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Re: Final, Temporary, and Proposed Chapters 3 and 4 Regulations

Dear Ladies & Gentleman:

Securities Industry and Financial Markets Association ("SIFMA")[1] members manage nearly 80 percent of all United States broker-dealer client assets and more than 50 percent of investment advisor assets under management. A subset of our members who participated in a recent SIFMA survey for this letter maintain nearly 4 million foreign accounts and they pay well over $1 trillion per year of gross income and broker proceeds to such accounts in a typical year as explained further below. As such, our members have a strong interest in these regulations, and we greatly appreciate the opportunity to submit comments on the final, temporary, and proposed regulations (TD 9808,

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. 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.

TD 9809, REG-134247-16, and REG-103477-14, collectively, the "Regulations") under Chapters 3 and 4 of the Internal Revenue Code (the "Code").

Our members greatly appreciate and acknowledge the significant effort that went into the drafting of these regulations and the continuing efforts of the Treasury Department ("Treasury") and the Internal Revenue Service ("IRS") to clarify issues related to the implementation of FATCA and coordinate the regulations under Chapters 3 and 61. The Regulations present several operational challenges for withholding agents and since they affect tax documentation, reporting and withholding for the 2017 taxable year, it is important to obtain clarification promptly so that member firms may adequately implement the Regulations. SIFMA is making the following comments to seek clarification on these matters and request guidance that is operationally administrable.

I. Requirement for payments beginning in 2018 to be associated with a withholding certificate that contains a beneficial owner's foreign Taxpayer Identification Number ("FTIN") and, in the case of an individual, date of birth

The members of SIFMA appreciate the recent FAQs addressing the Chapter 3 temporary regulations requirement for a beneficial owner withholding certificate obtained in 2017 to include the beneficial owner's FTIN and, in the case of an individual, date of birth.[2] However, the members of SIFMA once again respectfully request prompt guidance that clarifies a withholding agent's obligations in 2018[3], given that the regulations may require withholding agents to invalidate withholding certificates and apply withholding in the absence of a FTIN and, in the case of an individual, date of birth for payments beginning in 2018.

Withholding agents are not prepared operationally to remediate all withholding certificates that do not include a FTIN and, in the case of an individual, date of birth when the date of birth is not otherwise in the withholding agent's files. Further, the consequence of invalidating withholding certificates and requiring withholding beginning in 2018 will create turmoil in the financial markets

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[2] See Treas. Reg. §1.1441-1T(e)(2)(ii)(B).

[3] See SIFMA Comment letter dated February 6, 2017.

as it will require excessive amounts of Chapter 3 or 4 withholding and backup withholding on reportable payments[4], including, for example, portfolio interest and broker proceeds. Excessive withholding will undoubtedly result in a significant increase in refund claims with the IRS, and consequently, place undue burden on withholding agents, clients, and the IRS. Among the 21 members of SIFMA that participated in a survey that we conducted recently, the members maintain approximately 4 million accounts held by foreign persons that receive well over $1 trillion per year of dollars of fixed, determinable, annual or periodic income ("FDAP") income and broker proceeds that, absent an FTIN, would be subject to withholding or backup withholding by operation of the presumption rules.[5]

SIFMA requests that the requirement to obtain a FTIN apply to withholding certificates collected (not payments made) on or after January 1, 2018. We would like to stress the importance of relying on current systems and processes for tracking and re-soliciting expiring withholding systems. A one or two-year delay of the current regulation would be insufficient relief as systems are programmed to track withholding certificates based on the date of signature. The members of SIFMA do not have the resources or capabilities to track and remediate withholding certificates that do not contain a FTIN and that have not yet expired under the rules provided in Treas. Reg. §1.1441-1(e)(4)(ii).

In addition, SIFMA requests that for withholding certificates treated as valid indefinitely under Treas. Reg. § 1.1441-1(e)(4)(ii)(B), a withholding agent be given sufficient time to obtain a new withholding certificate that includes an FTIN and, for an individual, date of birth (if date of birth is not otherwise in the withholding agent's files), by the last day of the third calendar year following the year in which the withholding certificate is signed.

The members of SIFMA also request guidance that will support practical implementation solutions. It is our understanding that the requirement to collect and report an account holder's FTIN and date

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[4] I.R.C. §3460(b).

