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Re: Recommendations in anticipation of revisions to the Qualified Intermediary Agreement

Dear Gentlemen and Madams:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is pleased to submit comments on the Qualified Intermediary ("QI") Agreement[2] in advance of anticipated revisions. While we understand the Internal Revenue Service's ("IRS") intention to publish a final version without an advance opportunity for public comment, we hope our recommendations will be taken under consideration. SIFMA members may have additional comments once the final agreement is published as well.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

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

1. Request for an extension of RO certification to July 1

The QI Agreement as written sets the deadline at December 31 of the year following the three-year certification period when the third year of the certification period is chosen for the periodic review. When the third year is chosen for the periodic review, it gives little time to the financial institution since the extended due date of Form 1042 falls in September, a few months before the Responsible Officer ("RO") certification is due. Moreover, the deadline is even more unrealistic in the case of those QIs that want to file as part of a Consolidated Compliance Group ("CCG"). This is because those institutions must first file the CCG request (which requires information with respect to the QI accounts for the third year of the certification period, including a proposed sample plan) and then wait for IRS approval of the plan, which may take several weeks or months. In light of this, we are pleased that the IRS extended the last RO certification until March of the next year in response to industry concerns raised. However, resource constraints due to tax reporting season make this March deadline difficult for the operations teams involved in the periodic review and RO certification process. Therefore, we request that the upcoming QI Agreement allow those firms that choose the third year of the certification period for their periodic review to have up until July 1 of the second year after the end of the certification periodic to submit their RO certification. This would create parity amongst QIs that wish to select different tax years, and provide sufficient time to prepare for the RO certification.

2. Request that projections be made on a post-cure basis

Based on recent public comments by the IRS and the most recent IRS Large Business and International Process Unit published on January 13, 2020, any projection of underwithholding should be done on a post-cure basis. This standard, however, is not reflected in the current QI Agreement.[3] To avoid any confusion on this point, SIFMA requests that the updated QI Agreement make it clear that extrapolation is only on a post-cure basis, consistent with the Process Unit.[4]

In addition, we believe that the QI Agreement should reflect the flexibility also provided to the IRS examiners outlined in the Process Unit. Even conducting projection procedures on a post-cure basis, rigid application of Revenue Procedure 2011-42[5] could create harsh results. Projection generally would be required across the entire group of accounts from which the sample was drawn, even if it is clear that the error relates to a discreet business line, type of account, geographic location, etc. A one-size-fits-all approach could lead to much larger, and illogical, withholding projections. Providing the IRS with flexibility to project on a more principled basis would lead to more accurate results. Finally, we note the Process Unit affords a certain level of discretion to the IRS examiner and SIFMA requests the QI Agreement reflect this flexibility as well.

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[3] See Rev. Proc. 2017-15, Appendix II, Sec. III(C).

[4] Internal Revenue Service LB&I Process Unit. "FDAP Payments - Statistical Sampling and Projection Procedures," p. 12. "In instances in which statistical sampling is used, projection of the sample is on a post-cure, rather than a pre-cure basis." Found at: https://www.irs.gov/pub/irs-utl/wit_p_008_01_05r.pdf

[5] IRS Rev. Proc. 2011-42, I.R.B. 2011-37.

3. Clarify RO certifications in merger or termination scenarios

There remains uncertainty as to how the RO certification and periodic review should be handled in merger and termination situations. SIFMA suggests that the IRS provide similar flexibility as permitted for withholding and reporting under the alternative procedure in Rev. Proc. 99-50. The IRS should permit separate certifications for the predecessor entity and successor entity, or alternatively, permit consolidated certifications by the successor entity that covers both legal entities. In the latter scenario, SIFMA requests that the RO termination certification deadline for the predecessor be aligned with the successor entity's next RO certification deadline, to reduce the administrative burden on the IRS and the QI of having to make or review multiple RO certifications with respect to the same accounts for the same certification period.

This flexibility might also reduce situations where the terminating legal entity cannot make the required final certification within six months of termination because the system already has a certification for the previous certification period.

SIFMA also requests that the IRS only require one periodic review for the combined predecessor and successor entity following a merger. It would be duplicative and burdensome to require the terminating entity to certify and conduct a separate periodic review, only to have the successor entity conduct another periodic review covering the same accounts during the same certification period.

4. Consolidated Compliance Group (CCG) periodic reviews should not be limited to the last 2 years of a 3-year certification period

The formation of a CCG facilitates a more efficient use of resources than if each entity had a separate periodic review and filed a separate certification. The CCG process is beneficial to QIs and to the IRS in that it permits selection of an appropriate sample size where a group of QIs follows common procedures. However, FAQ5 of the "Certifications and Periodic Reviews" section[6] suggests QIs are not permitted to conduct a consolidated review covering the first year of a three-year cycle. We understand this limitation may be due to IRS concerns that the statute of limitations might expire if an earlier year were selected. Nonetheless, QIs selecting a CCG should not be penalized for doing so and the first year of a three-year cycle should be permitted.

