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Re: Comments on Qualified Intermediary Agreement

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] welcomes the opportunity to comment on the revised Qualified Intermediary Agreement (the "QI Agreement"). We appreciate the efforts of the Internal Revenue Service ("IRS") to revise the QI Agreement to reflect changes brought about as the result of the enactment of the Foreign Account Tax Compliance Act ("FATCA").

Restrictions on the joint account procedure

The QI Agreement includes several restrictions to the so-called "joint account" procedures that our members would like better to understand. The joint account procedure,

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

which is described in Section 4.05 of the QI Agreement, generally allows a QI to treat the beneficial owners of certain flow through entities as members of a joint account. As a result, the beneficial owners are not subject to separate, payee-specific Form 1042-S reporting.

As under the prior QI Agreement, a QI must meet certain conditions in order to apply the joint account procedures. However, the new QI Agreement, as modified by an IRS release dated September 23, 2014 (FATCA News and Information Issue 2014-30), includes the following additional conditions.

- ***Restriction on type of entities eligible for joint account treatment***

  The new QI Agreement (as modified by the September 23 notice) limits the scope of the joint account procedure to a partnership or trust that is: (1) a certified deemed compliant foreign financial institution ("FFI") (other than a registered deemed-compliant Model 1 Intergovernmental Agreement ("IGA") FFI); (2) an exempt beneficial owner; (3) an owner-documented FFI; or (4) a non-financial foreign entity ("NFFE") (other than a withholding foreign partnership ("WP") or withholding foreign trust ("WT")).

We believe the first requirement in subsection (1) above is unclear. A certified deemed compliant FFI is an entity type that is separate and distinct from a registered deemed-compliant FFI. It is not clear when you would ever have a certified deemed compliant FFI that is also a registered deemed compliant Model 1 FFI.

More broadly, it is unclear why the IRS is placing any restrictions on the joint account procedure related to the FATCA status of partnerships or trusts that otherwise satisfy the conditions to apply the joint account procedure. For example, it is possible that a foreign partnership or foreign grantor/simple trust will qualify as a reporting Model 1 or Model 2 FFI, yet such entities would no longer be eligible for joint account treatment under Section 4.05 above. We do not understand the tax policy objectives the IRS is seeking to achieve by denying eligibility for the joint account procedure to FATCA-compliance partnerships and trusts.

In addition, certain foreign simple/grantor trusts will qualify for exclusion from the definition of a financial account under Annex II of various IGAs, often because they were deemed to present a low risk of tax evasion by U.S. and foreign negotiators. Nevertheless, such Annex II entities do not appear to be eligible for joint account treatment. Because these entities were considered low risk and are excluded from classification as financial accounts, SIFMA believes they should continue to be eligible for the joint account procedure under Section 4.05.

> *SIFMA recommends that the IRS should clarify Section 4.05(1) and allow other types of partnerships or grantor/simple trusts that present a low risk of tax evasion to be eligible for the joint account procedure.*

- ***Remediation deadline of June 30, 2015***

The September 23 notice allowed QIs to apply the prior joint account procedure until December 31, 2014. SIFMA believed the December 31, 2014 deadline was too quick a transition and we are very pleased to acknowledge that the IRS recently announced an additional extension until June 30, 2015. (See FATCA News and Information Issue 2014-48.)

Clarification on consequences of a "hold mail" instruction

The QI Agreement defines a "permanent residence address" by cross-referencing that term in Treas. Reg. §1.1441-1(c)(38). That regulation includes the following statement:

> "Further, an address that is provided subject to instructions to hold all mail to that address is not a permanent residence address."

The meaning of this sentence is not entirely clear. One possible interpretation is that if a permanent residence address is provided, but the account holder instructs the QI to hold all mail to that address (thus keeping all mail at the QI), then the account is treated as not having a permanent residence address. Under the QI Agreement, such accounts would be treated as undocumented. (See QI Agreement Section 5.10(B)(2)(ii).)