[5] In the absence of valid documentation, the presumption rules of Treas. Reg. §§1.1441-1T(b)(3)(i) through (ix), 1.1471-3(f), and 1.6049-5(d)(2) provide that an individual account holder will generally be presumed a U.S. non-exempt recipient subject to backup withholding on reportable payments made to an account maintained inside the U.S. and an entity account holder will generally be presumed a nonparticipating FFI subject to withholding under Chapter 4 on withholdable payments or, for amounts subject to withholding under Chapter 3 that are not withholdable payments, a foreign person subject to Chapter 3 withholding.

of birth were added to the regulations in order to satisfy the US' reciprocal obligations under the intergovernmental agreements ("IGAs") to facilitate the implementation of the Foreign Account Tax Compliance Act ("FATCA"). Many foreign account holders are resident in jurisdictions that either: (1) do not have in force a reciprocal IGA and accordingly the U.S. financial institutions do not have a reciprocal reporting obligation[6]; or (2) do not issue taxpayer identification numbers. Accordingly, the requirement to collect from every foreign account holder a FTIN or, in the absence of a FTIN, a reasonable explanation is unnecessarily burdensome.

Respectfully, SIFMA members make the following additional requests.

1) Failure to provide a FTIN and, in the case of an individual, date of birth, result in information reporting penalties and not withholding or backup withholding. The imposition of penalties (and not withholding tax) is consistent with the enforcement provisions of the US' IGA partner jurisdiction for the collection US TINs by FATCA partner financial institutions reporting US accounts.

2) Similar to the bank deposit interest reporting regulations[7], the collection of FTIN and, for individuals, date of birth information should only apply to account holders that are resident in a jurisdiction that, as of December 31 of the prior calendar year, the US has in effect a reciprocal IGA. To facilitate the determination of these jurisdictions, the members of SIFMA request an allowance to rely on the Revenue Procedure 2017-31(Rev. Proc. 2017-16 I.R.B. 1104) and any superseding revenue procedure.

3) A revised version of the beneficial owner withholding certificates should be published that includes a box with the question "have you been assigned a tax identification number by your jurisdiction of tax residence" followed by check boxes for "Yes or "No." The instructions should further provide that "unless you checked "No" to the previous question you must enter your foreign TIN here." Further, the requirement to provide a reasonable explanation if

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[6] See Reciprocal Model 1A Agreement, Preexisting TIEA or DTC, Article 2, paragraph 2(b), updated November 30, 2014.

[7] See Treas. Reg. §1.6049-8.

no FTIN is provided should be removed from the regulation. Instead, the withholding certificate's instructions should provide that a foreign TIN is "mandatory if issued."

4) Delete IRS FATCA General Compliance FAQ 22 which provides that a withholding agent may treat a withholding certificate that does not contain the account holder's FTIN as valid if the "withholding agent obtains a written statement provided by the beneficial owner …that indicates that the foreign TIN is to be associated with the beneficial owner withholding certificate." A withholding certificate should be treated as valid in the absence of a FTIN if the withholding agent collects the FTIN in any reliable manner. For instance, account holders may provide their FTIN as part of account opening documentation or on a Common Reporting Standard ("CRS") self-certification form. Collecting a FTIN in such a manner is as reliable as a statement that links the FTIN to a particular withholding certificate. Thus, the addition of FAQ 22 only creates another obstacle to efficiently collecting and reporting FTINs.

II. E-signature Guidance

SIFMA welcomes guidance with respect to the circumstances in which a withholding agent that has not developed or maintained an electronic collection system may accept an electronically signed withholding certificate.[8]

Treas. Reg. §1441-1T(e)(4)(i)(B) states that "a withholding agent, regardless of whether the withholding agent has established an electronic system… may accept a withholding certificate with an electronic signature, provided the electronic signature meets the requirements of paragraph (e)(4)(iv)(B)(3)(ii)." Moreover, this section requires that the withholding certificate "reasonably demonstrate" that it was signed by the recipient identified on the form. An example in the regulation provides that a withholding certificate reasonably demonstrates that the withholding certificate has been electronically signed by the recipient identified on the withholding certificate if it includes the following elements: a signature block, the name of the person authorized to sign, a time and date stamp, and a statement that the certificate has been electronically signed.

