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Re: Responsible Officer Requirements under Chapters 3 and 4

Dear Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to provide comments to the Internal Revenue Service ("IRS") on outstanding issues relating to Responsible Officer ("RO") certifications under Chapters 3 and 4 of Subtitle A of the Internal Revenue Code (the "Code").[2] As you know, these requirements are contained in final, temporary and proposed

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[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.

[2] All citations are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

regulations issued under the Foreign Account Tax Compliance Act ("FATCA") as they pertain to participating foreign financial institutions ("FFIs") and certain deemed-compliant FFIs,[3] the 2017 FFI Agreement,[4] the 2017 Qualified Intermediary ("QI") Agreement,[5] and the 2017 Withholding Foreign Partnership ("WFP") and Withholding Foreign Trust ("WFT") Agreements[6] (collectively the "RO certifications").

SIFMA members greatly appreciate the time and effort that went into drafting the aforementioned guidance. Financial institutions have dedicated significant time and resources to ensure compliance with groundbreaking changes to Chapters 3 and 4 over the past several years. As key RO deadlines approach, our members are increasingly focused on making their initial certifications of compliance with these new rules. We have commented previously on the foregoing FATCA and Chapter 3 guidance, and our comments here are limited to RO issues.

I. RO certification deadlines, language and process

We anticipate that the RO certifications will be made under penalties of perjury, a task that will not be taken lightly by the senior executives who are appointed RO, or by their delegates involved in execution of the requirements under Chapters 3 and 4. The first certification deadline of July 1, 2018 is quickly approaching, yet the language of the RO certifications and much detail regarding the manner for making such certifications remains unavailable to the industry.

We request that language for the RO certifications and instructions for making the RO certifications be released as soon as possible. Critical guidance should not be delayed by technology updates to the IRS portals through which the RO certifications are expected to be made.

Members have expressed concerns that their ROs will be relying on sub-attestations provided by delegates within their organizations, and the ROs and their delegates will need sufficient time to ensure that they are comfortable with the language of these sub-attestations before making final RO certifications to the IRS. Moreover, key functions for multinational financial institutions are generally organized by product or line of business, rather than by legal entity; therefore, certifications require intricate mapping in order to be properly supported.

As we await additional guidance and clarification, the time in which organizations must complete these internal reviews and certifications is being compressed. Indeed, it is not practical for organizations to finalize their reviews without full knowledge of what they will be certifying to, as duplication of work could be problematic or costly. ROs and their delegates must be provided sufficient time in advance of the compliance deadline to analyze the language, and potentially modify internal sub-certification processes.

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[3] Treas. Reg. § 1.1471-4 and *Chapter 4 Regulations Relating to Verification and Certification Requirements for Certain Entities and Reporting by Foreign Financial Institutions* (REG-103477-14), 2017-5 I.R.B. 746, 82 FED. REG. 1629 (January 6, 2017). Chapter 4 of Subtitle A of the Internal Revenue Code, encompassing Sections 1471-1474, contains the provisions enacted as part of the Foreign Account Tax Compliance Act ("FATCA").

[4] Rev. Proc. 2017-16, 2017-3 I.R.B. 501.

[5] Rev. Proc. 2017-15, 2017-3 I.R.B. 437.

[6] Rev. Proc. 2017-21, 2017-6 I.R.B. 791.

Moreover, clarification is needed on how so-called "qualified certifications" will be addressed in the IRS portal. We would suggest that a page is created with boxes to tick for either a certificate of compliance or a qualified certificate, with the option given to attach a word document or pdf that gives details of any failures that were identified. Further guidance may be needed with regards to the level of detail required on such an attachment.

For the reasons explained above, SIFMA requests that IRS issue written guidance extending the deadline for all RO certifications (i.e., for FFIs, QIs, WFPs and WFTs) until the later of 12 months following when the rules are further clarified, or July 1, 2019.

SIFMA also requests that any extension of RO certifications be aligned for FFIs, QIs, WFPs and WFTs, to allow for consistency in applying the overlapping RO requirements. Staggered certification deadlines would result in duplicated efforts, as many of the same functions, employees, processes and procedures are involved in FATCA, QI, WFP and WFT compliance.[7]

II. Clarification regarding "consolidated compliance programs"

SIFMA requests clarification that a single RO may attest on behalf of an entire global group of associated entities, including sponsored groups and non-EAG entities, or, alternatively, guidance clarifying whether a separate certification is required for each EAG, sponsored group and standalone FFI. "In some institutions it may be more practical and consistent with their regulatory structure to have a single RO, while other firms may be structured in a way that is conducive to separate ROs for different groups or legal entities. Therefore, we would urge Treasury to consider making single RO attestation or separate certification optional to the extent possible.

