

## THE ASSOCIATION OF GLOBAL CUSTODIANS

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22 April 2011

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### **Re: Issues Raised By Interpretations of Recent Amendments to the Corporate Tax Law in Poland**

Dear Sirs:

We write on behalf of the members of the Association of Global Custodians (the "Association") to convey members' concerns regarding aspects of the recent amendments to the Polish Corporate Tax Law ("Law"), notably the conditions pertinent to dividend withholding exemptions. As you may know, the Association is an informal group of eleven global banking institutions, listed on the letterhead above, that conduct significant custodian services and related asset-servicing functions on behalf of cross-border institutional investors worldwide, including non-resident institutional clients investing in Poland.

As we understand, the Law provides for a dividend withholding tax exemption for European Union ("EU") and European Economic Area ("EEA") resident pension and investment funds provided they meet certain conditions outlined in the legislation.

Pension funds, for example, must meet the following conditions in order to benefit from the exemption:

- They fund must be resident in an EU / EEA member state that has signed a Double Taxation Agreement ("DTA"), or a Tax Information Exchange Agreement ("TIEA") with Poland;
- The pension fund is taxed in its country of residence on all income received;
- The pension fund must conduct its activities based on the approval and supervision of the relevant authorities in its country of residence;

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- The pension fund must appoint a Polish custodian bank to register its Polish assets;
- The sole business of the pension fund is the collection of contributions and subsequent investment; and
- Distribution of funds to pension fund beneficiaries occurs only when the pension age is reached.

In turn, investment funds must meet the following conditions in order to benefit from the exemption:

- The investment fund must be resident in an EU / EEA member state that has signed a DTA or TIEA with Poland;
- The investment fund must be taxed in its country of residence on all income received;
- The investment fund must be established solely for collective investment into securities, money market instruments and other property rights (by offering participation in units);
- The investment fund must conduct its activities based on the approval and supervision of the authorities in its country of residence; and
- The investment fund must appoint a Polish custodian bank to register its Polish assets.

Given these Law changes, many Polish custodian banks -- members of the Polish Bankers Association -- have issued their own versions of forms and procedures to enable non-resident investors to obtain the tax exemption benefit. The forms are to be completed by end investors to avail themselves of the exemption benefit. Unfortunately, the forms in circulation are not consistent, and some require the investor to confirm they are 'subject to tax' while others require the investor to confirm they are 'liable to tax'.

As a result, the Association is concerned that the forms do not make clear the conditions set out in the Law. In particular, Association members are concerned that the taxation requirement from the Polish wording "podlega opodatkowaniu" may have been unofficially interpreted to mean 'subject to tax' and this conclusion has been reflected in some forms, but not consistently.

Significantly, Association members are concerned that investors will be unable to avail of the benefit foreseen by the changes in the Law until a clear definition of the meaning of the term 'podlega opodatkowaniu' can be provided. The substantive issue

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is whether this term requires that a person *must actually pay tax* on the income in their country of residence. As you will be aware, pension funds are *typically exempt from tax* on income received from investments provided that certain conditions are met. As such, this test is of primary importance in determining eligibility for this relief.

Although members recognize that the wording in question is a matter of local law, the matter of interpretation is helpfully referenced in the 2010 The Organisation for Economic Co-operation and Development ("OECD") Income and Capital Model Convention and Commentary. This document discusses, as follows, how the terms 'liable to tax' and 'subject to tax' have been interpreted:

In many States, a person is considered liable to comprehensive taxation even if the Contracting State does not in fact impose tax. For example, pension funds, charities and other organisations may be exempted from tax, but they are exempt only if they meet all of the requirements for exemption specified in the tax laws. They are, thus, subject to the tax laws of a Contracting State.

Some countries consider that an entity exempt from tax in its home country does not pay tax and therefore is not "subject to tax"; they determine that "subject to tax" requires the "actual payment of tax."

The Association believes it would be very helpful to members and cross-border investors if the Polish Bankers Association ("PBA") would issue a formal confirmation of how the term in question should be interpreted and translated, which could then be used consistently by PBA members. The Association would be very pleased to receive your reaction to this suggestion as a first step. Members stand ready to provide any further information or assistance that you may require in this connection.

\* \* \* \*

The Association appreciates the opportunity to provide the comments and requests set forth above. If you have questions concerning the foregoing or would like to discuss any of these issues further, please feel free to contact the undersigned as an

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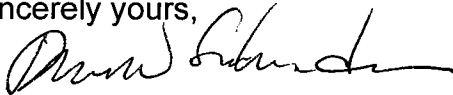
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initial matter or Lorraine White, Northern Trust, on +442079822949  
LW42@NTRS.COM.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dan W. Schneider". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dan W. Schneider  
Baker & McKenzie LLP  
Counsel to the Association