[8] Treas. Reg. §1441-1T(e)(4)(i)(B).

The example in the regulation is subject to multiple interpretations and is causing uncertainty. Although the members of SIFMA acknowledge that the elements described above are contained in an example (as opposed to the substantive rule), we are concerned that the example may be viewed as providing a minimum standard that will not be consistent with changes in technology. For instance, the members of SIFMA believe that the elements enumerated in the example conform to the e-signature designed by a few technology companies that have an e-signature feature for documents. Changes to e-signature technology may make the specific items contained in the example irrelevant. Worse, the presence of the example may prevent the adoption of new technologies with more effective verification safeguards.

Since the intent of the regulations was likely to ensure consistency with the ESIGN Act[9] and most electronic signature systems will be designed to meet those requirements, SIFMA would like to make the following recommendation:

1) the example should be deleted from the regulation, and

2) the regulation provide only that the withholding certificate reasonably demonstrate that the withholding certificate has been electronically signed by the recipient identified on the form.

III. Electronic system maintained by an NQI, NWP, or NWT

Notice 2016-08[10] addressed the standards of knowledge that applied to withholding agents under Treas. Reg. §§1.1441-7(b)(10) and 1.1471-3(e)(4)(vi)(A)(2) regarding a Form W-8 or W-9 collected from a beneficial owner or payee through an electronic system maintained by a nonqualified intermediary ("NQI"), nonwithholding foreign partnership ("NWP"), or nonwithholding foreign trust ("NWT") and furnished to an upstream withholding agent. Notice 2016-08 provides that a withholding agent could accept the electronic version of the Form W-8 or Form W-9 as an original if the NQI, NWP, or NWT provided a written statement confirming that the electronic documentation was generated from a system that meets the requirements in §1.1441-1(e)(4)(iv),

[9] Electronic Signatures in Global and National Commerce Act (ESIGN Act), Pub. L. 106-229, 114 Stat. 464, June 30, 2000).

[10] Notice 2016-08, 2016-6 IRB 304.

§1.1471-3(c)(6)(iv), or Announcement 98-27, as applicable, and the withholding agent does not have actual knowledge that such statement is incorrect.

Unfortunately, the rule provided in the Notice 2016-08 is not included in recently published regulations. While the members of SIFMA appreciate that the electronic signature rule provided in Treas. Reg. §1441-1T(e)(4)(i)(B) (described in Section II. above) does not limit acceptance of electronically signed forms through intermediaries or flow-through entities, it also does not provide the same relief to withholding agents as the rule provided in Notice 2016-08. Specifically, Notice 2016-08 applied to both Forms W-8 and W-9, while the regulation only applies to Forms W-8. The Notice, unlike the electronic signature regulation, limited the standards of knowledge for withholding agents, recognizing that the same standard that applies to withholding certificates received directly from a beneficial owner or payee cannot apply to withholding certificates received through intermediaries or flow-through entities and correctly allowed a withholding agent to rely on the statement of the NQI, NWP, or NWT.

Accordingly, SIFMA requests that the rule proposed in Notice 2016-08 for reliance on an electronically signed Form W-8 or W-9 provided by an NQI, NWP, or NWT be included in the regulations.

IV. GIINs from sponsored entities

On line 5 of the February 2014 version of Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting ("Entities"), a Sponsored Investment Entity ("SIE") from an IGA country could have represented its FATCA status either as a "Sponsored FFI that has not obtained a GIIN" (completing Part IV of the form) or "Nonreporting IGA FFI" (completing Part XII of the form). That version of the form could have been accepted by withholding agents until November 1, 2016. Thus, some of those forms may be valid until the end of 2019.