Another interpretation is that any address that is used to hold mail for the account holder, such as a QI's address, is not a permanent residence address for the account holder. If, however, an account holder provides a permanent residence address and also has requested that the QI hold all mail to that address, the account will nevertheless be treated as having the permanent residence address provided. We think this interpretation is more reasonable, but we are unsure whether the first or second alternative, or some other rule, is intended, because the language of the rule is ambiguous.

> *SIFMA recommends that the IRS clarify that an account may still be treated as having a permanent residence address even if there is a hold mail instruction on that account, if the account holder has provided a permanent residence address.*

Qualified Securities Lender Certification

The scope of the new QI Agreement has been expanded to include Qualified Securities Lender ("QSL") activities. SIFMA welcomes this change; however, we request that the application of the QI Agreement to QSLs be optional and we ask that the IRS clarify the following points regarding that application:

- *The QI Agreement should apply to QSLs acting as principal*. The prior QI Agreement applied only to the extent an entity acted as an intermediary. QSLs, however, frequently act as principal in securities lending transactions. SIFMA recommends, therefore, that the IRS clarify that a QSL acting as a principal is still covered by the QI Agreement. This recommendation applies only to a QSL that is acting as a QI.

- *A QSL should be allowed to apply the documentation and reporting requirements applicable to QIs*. The new QI Agreement does not specifically apply the QI documentation and information reporting requirements of QSLs. SIFMA recommends that the IRS clarify that a QSL is subject to such provisions, thus ensuring that, for example, pooled reporting is permitted for QSL payments of substitute U.S. dividends.

- *Further clarification is requested on the QSL certification requirements.* Previously, a QSL was required to provide an annual certification in compliance with Notice 2010-46. Form W-8IMY (line 14f) requires an entity to certify that it is acting as a QSL with

respect to substitute payments associated with the form. The other certification information required in Notice 2010-46 is not included on the W-8IMY. Under Section 6.01 of the revised QI Agreement, if a QI is acting as a QSL for a substitute dividend payment, QI must also certify that it is acting as a qualified securities lender and provide all other information required by the form including its QI-EIN. We request confirmation that checking the box on line 14f will be sufficient certification, or if this is not the case, clear direction that a separate certification with all of the information required by Notice 2010-46 be provided. It is our understanding that in either case an annual certification is still required.

The QI Agreement should address Dividend Equivalent Amounts under Section 871(m)

The QI Agreement does not address payments treated as U.S. source dividends under IRC Section 871(m) (Section 871(m) payments). Although Section 871(m) and the proposed regulations released December 2013 raise several operational challenges for financial institutions, this letter focuses on issues facing QIs.

In particular, under the proposed regulations, a QI may issue an instrument that qualifies as an "equity linked instrument" ("ELI"), payments on which may be treated dividend equivalent amounts ("DEAs"), which constitute U.S. source dividends. Such payments would generally be subject to 30 percent nonresident alien ("NRA") withholding and Form 1042-S reporting.

If the QI is making payments on the ELI as principal, however, it does not appear that it can invoke its QI Agreement. The QI Agreement generally applies only if the financial institution is acting as an *intermediary*, not as a principal. Consequently, the QI would likely not be able to apply its QI Agreement to such Section 871(m) payments, resulting in Form 1042-S reporting to each payee of the payment (not pooled reporting as allowed under the QI Agreement).

To prevent potential breaches of local confidentiality laws, SIFMA recommends that a QI be permitted to apply its QI Agreement to Section 871(m) payments under the condition that the QI reports the payment on Form 1042-S as a QI, using its QI-EIN on the form.

Provided this condition is satisfied, the QI would be permitted to apply the reporting rules applicable to QIs, including the ability to "pool" all dividends to direct beneficial owners on a single Form 1042-S. In addition, any withholding required on the 871(m) payments would also be covered by the QI Agreement.

