



July 9, 2013

taxforms@irs.gov

Via electronic delivery

RE: Comments on Draft Forms

Ladies and Gentlemen,

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the draft Internal Revenue Service (“IRS”) forms listed herein. SIFMA also submitted comments on June 21 on the final regulations implementing the provisions of the Foreign Account Tax Compliance Act (“FATCA”). In those comments we outlined a number of outstanding concerns and made recommendations to the Treasury, including a request for further relief from the January 1, 2014 effective date.

1. Further relief is necessary regarding the January 1, 2014 effective date to avoid over-withholding due to delays in the promulgation of guidance, including final forms and instructions.

Although the financial industry has been actively working to implement FATCA, SIFMA is increasingly concerned that there will be a substantial amount of over-withholding against ordinary, international capital flows if the January 1, 2014 deadline for FATCA withholding is retained. Such withholding will likely have severe adverse consequences for the financial markets generally, and will potentially expose financial intermediaries to claims from their counterparties. While we continue to support the goals of FATCA and appreciate the discretion

¹ SIFMA brings together the shared interests of securities firms, banks, and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Treasury already has used to implement a new and highly complex regulatory scheme, we question whether a January 1, 2014 effective date of FATCA withholding would further the goal of detecting or deterring tax evasion by U.S. taxpayers. We are concerned that unexpected 30% withholding on payments to foreign taxpayers with no U.S. tax liability - - withholding caused solely by the inability of U.S. financial institutions (“USFIs”) and foreign financial institutions (“FFIs”) to develop the required compliance systems in the time remaining after the availability of final forms and instructions or delays in finalizing FATCA intergovernmental agreements - - could cause foreign investors to lose a measure of confidence in U.S. markets with long-lasting, negative consequences for all Americans. Given the severity of the potential consequences, we would urge Treasury to work closely with SIFMA members and other financial institutions to avoid unnecessary FATCA withholding.

In our April 2012 comment letter, SIFMA shared the attached chart illustrating the timeline for development of systems necessary to comply with FATCA (see Appendix 1 to SIFMA’s April 30, 2012 letter, which anticipates a 15 month timeline). At the time, we had assumed that “all relevant final FATCA regulations, forms, instructions, and model agreements” would be available by September 1, 2012. It is now many months past that date, and key forms and instructions are not yet available in final form.

The absence of final forms and instructions is a serious impediment to USFIs and FFIs being able to be ready by January 1, 2014 (since the IT systems will need to be programmed in conformity with the forms). As we previously advised the Treasury and the IRS, withholding agents will require at least 15 months from the issuance of all final guidance, including instructions, in order to design, build and implement the necessary systems. Modifications to these forms at this point in the year is particularly difficult as many SIFMA members use substitute forms embedded in account opening documentation. Changes to these forms will require additional time to implement. In addition, the window of opportunity to develop definitive and complete training materials for internal personnel and to commence educating clients about the impact of FATCA on their accounts is quickly narrowing. Ample time must be provided to enable financial institutions to roll-out effective educational programs as well.

2. All required fields should be clearly marked as such.

We recommend the IRS clearly mark all fields that are required. On several forms where there is a capacity box to be checked, the word “required,” or similar verbiage, should be included next to the box.

3. References to “Chapter 3” and “Chapter 4” should be removed on the forms.

References to “Chapter 3” and “Chapter 4” should be removed on the actual forms and instead referred to as “Entity Type” (or U.S. tax classification) and “FATCA Status,” respectively. Further clarifications should be made in the instructions (e.g., “entity type pursuant to [section number]”). This change should be consistent across all forms.

4. Terminology should be consistent across all forms.

The terminology should be consistent across all forms. For example, on Part I of the draft Form W-8BEN-E as of May 20, 2013, the Chapter 3 status selections in Box 4 lists “private foundation” as one of the options. Similarly, the draft Form W-8ECI as of June 27, 2013 has “private foundation” in Box 4 of Part I. However, on the draft Form W-8EXP as of May 23, 2013, Box 3 (“type of entity”) lists “foreign private foundation.” This particular difference has existed since release of the 2006 forms but should be harmonized in the final forms. “Private foundation” would be sufficient terminology to use since the only entities completing the forms are foreign.

5. Numbering should be kept as consistent as possible to forms from prior years.

Numbering should be kept as consistent as possible to forms from prior years. On the new forms old values have been renumbered and moved around on the list. For example, on the draft 2014 Form 1042-S, “Individual” is now recipient code number 19 whereas on the original 2013 Form 1042-S “Individual is code 01. Such renumbering presents a very significant data challenge for our systems and clients. In addition to coding for the new values and new Chapter 4 boxes, the old values for Chapter 3 need to be revamped and a data conversion for existing accounts will be required. This adds significant complexity and overhead to the already extremely complex development effort. We recommend the IRS revert back to the original

numeric values for the same recipient descriptions (boxes “Chapter 3 Status Codes” and “Chapter 4 Status Codes”), while adding new numeric values for the additions to the list due to FATCA changes. This will remove the need for a major data conversion effort on our clients’ part.

6. The forms should clarify which forms foreign branches should provide to other withholding agents.

The IRS should clarify which forms (Form W-9 or Form W-8IMY) should be provided by a foreign branch of a USFI that is located in a Model I Intergovernmental Agreement (IGA) country.