SIEs under the regulations, under Model 2 IGAs, and (if they had a US Reportable Account) under Model 1 IGAs, had until December 31, 2016, to register and obtain GIINs of their own.[11] The regulations provide that SIEs must provide those GIINs to withholding agents, and can do so orally or in writing without providing a new Form W-8BEN-E. The Regulations contain a transition rule that gave withholding agents with previously documented SIEs until March 31, 2017, to obtain the SIE's GIIN.[12] Those regulations contain the following exception to the requirement that an SIE provide a GIIN:

> a GIIN is not required for a payee that provides a valid withholding certificate prior to January 1, 2017, that identifies the payee as a sponsored FFI and includes the GIIN of the sponsoring entity if the withholding agent determines, based on information provided on the withholding certificate, that the sponsored entity is resident, organized, or located in a jurisdiction that is treated as having a Model 1 IGA in effect.[13]

This language appears to have been intended to take into account that many Model 1 SIEs with no US Reportable Accounts have no requirement to obtain a GIIN, and therefore should not be required to provide a GIIN. However, the term "sponsored FFI" in the regulation has created uncertainty about whether the IRS intended to limit this exception only to entities identifying themselves as "Sponsored FFI that has not obtained a GIIN" on line 5, or to also cover entities that selected "Nonreporting IGA FFI." Without the exception, the regulation could be read to require the latter type of SIE to provide its own GIIN, which it may not have.

Another problem is that the exception, by requiring that the withholding certificate include the sponsoring GIIN, seems to preclude the possibility that the sponsoring GIIN could be obtained by email or other means. The only other sensible option is for the withholding agent to obtain a new withholding certificate on the April 2016 version of Form W-8BEN-E.

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[11] Treas. Reg. Sec. 1.1471-3(d)(4)(vi)(C).
[12] Id.
[13] Id.

After consulting its members, SIFMA requests that Treasury and IRS clarify that:

1) For a sponsored entity that is organized or resident in an IGA country, a withholding agent can accept an otherwise valid withholding certificate claiming either Sponsored FFI or Nonreporting IGA FFI status.

2) In the case of an entity that selects Nonreporting IGA FFI on line 5 and writes "Treas. Reg. § 1.1471-5(f)(1)(i)(F)" (or (f)(1)(i)(F)(1) or (2)) on the second blank line of Part XII, the entity is required to register with the IRS and provide its GIIN on line 9a, even if that entity is from a Model 1 jurisdiction.

V. Sponsored entities from certain Model 1 countries

Annex II of some Model 1 IGAs that were entered into before the current model was published in November 2014, notably the UK and Ireland, do not mention SIEs. Because the "most-favored nation" provisions in Article 7 do not cover Annex II, these older IGAs are not automatically updated to include SIE status. These IGAs include a definition of Nonreporting Financial Institution that includes entities that are "deemed compliant" under the regulations, which would include SIEs. A requirement of the regulations for an SIE is that it be registered with the IRS,[14] which should result in the SIE obtaining its own GIIN. Another requirement is that the sponsoring entity perform reporting on the sponsored entity's behalf as if the sponsored entity were a participating FFI,[15] apparently directly with the IRS.

Importantly, guidance from both the UK[16] and Ireland[17] require that the sponsoring entity of an SIE domiciled in those jurisdictions report to the local tax authority, not the IRS – notwithstanding that they are *Nonreporting* Financial Institutions under the IGAs and that both sets of guidance refer to SIEs as registered deemed-compliant FFIs. This rule unnecessarily complicates the requirements for

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[14] See Treas. Reg. § 1.1471-5(f)(1)(i)(F)(3)(iii).
[15] See Treas. Reg. § 1.1471-5(f)(1)(i)(F)(3)(iv) & (v).
[16] https://www.gov.uk/hmrc-internal-manuals/international-exchange-of-information/ieim401120.
[17] Guidance Notes on the Implementation of FATCA in Ireland (July 4, 2016) at 20, 39.

SIEs in jurisdictions that negotiated IGAs with the U.S. during the early stages of FATCA, and requires reporting that may be subject to local legal limitations that prompted the need for the IGAs in the first place.

The members of SIFMA request that the IRS and Treasury clarify the following:

1) SIEs from Model 1 countries that lack SIE provisions in Annex II are not required to obtain their own GIINs, and

2) SIEs may follow guidance from HMRC and the Irish Revenue (and similar guidance) that sponsoring entities of UK and Irish sponsored entities (and similarly situated sponsoring entities) report to the local government, consistent with the Model 1 IGA framework, and not be required to do duplicative reporting to the IRS.