Form 1099 Reporting Requirement for QIs that are non-U.S. Payors

While the amendments contained in Section 8.06 of the QI Agreement and associated U.S. Treasury Regulations provide welcome relief for non-U.S. QIs from Form 1099 reporting in most instances where the non-U.S. payor has reported the accountholder for FATCA purposes, the requirement for a non-U.S. payor QI to comply with Form 1099 cost basis reporting still exists – limited to instances where backup withholding is required or where the account has not been reported under FATCA.

The rules for cost basis reporting are extremely onerous and complex, and for non-U.S. payors would only be applied to a very small number of accounts. This reporting would require manual implementation and maintenance, which will be quite costly and risky to QIs that are non-U.S. payors. If cost basis reporting requirements continue, we are concerned that non-U.S. payors will face unreasonably high costs and bear a disproportionate amount of risk.

SIFMA recommends that QIs that are non-U.S. payors be exempted from the cost basis reporting requirements (even where Form 1099-B reporting is otherwise required).

Compliance Procedures—Timing of Periodic Certification

Under the revised QI Agreement, a periodic certification will be required and will generally cover a 3 year period, with the initial certification period covering July 1, 2014 to December 31, 2017. The first compliance certification will then be due on or before July 1, 2018.

We are concerned with the quick timeline of only 6 months for providing the certification to the IRS. Under the previous QI Agreement, there was also a 6 month timeframe allowed to submit the QI Audit Report to the IRS. However, a request for a 6 month extension was generally made and was accepted automatically by the IRS provided the request was submitted in writing by the external auditor prior to the original due date of June 30. This extra time will generally be required, particularly where external advisors are engaged to perform review procedures.

> *SIFMA recommends that a 6 month extension be allowed for a QI to submit its compliance certification to the IRS, provided the request is made in writing on or before the end of June 30 of the year following the end of the certification period.*

Responsible Officer ("RO") Obligations under the QI Agreement

The new QI Agreement requires under "Section 10. Compliance Procedures," a QI to adopt a compliance program under the authority of a Responsible Officer ("RO"). Section 10.02 stipulates that the RO must be identified on the FATCA registration website as the QI's responsible officer for purposes of compliance with its FATCA requirements.

The RO (or designee) must establish written policies and procedures sufficient for the QI to satisfy the documentation, withholding, reporting and other obligations under the Agreement, including its FATCA requirements as a participating FFI ("PFFI"), registered-deemed compliant

FFI, registered deemed-compliant Model 1 IGA FFI. The RO will be required to certify compliance with FATCA requirements under the QI Agreement.

It is unclear why the RO must certify compliance with FATCA if the QI is subject to the provisions of a Model 1 IGA jurisdiction. FFIs subject to the provisions of a Model 1 IGA jurisdiction are not required to provide certifications to the IRS concerning compliance with FATCA requirements. SIFMA requests that the IRS clarify the scope of the certification required to be provided by an RO of a QI that is located in a Model 1 IGA jurisdiction.

The requirement in Section 10.02 that the RO must be identified on the FATCA registration website as the QI's responsible officer seems to be in conflict with an FAQ. FAQ #5 under the Qualified Intermediaries/Withholding Foreign Partnerships/Withholding Foreign Trusts section states:

> Q. If an FFI has a QI/WP/WT agreement in place, does the Responsible Party for purposes of the QI/WP/WT Agreement also have to be the same as the FFI's Responsible Officer?
>
> A. No, the FFI's Responsible Party for purposes of a QI/WP/WT Agreement does not have to be the Responsible Officer chosen by the FFI for purposes of certification under the regulations or for FATCA Registration purposes.

SIFMA requests that the IRS clarify that the RO under a QI agreement is not required to be the RO listed on the FATCA registration website.

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SIFMA appreciates your consideration of these comments. Please do not hesitate to contact me at (202) 962-7300 or ppeabody@sifma.org if you have any questions or if we can be of further assistance.

Sincerely,

Payson R. Peabody
Managing Director & Tax Counsel
Securities Industry and Financial Markets Association