7. Comments on Form 1042-S

We recommend the IRS increase the size of the input field for the names on Form 1042-S. Line 13a (“Withholding agent’s name”) and line 16a (“Intermediary or flow-through entity’s name”) should be increased in size.

On the Form 1042-S, there is no box provided for the GIIN with respect to the recipient. The IRS should include that field on the form, consistent with the Form W-8BEN-E.

8. Comments on Form 1042

Regarding Line 62d (“Enter gross amounts actually paid if different from gross amounts reported”) on Form 1042, we would appreciate clarity on what situations would cause the gross amounts paid to be different from the gross amounts reported.

Section 2 of Form 1042 (“Reconciliation of Payments of U.S. Source FDAP Income”) should be eliminated, or at least postponed a number of years, as it is too burdensome to implement at this point. It will take time to implement the processes and procedures necessary to perform this reconciliation; time that withholding agents will not have in the early stages of FATCA implementation, considering the plethora of other new responsibilities of withholding agents as a result of the regulations.

9. Comments on Form W-8BEN-E

We would appreciate clarity as to what the last check box on Line 5 refers. The check box reads, “Not receiving withholdable/passthru payment. Must enter code:” and then provides a space for a code. This entry is confusing since this is a statement of fact and may change on a daily basis. This box does not seem to be an alternative to the other boxes and it is unclear why it is included, because it does not appear to be a representation of FATCA status of the foreign entity. We believe this will result in many improperly completed forms.

On the draft Form W-8BEN-E, the check box for “excepted interaffiliate FFIs” was omitted from the list of Chapter 4 status codes in Part I, Line 5.

The current location of Part III (“treaty claim”) could cause confusion and we recommend the IRS organize the form so that all sections relating to Chapter 3 are more closely linked.

We recommend that “do not abbreviate” be removed from Lines 2, 6, and 7 regarding the country of incorporation or organization or the permanent residence or mailing address. There are a number of countries with well-known abbreviations and it is unreasonable to invalidate a form based solely on an abbreviation. We believe if a country’s abbreviation is not ambiguous the form should be acceptable.

The draft Form W-8BEN-E includes in Line 5 a section for 501(c) organizations, which is already included on the Form W-8EXP. The instructions should make it absolutely clear when to use which form, and clarify that both are not necessary.

While we understand the need to ascertain a physical address, we believe it would be appropriate for an entity to use a P.O. box or in-care-of address in the case the entity does not have a physical address. Lines 6 and 12 state, “Do not use a P.O. box or in-care-of address,” which is unduly burdensome. According to Notice 2001-4, the IRS “will permit Forms W-8 that contain a P.O. box as a permanent residence address to be relied upon provided that the

withholding agent does not know, or have reason to know, that the person providing the form is a U.S. person and provided that the withholding agent does not know, or have reason to know, that a street address is available.” Consistent with this policy, SIFMA believes a P.O. box or in-care-of address should be acceptable in cases where no brick and mortar location exists except at the offices of administrator or trustee. The language on the new Form W-8 that blocks usage of a P.O. box does not reflect the policy announced in Notice 2001-4 and, accordingly, such language should be eliminated.

Finally, there is concern that Part XXVII of the W-8BEN-E comes after the perjury certification (Part XXVI), and may be confused as not being completed under penalties of perjury. We recommend the IRS move the perjury certification underneath “Substantial U.S. Owners of Passive NFFE.”

10. Comments on Form W-8BEN

The draft Form W-8BEN for individuals includes a line with “print name of signer” and “capacity in which acting (if form is not signed by beneficial owner).” We recommend the form be changed to make clear that neither of these lines are required unless the signer is someone other than the person named on Line 1. Towards this end, the last portion of the form should be preceded by a caption to the effect of, “If this form is signed by someone other than the person named on Line 1, complete the following:”

As we recommended on the Form W-8BEN-E, “do not abbreviate” should be removed from Lines 2, 3, and 4 regarding the country. As stated above, we believe if a country’s abbreviation is not ambiguous the form should be acceptable.

Also as reflected in Notice 2001-4, we believe it is appropriate in some circumstances for withholding agents to rely on a P.O. box provided by an individual, although we agree that individuals should not provide an “in care of” address. Therefore we believe “a P.O. box or” should be removed and replaced with “an” on Line 3.

11. Comments on Form W-9

Form W-9 includes a box for exemption codes from FATCA reporting. Inclusion of these codes raise concerns that once these codes become mandatory, requests of forms W-9 will be required to continuously verify the exemption. We recommend that requesters be able to rely on the code without having to verify it initially or at any subsequent point during the validity of the form. For accounts maintained in the U.S., the FATCA codes are not relevant. The form should make it clear that the codes are not required in this instance. Additionally, we recommend that IRS issue guidance affirming that an incorrect code does not invalidate the form in the case the code is not relevant to tax withholding or reporting.

Finally, the substitute Form W-9 requirements should clarify that only applicable sections of the form are required, including certifications, in order for a substitute Form W-9 to be treated as valid. Accordingly, the new exemption codes from FATCA reporting and the new fourth certification would not be required on valid substitute Forms W-9 used to document accounts maintained in the U.S.

SIFMA appreciates your consideration of its collective views and concerns on the draft forms. Please do not hesitate to contact Payson Peabody at (202) 962-7300 or ppeabody@sifma.org if you have any questions or if we can be of further assistance.