Technically, the current definition of RO under FATCA requires a large multinational financial institution with sponsored entities or other entities that are not a member of an expanded affiliated group ("EAG") to appoint separate ROs to oversee compliance for various groups of legal entities. Under the definition of RO in Treas. Reg. § 1.1471-1(b)(116) the RO of an FFI that elects to be part of a consolidated compliance program must be an officer of the "Compliance FI." Under Treas. Reg. § 1.1471-4(f)(2)(ii)(A), a member of the EAG must be the Compliance FI for the EAG, and similarly, the sponsoring entity of a sponsored FFI group is required to act as the Compliance FI for the sponsored FFI group. However, a "consolidated compliance program" appears to only be available for EAGs and sponsored FFI groups.

Our members also would like guidance to clarify whether the FFI RO for certification purposes must be the RO listed in question 10 of Part 4 ("FI Responsible Officer Information") of the IRS registration portal, or if the RO may be a different individual who meets the definition.

With respect to timing, the consolidated compliance program currently assigns different certification periods and filing dates to FFIs, including those that are members of the same EAG, based on the year in which a particular entity's FFI Agreement became effective.[8] The effect of this for large

[7] For example, based on current guidance, a Model 2 FFI that is a QI might have to make its FATCA RO certifications on July 1, 2018, with similar QI RO certifications following 6 months later, on December 31, 2018 (assuming the QI selects calendar year 2017 for its periodic review).
[8] Treas. Reg. § 1.1471-4(f)(3)(i).

multinational firms that form and register FFIs annually is that there will be groups of EAG members certifying every year based on when the members registered. For example, for all participating FFIs ("PFFIs") whose agreements become effective at any time in 2014, the first certification period will be from the effective date in 2014 of the relevant FFI agreement through December 31, 2017 and under regulations in effect those certifications must be filed by July 1, 2018. However, entities formed and entering into PFFI agreements in 2015 will certify for the period from the effective date in 2015 of the relevant FFI agreement through December 31, 2018 and those certifications must be filed by July 1, 2019. As noted above, having different certification periods and certification filing dates complicates the design of an effective consolidated compliance program and related internal controls. The same considerations apply in the case of a sponsored FFI group.[9]

SIFMA requests that the following new sentence be added to Treas. Reg. § 1.1471-4(f)(3)(i) (and Prop. Treas. Reg. § 1.1471-5(j)(3)(iii)) in order to permit a participating FFI (or sponsored FFI) to elect, as its first certification period, a period that is shorter than the normally applicable certification period so that the electing participating FFI (or sponsored FFI) will have the same certification period and filing date as the EAG (or sponsored FFI group) of which it is a member:

> "Alternatively, at the election of a participating FFI or a sponsored FFI that is a member of an existing expanded affiliated group or sponsored FFI group, respectively, the first certification period begins on the effective date of the FFI agreement and ends at the close of the calendar year in which the FFI agreement becomes effective or at the end of the first or second calendar year following the effective date of the FFI agreement."

This would clarify the guidance to permit the optional election for a "short period" certification to prevent large multinationals with a consolidated compliance program from having to complete an annual certification process.

SIFMA also requests that similar clarifications be made with respect to a consolidated compliance program under a QI Agreement, WFP Agreement and WFT Agreement.

III. RO certifications for entities that terminate or change status in 2014, 2015 or 2016

Previous language suggests that an RO certification was not required for an entity that terminated or changed status in 2014, 2015 or 2016 from a status that was in scope of an RO certification to a status that was out of scope of an RO certification (e.g., due to liquidation; move from a Model 2 country to a Model 1 country; or registration in error in 2014 and subsequent cancellation of registration upon determining an entity was an Active NFFE). However, uncertainty remains. While the initial certification period generally covers mid-2014 through 2017, the final QI, FFI, WFP and WFT Agreements updated in the 2017 guidance provide that RO certifications are required for entities subject to such agreements that terminate or change status. Many legal entities have liquidated or changed status during this period and the differing language is causing confusion among our members.