VI. Third-party repository

SIFMA Members request the following with respect to third-party repositories:

1) Authorization to obtain a withholding certificate

Treas. Reg. § 1.1471-3T(c)(1) states that a withholding certificate will be considered provided by a payee if a withholding agent obtains the certificate from a third-party repository (rather than directly from the payee through its agent) and the requirements in Treas. Reg. Sec. 1.1441-1T(e)(4)(iv)(e) are met. Treas. Reg. § 1.1441-1T(e)(4)(iv)(e) could be read to impose a significant new burden on withholding agents. The temporary rule states that "each request and authorization must be associated with a specific payment, and, as applicable, a specific obligation maintained by a withholding agent."[18] If this language is intended to require a separate request for a withholding certificate and a separate authorization for each payment, the administrative burdens of compliance would make third-party repositories untenable. A more practical interpretation might be that the withholding certificate may be relied upon if a customer specifically authorizes the withholding agent

[18] Treas. Reg. Sec. 1.1441-1T(e)(4)(iv)(e).

to apply a particular withholding certificate to all payments made through a particular account, as it can with a standard Form W-8.

The members of SIFMA request clarification that the reference in the temporary rule to "a specific payment," does not require an authorization for each payment made to the beneficial owner or payee. While we appreciate that there are instances in which a payee must maintain more than one version of a Form W-8, the withholding agent needs to ensure that it can reliably associate the payment with the appropriate documentation. However, it would be unnecessary, for example, for a withholding agent for a securitized loan to make a specific request and receive a specific authorization each time it makes an interest payment. Example 2 in the regulations (Treas. Reg. § 1.1441-1T(e)(4)(iv)(E) refers to "payments received under a contract" and seems to support the above interpretation.

The members of SIFMA request that the regulations be clarified to provide that the request and authorization to obtain a withholding certificate "must be associated with a payment, account or obligation as necessary to reliably associate a payment or payments with the appropriate documentation."

2) Forms W-9

The members of SIFMA generally request that the allowances for sharing Forms W-8 also apply to Forms W-9; specifically, we request clarification that a Form W-9 can be obtained through a third-party repository.[19] Treas. Reg. §1.1441-1T(e)(4)(iv)(E) provides that the third-party repository that maintains the withholding certificates is not an agent of the withholding agent or the person providing the withholding certificate. Announcement 2001-91[20] allows for a payor with an electronic system to electronically receive a Form W-9 from a person authorized as the payee's agent. It is unclear whether a third-party repository can satisfy the requirements of Announcement

[19] See Treas. Reg. §1.1441-1(e)(4) providing that "the provisions in this paragraph (e)(4) describe procedures applicable to withholding certificates on Form W–8 or Form 8233 (or a substitute form) or documentary evidence furnished to establish foreign status. These provisions do not apply to Forms W–9 (or their substitutes)."

[20] Announcement 2001-91, 2001-36 IRB 221.

2001-91 since the system is not maintained by the payor and the third-party repository is not permitted to be an agent of the payee.

To maximize efficiency, reduce costs, and ensure compliance with increasingly complex rules, withholding agents have become more dependent on technology for the collection of withholding certificates. Maintaining separate processes and requirements for Forms W-8 and Forms W-9 is unnecessarily burdensome and thus the members of SIFMA request that the rules be aligned.

VII. Determining when a withholding agent may accept a prior version of a withholding certificate

Generally, under Treas. Reg. §1.1441-1T(e)(4)(viii)(C), a withholding agent may accept a prior version of the withholding certificate until the later of six months after the revision date on the form, or the end of the calendar year that the updated withholding certificate is issued, unless the IRS has issued guidance that indicates that the period for accepting a prior version is shortened or extended. The regulation also provides that a withholding agent may continue to rely upon a previously signed prior version of the withholding certificate until its period of validity expires.

In the instance of underlying documentation received by an upstream withholding agent through an NQI, NWP, or NWT that provides a Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting, it is unclear how this rule should be applied. It would be impractical to require the withholding agent to reject a prior version of a withholding certificate based upon the date it received the documentation as this would require the intermediary or flow-through entity, who is also a withholding agent, to renew valid documentation. An upstream withholding agent is also not in the position to determine when the withholding certificate was accepted by the intermediary. The only practical approach is to allow a withholding agent to rely based on the date the withholding certificate was signed.