5. Request to simplify joint account certifications in the new QI Agreement

Under section 4.05(A)(1) of the 2017 QI Agreement, a QI is required to obtain a certification from each partnership or trust subject to joint account treatment indicating that the partnership or trust has maintained a permissible chapter 4 status at all times during the certification period. This certification would have been required in addition to a Form W-8 from the partnership or trust, which already contained certifications regarding the entity's FATCA status, including a certification,

[6] https://www.irs.gov/businesses/corporations/qualified-intermediary-general-faqs#collapseCollapsible1573155877470

under penalties of perjury, that the partnership or trust would update the form within 30 days of any change in circumstances.

SIFMA appreciates the FAQ published on May 25, 2018 regarding what a QI may rely on for purposes of certification regarding partnerships and trusts subject to joint account treatment under Section 4.05. Helpfully, the FAQ states that a QI may rely upon a valid Form W-8IMY it has on file in lieu of obtaining a separate representation from each partnership or trust for each certification period. SIFMA requests that this language be incorporated into the updated QI Agreement, and Section 4.05 be revised accordingly.

6. **Limit the scope of "depooling" required**

In overwithholding scenarios, SIFMA requests the IRS limit the scope of "depooling" required under the QI Agreement, especially considering the broad definition of "overwithholding" in Section 2.56.[7] Section 9.04 of the QI Agreement requires that QIs, upon request, provide an account holder with a payee-specific Form 1042-S when the QI does not opt to apply the collective refund procedure. However, in the absence of a time limitation, even in instances of expired statute of limitations, this rule is problematic in that it requires QIs to be prepared to amend prior year returns indefinitely.

We request that a QI be required to furnish a separate Form 1042-S *only if* the request is received by July 1 of the year following the year of overwithholding. This date is sufficiently prior to the extended due date for Form 1042, which still provides the account holder with a reasonable amount of time to make their request and eliminates the operational burden associated with multiple or amended Form 1042 filings for prior tax years.

Moreover, if the QI issues the Form 1042-S after the due date to accommodate the client request, there is a risk that the IRS will treat that Form 1042-S as late filed and apply a penalty against the QI. In fact, even if the IRS were to limit the time for depooling requests, the risk of late filing penalties remains. To mitigate this risk, we would also request the IRS develop a simplified or specific amendment process for depooling scenarios that would provide the QI an opportunity to identify corrections resulting from depooling requests. Without a deadline for filing client-specific Form 1042-S requests in cases of overwithholding, QIs have been subject to late filing penalties, often through no fault of the QI. This has resulted in additional burden to QIs to investigate the notice and schedule time with the IRS to try and abate these penalties. Furthermore, the administrative burden to reconcile, prepare, refile, investigate the notice, respond to the IRS, and schedule an abatement meeting is often greater than the penalty itself.

[7] Rev. Proc. 2017-15. Sec. 2.56. "Overwithholding. The term 'overwithholding' means any amount actually withheld (determined before application of the adjustment procedures described in section 9 of this Agreement) from an item of income or other payment that is in excess of: (A) The amount required to be withheld under chapter 4 with respect to such item of income or other payment, if applicable, and, (B) In the case of an amount subject to chapter 3 withholding, the actual tax liability of the beneficial owner of the income or payment to which the withheld amount is attributable, regardless of whether such overwithholding was in error or appeared correct at the time it occurred. For purposes of section 3406, the term 'overwithholding' means the excess of the amount actually withheld under section 3406 over the amount required to be withheld."

Finally, SIFMA requests that the IRS explicitly require any beneficial owner that requests to be depooled to furnish a U.S. taxpayer identification number ("TIN") to the QI for inclusion on the recipient-specific Form 1042-S. This will prevent the IRS from having to reject refund claims by non-U.S. persons that present a Form 1042-S without a U.S. TIN, and eliminate unnecessary back and forth between the IRS, QIs and non-U.S. return filers.

7. **Future revisions should not be limited to Section 1446(f)**

SIFMA requests that future expansion of the QI Agreement provide flexibility and not be limited to Section 1446(f). A QI should be able to elect primary withholding responsibility for those regimes where it makes the most sense. Flexibility would allow a QI to maintain withholding responsibility under much of chapter 3 but not 1446, or conversely be able to withhold under 1446 but not under chapter 3. We request that section 1445 withholding also be included in the QI Agreement, if elected to be included by the QI.

8. **Reinstate prior version reassurances that client information does not need to be divulged**

The prior QI Agreement stated that the external auditor is not required to divulge the identity of the QI's account holders.[8] The current QI Agreement, however, does not provide any such reassurance to the RO. SIFMA believes it should. In addition to privacy concerns, one of the primary negotiation points for attracting QIs was the relief from disclosing account holder information upstream.

