation and Development ("OECD") recommends that voluntary disclosure programs be designed to (1) make participating taxpayers pay more than they would pay if they had been compliant, and (2) sanction participating taxpayers less severely than it does non-compliant taxpayers. The Committee thus concluded that:

Striking a balance between fairness, on one hand, and revenue generation, on the other hand, is critical to the successful operation of a VDP. To appear fair, a VDP should operate under consistent and transparent rules and practices across the country. For example, it should not be so lenient as to raise fairness concerns for taxpayers who are complying with the tax obligations.

Report on the Voluntary Disclosures Program, p. 2.

Similarly, the Federal Government has repeatedly stated its commitment to fairness. For example, in the 2017 Budget, the Federal Government stated its intention to take actions to ensure that the tax system is fair in both design and administration. Further, the CRA's publication *Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer* states that taxpayers have the right to be treated fairly. TEI recognizes the CRA's need to revisit its VDP and encourages the CRA to focus this administrative guidance on fairness, common sense, consistency, and transparency.

C. Changes to VDP for Certain Corporations

As discussed above, sophisticated taxpayers are eligible for relief under the Limited Program of the income tax VDP and are subject to Track Three under the GST/HST VDP. As such, sophisticated taxpayers are entitled to relief only from the gross negligence penalty and are not entitled to interest relief. Furthermore, corporations with gross revenue in excess of \$250 million for at least two of the last five tax years are ineligible to participate in the income tax VDP altogether.

As a preliminary matter, neither the Draft Circular nor the Draft Memorandum define a “sophisticated taxpayer.” Such clarification is vitally important for the business community to evaluate its eligibility for, and interest in, participating in the VDP.

Moreover, there is no valid policy basis for the Draft Circular’s and Draft Memorandum’s disparate treatment of these taxpayers. Such treatment contravenes the VDP’s principles of procedural fairness, which require decisions to be made in good faith and in a manner that promotes the objects of the relevant legislation, without discriminating between applicants on the basis of irrelevant considerations.

The mere “sophistication” or size of a taxpayer should not determine whether they are entitled to relief under the VDP. Assuming the CRA’s policy choice to treat such taxpayers disparately is inspired by gross revenues or GST/HST disclosed, TEI would like to make clear that there are many large taxpayers that have no internal tax resources and limited resources to hire tax consultants. Moreover, the size or complexity of a sophisticated taxpayer’s operations could give rise to more opportunities for inadvertent non-compliance, as opposed to willful or deliberate non-compliance.

Limitations on relief under the VDP should be based upon a taxpayer’s inappropriate conduct rather than its size or sophistication.¹ The lists provided by the Committee and the CRA at paragraph 21 of the Draft Circular largely target specific circumstances, transactions, or scenarios—not specific taxpayers (except for the exceptions noted in this submission). TEI maintains that the final versions of the Draft Circular and Draft Memorandum should focus on situations or circumstances in which the CRA does not wish to provide interest and penalty relief, rather than discriminating against specific groups of taxpayers.

¹ TEI notes that the Committee provided a partial list of the circumstances that may warrant reduced relief of interest and penalties at page 4 of its 2016 *Report on the Voluntary Disclosures Program*, which included “sophisticated” taxpayers. However, the Committee did not provide any reasoning or policy basis for reducing interest and penalty relief to sophisticated taxpayers. Moreover, in its explanation, the Committee referenced “sophisticated taxpayers [that] have sought expert advice and used complex offshore structures to evade significant amounts of tax over several years” as taxpayers whose interest and penalty relief should be reduced.

Moreover, the Draft Circular and Draft Memorandum threaten to unduly limit the Minister's discretion. Subsection 220(3.1) of the *Income Tax Act* and Section 281.1 of the *Excise Tax Act* provide the Minister broad discretion to waive or cancel penalties and interest. Denying the benefits of the VDP to an entire class of taxpayers on the basis of irrelevant or arbitrary considerations such as revenue or size, rather than the facts and circumstances of each case, could be considered an improper fettering of the Minister's discretion, such that a refusal to grant relief on that basis would be per se unreasonable. At a minimum, in the spirit of transparency, we request that the CRA provide an explanation of the basis for this policy choice.

In sum, any taxpayer can make mistakes. A VDP should encourage taxpayers to voluntarily come forward and disclose them. The Draft Circular and Draft Memorandum undermine this fundamental objective.

D. Reopening Statute-Barred Years

Paragraph 30 of the Draft Circular provides, in pertinent part, that “[a] taxpayer’s VDP application for a particular issue must be made for *all relevant taxation years* where there was previously inaccurate, incomplete, or unreported information regarding their tax affairs, including any non-arm’s length transactions and circumstances.” (Emphasis added.) The Draft Circular would thus re-open the statute of limitations for all relevant years for income tax VDPs.

A similar provision applies to Track Three cases in paragraph 26 of the Draft Memorandum, which specifies different lookback periods for each of the three tracks: Track One applicants must address the prior four years; Track Two applicants must address the prior six years; and Track Three applicants must address all relevant years. In general, the statute of limitations for GST/HST assessments is four years. The Draft Memorandum would thus re-open the statute of limitations for two closed years of Track Two applicants and for all relevant years of Track Three applicants.

This policy is certain to discourage all taxpayers from participating in the income tax VDP and Track Two and Track Three applicants from participating in the GST/HST VDP, particularly given the limited relief available thereto. These policy decisions thus undermine the VDP’s stated objective of promoting compliance with Canada’s tax laws by encouraging taxpayers to voluntarily come forward and correct any previous errors or omissions in their tax affairs.

TEI’s comments were jointly prepared under the aegis of TEI’s Canadian Income Tax Committee, whose Chair is Paul Magrath and TEI’s Canadian Commodity Tax Committee, whose Chair is David Card. Pilar Mata and Watson M. McLeish, Tax Counsels for TEI, coordinated the preparation of TEI’s comments. If you have questions about TEI’s comments, please contact Mr. Magrath at (905) 944-5000 ext. 7264 or paul.magrath@huawei.com, Mr. Card

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Respectfully submitted,
Tax Executives Institute, Inc.



Robert L. Howren
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