We request clarification that a withholding agent accepting underlying documentation from an NQI, NWP, or NWT may rely on the date the documentation was signed in order to determine if it they can rely on a prior version of the form.

VIII. The cure for a permanent residence address that has hold mail instructions

The definition of permanent residence address in Treas. Reg. §1.1471–1T(b)(99) states that an address that is provided subject to instructions to hold all mail to that address is not a permanent residence address. Providing instructions to hold mail is very common, especially for individuals who prefer electronic mail or for entities that want to control the amount of mail received. Thus, the members of SIFMA are concerned that the operational burden of having to cure a permanent residence address that contains an instruction to hold mail may outweigh its value as indicia of an unreliable claim of foreign status, especially for persons claiming only foreign status (and not treaty benefits). The members of SIFMA request that the limitation on providing a hold mail instruction be removed and that an address that is provided subject to instructions to hold all mail be considered a valid permanent residence address.

Further, Treas. Reg. §1.1471–1T(b)(99) allows a withholding agent to cure a permanent residence address that is subject to instructions to hold all mail if the withholding agent maintains documentary evidence described in Treas. Reg. § 1.1441-1T(c)(38)(ii) supporting the claim of foreign status. Treas. Reg. § 1.1441-1T(c)(38)(ii) requires "documentary evidence establishing residence in the country in which the person claims to be a resident for tax purposes." While the Chapter 4 regulations appear to indicate that documentary evidence supporting the claim of foreign status is sufficient to cure documentation, the cross-reference to the Chapter 3 regulations requires documentary evidence establishing tax residence in a particular country. Thus the standards under the Chapter 3 and Chapter 4 regulations appear to be different, and we are unsure whether this is intended.

Finally, the Chapter 3 regulations do not indicate which types of documentary evidence are sufficient to support residence in the country in which the person claims to be a resident for tax purposes. Absent more specific guidance, withholding agents are forced to decide on their own which type of

documentary evidence is sufficient to establish tax residence. Our members are concerned that inconsistent standards could emerge and it would be helpful to know in advance what types of documentation the government will consider sufficient to establish tax residence.

Accordingly, SIFMA requests clarification that any documentary evidence establishing foreign status under Treas. Reg. § 1.1471-3(c)(5)(i) is sufficient to cure a hold mail address and that it is not necessary to establish residence in a particular country (unless treaty benefits are claimed).

IX. Limitation on benefits ("LOB") provision

The members of SIFMA request clarification on when an LOB provision is unreliable or incorrect based upon the actual knowledge of the withholding agent. Under Treas. Reg. § 1.1441-6T(b)(1)(i), a beneficial owner providing a Form W-8BEN-E is required to identify the specific LOB provision on which the taxpayer is relying to claim treaty benefits. The regulations further provide that a withholding agent may rely on a valid Form W-8BEN-E that includes LOB information unless it has actual knowledge that the information provided with respect to the limitation on benefits is unreliable or incorrect.

Specifically, our understanding is that the actual knowledge standard requires a review of readily available facts that are determinative regarding the truthfulness of a beneficial owner's Chapters 3 and 4 claims and eligibility for a reduced rate of withholding, if any. The standard historically has not, and should not, require determinations regarding facts that go beyond what a withholding agent can be expected to know in the normal course of its business. More importantly, the standard should not require a withholding agent to perform a legal analysis or interpretation. Nearly all LOB provisions involve the kinds of factual determinations and legal interpretations that a withholding agent cannot, and is not qualified to perform. Even seemingly simple determinations based on what appear to be readily available facts often involve a complex analysis. For example, the LOB test that applies to a corporation the shares of which are regularly traded requires a determination of which shares constitute the "principle class of shares;" what constitutes a "disproportionate class of shares;" and whether the trading volume within an applicable testing period is sufficient.

Other LOB provisions such as the ownership/base-erosion test or the active-conduct-of-a-trade-or-business test are even more difficult to apply. Further, even to determine whether a specific LOB provision is present in a particular treaty is beyond the capacity, both in terms of personnel knowledge and time, of most withholding agents. In our view, the only truly administrable rule is that a withholding agent is responsible solely for determining whether there is a treaty that is currently in force. This is the rule that applies to treaty claims in general.