9. **Limitation on Benefits ("LOB") information should be required only when recipient-specific Form 1042-S reporting is required**

The QI Agreement requires the collection and reporting of the specific LOB provision from all entity account holders, including governments.[9] Specific LOB information, however, should be required *only* when recipient-specific Form 1042-S reporting is required. LOB information should not be required for pool reporting; otherwise, firms would have to do separate pool reporting for each LOB category. Furthermore, Sec. 5.03(B) of the QI Agreement states that the specific category is to be reported as required on Form 1042-S. This clarification is included in the 2020 Form 1042-S instructions to Box 13j (p. 29) which says, "If you are a QI, WP or WT reporting a chapter 3 pool for which a reduced rate of withholding under an income tax treaty applies, do not include an LOB code." SIFMA requests that future versions of the QI Agreement clarify, as in the instructions, that LOB information is not required where there is pool reporting.

10. **The standards of knowledge to review account information should be reinstated at the account holder level**

Prior versions of the QI Agreement and FAQ language set forth the general standards of knowledge requirements of a QI to validate a claim of foreign status, and, if applicable, treaty benefits, at the

[8] See Rev. Proc. 2000-12, Sec. 10.01.

[9] See Sec. 5.03(B).

account holder level. For example, a QI was deemed to have "reason to know" a Form W-8 was unreliable if conflicting information relating to the account holder was in the account file.

However, Section 5.10(B) of the current QI Agreement inadvertently broadened the standards of knowledge to require a QI to consider any conflicting "account information," even if the information relates to a person other than the account holder (e.g., an advisor or fund manager). It is overly burdensome to require QIs to cure any account file conflicts that relate to persons beyond the QI's direct account holders.

SIFMA appreciates the clarification in FAQ1 published on December 29, 2017, and requests that the IRS incorporate the FAQ language in the next version of the QI Agreement. This would reinstate the language in prior QI Agreement versions, requiring QIs to continue to apply the standards of knowledge at the "account holder" level.

11. Request simplified registration process for renewals

QI renewal requests require significant, detailed account information. The IRS should already have access to detailed account information, based on recent periodic reviews and RO certifications. SIFMA believes requests for additional account data upon renewal of an existing QI Agreement is an unnecessary burden and the process can be simplified. We therefore request that a QI seeking to renew its QI Agreement not be required to provide detailed account information.

12. Qualified Derivative Dealer requirements

In light of extension of the transition relief under section 871(m) provided in Notice 2020-2, we think it would be helpful to update section 10.01(C) of the QI Agreement to further extend the "good faith" compliance period, consistent with Notice 2020-2. We also anticipate further guidance from the Treasury Department regarding section 871(m) and SIFMA would appreciate an opportunity to comment on a future draft QI Agreement in advance of any changes made. We have several recommendations relating to the QI Agreement requirements for Qualified Derivatives Dealers ("QDDs") that we would like the opportunity to raise at the proper time.

13. Incorporate IRS FAQs into QI Agreement

Although the foregoing highlights specific areas of concern and references specific FAQs, SIFMA requests that IRS incorporate all of the various FAQs that have been issued in recent years to ensure that all IRS guidance is consolidated in the QI Agreement.

14. Documentation for Treaty Benefits

The documentation standard for individuals claiming treaty benefits absent a Form W-8 should be clarified and rationalized. Under the QI Agreement, an individual may claim treaty benefits based on either: (1) a Form W-8BEN; (2) documentary evidence obtained pursuant to the applicable know your customer ("KYC") rules; or (3) documentary evidence required under Reg. 1.1441-6.

The IRS issued FAQs, now withdrawn, to clarify how treaty claims can be made with passports. According to FAQ #21 (Part IV), the IRS view was that a passport – which proves nationality but not residency – would support a treaty claim from the country of issuance. The FAQ did not allow an

option to use a Certificate of Residence ("COR"), together with a passport, to claim treaty benefits based on the COR. The new QI Agreement does not provide specific guidance.

SIFMA recommends that the QI Agreement (or new FAQ) allow QIs the option of using the combination of an individual's (1) passport and (2) COR issued by an authorized government body (for example, a government or agency thereof, or a municipality) of the country in which the individual claims to be a resident, in order to establish eligibility for treaty benefits under Section 5.03(A). An acceptable COR for this purpose, therefore, would not need to be issued by a tax official or indicate that the taxpayer filed its most recent income tax return (which would be in line with the IGA standard, but in contrast to the standard in the chapter 3 regulations). Thus, treaty benefits could be based on the country identified in the COR, not the passport consistent with the general standard for treaty eligibility. Alternatively, treaty benefits could still be based on the passport's country of issuance.

15. Conclusion

We appreciate your consideration of our requests. Please don't hesitate to contact me at JWall@sifma.org or (202) 962-7440, or my colleague Jillian Enoch at JEnoch@sifma.org or (202) 962-7339 if you have any questions.

Respectfully submitted,

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