[9] Prop. Treas. Reg. § 1.1471-5(j)(3)(iii), stating that, with respect to sponsoring entity verification: "The first certification period begins on the later of the date the sponsoring entity is issued a GIIN to act as a sponsoring entity or June 30, 2014, and ends at the close of the third full calendar year following such date. Each subsequent certification period is the three calendar year period following the previous certification period."

Because the prior guidance did not reference entity termination or change of status and the new versions were only released and effective beginning in 2017, an RO should not be required to make a certification for an entity that terminated or changed status prior to 2017.

Furthermore, some firms took a conservative view by registering entities as FFIs prior to their registration deadline, and as a result, proactively de-registered entities with nothing to report prior to 2017. This conservative registration approach may unnecessarily expand the scope of entities that should be subject to review, thereby reducing the time the IRS can allocate to reviewing entities with reportable information.

Therefore, SIFMA requests the IRS confirm that RO certifications will not be required for entities that terminated, liquidated or otherwise changed their status in 2014, 2015 or 2016 to a status that no longer requires RO certifications.

Similarly, an FFI, QI, WFP or WFT that terminated or changed status in 2017 or 2018 should be permitted to align its certification deadline with the certification deadline applicable to other FFIs, QIs, WFPs or WFTs, so they are not required to make an RO certification prior to the initial RO certification deadline.

IV. Mergers and acquisitions

Section 11.05 of the QIA addresses mergers, noting that "[…] In addition, the successor QI must provide the certification required by section 10.03 for the predecessor QI's compliance period prior to the merger (and must include the predecessor QI in its review following the merger)." The IRS has also made public comments that the RO certification would be handled by the successor. However, the guidance does not provide full clarity when a legal entity moves from one jurisdiction to another, either through merger, acquisition, or otherwise. It is unclear in such an instance how these certifications will be managed, and whether an exception is warranted because of the jurisdictional change.

We recommend that the IRS permit the successor QI to rely on a certification from the acquired QI, covering the period of time up until the acquisition.

V. Definition of Responsible Officer

For a participating FFI and a registered deemed-compliant FFI, the definition of RO is currently limited to an "officer" of a non-US EAG member. Many investment entities do not have an "officer" and are not members of an EAG. Moreover, in situations in which the investment entity is a member of an EAG, an officer of another non-US EAG member may not be best suited to make RO certifications for the investment entity.

SIFMA recommends that the definition of RO in Treas. Reg. § 1.1471-1(b)(116) be expanded to include an officer, a director of an investment entity, or an individual member of a General Partner (GP) that is a GP in a partnership that is an investment entity. This provision should also permit any of these individuals holding similar roles at a US financial institution that is an EAG member to serve as RO. This expanded definition of RO permits necessary flexibility for certain structures.

Similar flexibility should be permitted for QIs, WFPs and WFTs. As noted above, because multinational financial institutions are generally organized by product or by line of business, and not by legal entity, it is common for a senior executive in a multinational financial institution to be an employee or an officer of one legal entity and to provide services or support to another legal entity.

VI. Proposed regulations impacting types of sponsored entities

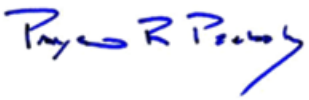
We understand that the IRS has indicated it will issue final and/or temporary regulations that impact sponsored entities in 2017. However, as the FATCA regulations relating to verification and certification requirements for FFIs are currently in proposed form,[10] SIFMA is concerned that the final regulations will provide a very limited amount of time to include these entities in RO certification models in 2018. It will take considerable time to prepare properly for these certifications as they will require careful consideration of an entity's compliance with relevant FATCA provisions.

We would urge you to consider making the final regulations apply to RO certifications for years after 2018 to give members sufficient time to prepare these new certifications.

VII. Conclusion

SIFMA appreciates your consideration of our comments regarding some of the outstanding issues relating to Responsible Officers and we would like to request an opportunity to meet with you in person to further discuss the issues in this submission with you and your colleagues. Given the complexity of many of the issues raised, we would suggest IRS establish an industry working group to ensure we are working toward common goals. Please do not hesitate to contact me at (202) 962-7000 or ppeabody@sifma.org.

Sincerely,



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[10] *Chapter 4 Regulations Relating to Verification and Certification Requirements for Certain Entities and Reporting by Foreign Financial Institutions* (REG-103477-14), 2017-5 I.R.B. 746 (January 30, 2017), 82 FED. REG. 1629 (January 6, 2017).