The regulations appear to articulate a more elevated standard of knowledge for limitations on benefits than the standard that applies to treaty benefits in general. For a claim of treaty benefits, a withholding agent has reason to know that the claim is invalid or incorrect if the claim is made under an income tax treaty that does not exist or is not in force.[21] As discussed above, we believe that in practice the standards of knowledge for limitations on benefits and treaty benefits are or should be the same. The notable difference between these standards is that a withholding agent has the obligation to consult either the IRS or State Department's website to determine whether an income tax treaty exists and is in force even when the withholding agent would not otherwise know this information in the normal course of its business.

We request, due to the administrative concerns articulated above, that the Form W-8BEN-E requestor instructions or an FAQ provide guidance that a withholding agent is only required to review whether the income tax treaty under which benefits are claimed exists or is in effect to determine if limitation on benefits information is unreliable or incorrect.

X. Alternative withholding statement, and clarification as to when it can be used

The members of SIFMA are requesting clarification on the effective date of the alternative withholding statement in Treas. Reg. §§ 1.1441-1T(e)(3)(iv)(C)(3) and 1.1471-3T(c)(3)(iii)(B)(5). Industry practice has generally been to provide a withholding statement similar to the alternative withholding statement described in the Regulations because the requirements in the prior regulations were onerous and the required information was repetitive of the information contained on the

[21] Treas. Reg. §1.1441–6T(b)(1)(ii).

withholding certificates. Members of SIFMA appreciate that the IRS and Treasury agreed with industry and formalized this practice in the regulations with the alternative withholding statement.

Since the regulations are effective upon publication (i.e., January 6, 2017) and the preamble makes no mention of prior industry practice, members of SIFMA are concerned that IRS exam may take the view that it was not acceptable to provide a version of an alternative withholding statement prior to the effective date of the regulations.

Thus, SIFMA requests that the IRS, either through the requestor instructions or an FAQ, clarify that a withholding statement provided for years prior to 2017 and that did not meet the requirements of Treas. Reg. §§ 1.1441-1T(e)(3)(iv) and 1.1471-3T(c)(3)(iii)(B) because it did not include the required information for the beneficial owners, may be treated as a valid withholding statement even though if it does not meet the requirements of the new Regulations for an alternative withholding statement but otherwise contained information necessary for the withholding agent to determine the amount it is required to withhold. However, any alternative withholding statement provided on or after January 6, 2017 must meet the requirements of the Regulations.

XI. Requirements of a written sponsorship agreement

Prop. Treas. Reg. §1.1471-5(f) includes verification requirements for sponsored entities and requires that a sponsoring entity have a written sponsorship agreement in effect that authorizes the sponsoring entity to fulfill the due diligence, withholding, and reporting requirements of the sponsored entity. The requirement to have a written sponsorship agreement was not a requirement of sponsored entity status in the final regulations. The final regulations only required the sponsored and sponsoring entity to have "agreed" to such relationship. Most sponsoring entities have written documentation in place that allows the sponsoring entity to fulfill the FATCA requirements of the sponsored entity, but these documents might not contain a specific reference to FATCA or the requirements of a sponsored entity. Typically, the existing service level agreement ("SLA") between a fund and its investment manager/advisor is sufficient to enable the investment manager/advisor to act as a sponsoring entity.

The members of SIFMA do not view the proposed regulations as requiring a specific, separate agreement that addresses sponsoring entity obligations and authorization. The absence of a written sponsorship agreement results in an event of default and the certification period ends in a few months.

Thus, SIFMA requests confirmation from Treasury and the IRS that an SLA or other similar agreement that allows them to fulfil the FATCA requirements of the sponsored entity will satisfy the written sponsorship agreement requirement, even if such requirements are not explicitly referenced in the agreement.

XII. Conclusion

We appreciate your consideration of our members' views and concerns, and we would appreciate the opportunity to discuss the issues in this submission with you and your colleagues.

Please do not hesitate to contact me at (202) 962-7300 or ppeabody@SIFMA.org, or our outside consultants Tara Ferris at Ernst & Young. Tara can be reached at (212) 360-9597 or tara.ferris@ey.com.

Sincerely,

Payson Peabody
Managing Director & Tax Counsel
SIFMA