



May 27, 2022

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Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Notice 2022-23 (the “Notice”)

The Securities Industry and Financial Markets Association (“SIFMA”)¹ welcomes the opportunity to comment on Notice 2022-23 (the “Notice”). We request that the following be taken into consideration when drafting the forthcoming Qualified Intermediary Agreement (“new QI Agreement”).

1. Requirement that a Qualified Intermediary (“QI”) Obtain a U.S. TIN on Withholding Certificates

- ***Overall Transition Relief for Obtaining a U.S. TIN for Forms W-8 Validity and Treaty Claims Purposes.*** The Notice does not provide any relief to QIs that cannot obtain a U.S. TIN from account holders that are partners in a publicly traded partnership (“PTP”) prior to January 1, 2023. Given the challenges in obtaining a U.S. TIN by non-U.S. account holders, and considering the short time frame required for the QI to obtain a U.S. TIN (only six months), the IRS should provide transition relief from obtaining a U.S. TIN from account holders for purposes of the overall Forms W-8 validity and for ascertaining treaty benefits claims on Forms W-8. Accordingly, we request that the new QI Agreement provide that for all QIs a Form W-8 without a U.S. TIN will be valid for purposes of sections 1446(a) and 1446(f) until the later of (1) January 1, 2024 or (2) the date an existing Form W-8 expires (at the end of the third calendar year following the year in which the form was received).
- ***Clarify a QI’s Obligation to Exercise “Best Efforts” to Obtain U.S. TINs.*** The Notice provides that QIs must use “best efforts” to obtain the required documentation (e.g., Form W-8BEN with a U.S. TIN) from a partner in a PTP. The IRS should clarify that the existing “reasonable cause” requirements for missing TIN penalties establish a “best efforts” safe harbor (i.e., making an initial solicitation and two follow-up solicitations). See Treas. Reg. § 301.6724-1(e). The IRS should clarify that the initial solicitation may be performed at either: (1) account opening or (2) any time prior to the due date of the first Form 1042-S reporting payments with respect to the PTP acquired.

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 one million employees, we advocate on 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. For more information, visit <http://www.sifma.org>.

2. Requirements for Disclosing QIs to Obtain a U.S. TIN to Act as a Disclosing QI

- ***Do Not Impose an “All or Nothing” Standard for a QI to Act as a Disclosing QI.*** We understand that the IRS interprets the Notice to require a Disclosing QI to provide a U.S. TIN on any Form W-8 disclosed upstream in order for the QI to act as a Disclosing QI. See proposed sections 5.02(B), and (C). Under this interpretation, a single failure to provide a Form W-8 with a U.S. TIN prevents the QI from being a Disclosing QI for any accounts. However, receipt of a U.S. TIN on a Form W-8 should not be a requirement to act as a Disclosing QI. Missing and incorrect U.S. TINs are common for Schedules K-1.² While the IRS may need to target this problem, we do not believe it should be done indirectly through the new QI Agreement. We recommend that the IRS allow a QI to act as a Disclosing QI to the extent it provides the required documentation to the upstream withholding agent, even if the documentation does not include an account holder’s U.S. TIN.
- ***Allow Transition Relief.*** If the IRS does not provide the permanent relief from the U.S. TIN requirement for Disclosing QIs requested immediately above or the overall transition relief requested above for obtaining U.S. TINs, then transition relief is necessary for Disclosing QIs to obtain U.S. TINs. Such transition relief should allow a Disclosing QI to provide Forms W-8 without U.S. TINs until the later of (1) January 1, 2024 or (2) the date an existing Form W-8 expires (at the end of the third calendar year following the year in which the form was received).

3. Material Failures and Events of Default

- ***No Material Failure or Event of Default Should Be Assessed Based on a Failure to Collect U.S. TINs.*** Section 11.06(D) of the existing QI Agreement provides that an Event of Default includes if “Documentation described in section 5 of this Agreement is lacking, incorrect, or unreliable for a significant number of direct account holders,” and proposed sections 10.03(B)(1)(i), (j) and 11.06(B), (E) expand the definitions of a Material Failure and Event of Default to include failure to comply with certain requirements related to sections 1446(a) and (f). Taking into account substantial challenges to collect U.S. TINs³ from non-U.S. account holders, clarification is needed to confirm that a failure to collect a U.S. TIN from a non-U.S. account holder receiving a payment of a PTP distribution or amount realized is not a Material Failure or Event of Default, so long as the QI makes “best efforts” to obtain U.S. TINs (as described in our comments above) and properly executes all of its other withholding and reporting obligations for section 1446 purposes.
- ***No Material Failure or Event of Default Should Be Assessed Where a QI Has No Liability Under Treas. Reg. § 1.1446(f)-5(b) for Any Failure to Withhold.*** Treas. Reg. § 1.1446(f)-5(b) generally protects withholding agents from liability for failure to withhold under section 1446(f) where no substantive tax is actually due under section 864(c)(8). A QI should similarly be protected from assessment of a Material Failure or Event of Default under such circumstances. Accordingly, the IRS should clarify that a QI will be considered in compliance with its section 1446(f) withholding responsibilities under the new QI Agreement in any instance where the tax liability was otherwise satisfied, where the QI shows a reduced rate of withholding was appropriate by establishing the

² See U.S. Gov’t Accountability Office, GAO-04-1040, Tax Administration: IRS Should Take Steps to Improve the Accuracy of Schedule K-1 Data; V. Avdeev, The Need for Tax Reform: Schedule K-1 Document Matching Program and Effective Revenue Collection, 59 N.Y.L. Sch. L. Rev. (2014-2015).

³ Certain account holders may choose not to apply for a U.S. TIN and file a U.S. tax return because the associated compliance costs may exceed the amount of their refund. In those cases, where an account holder does not have a U.S. TIN, the QI’s withholding and timely remittance should satisfy the QI’s obligation with respect to sections 1446(a) and (f). Account holders that want a refund will have every incentive to obtain and provide their U.S. TIN to the QI.

amount of tax due by the foreign transferor, or where the QI establishes to the satisfaction of the Commissioner that no gain on the transfer was treated as effectively connected with the conduct of a U.S. trade or business under section 864(c)(8).

4. Requirements for a QI to Perform Nominee Reporting Under Treas. Reg. § 1.6031(c)-1T(a)

- ***Provide a Nominee Reporting Exception for Disclosing QIs with Segregated Accounts.*** Currently, many QIs separately maintain NQI accounts for customers who wish to invest in PTPs. These NQI accounts are fully segregated, with separate Forms W-8BEN or W-8BEN-E provided to the upstream custodian. With this information, custodians currently apply section 1446(a) withholding, file Forms 1042-S to the beneficial owners, and may perform nominee reporting under Treas. Reg. § 1.6031(c)-1T(a) with respect to each beneficial owner (rather than providing the beneficial ownership information to the PTP). The new QI Agreement should allow this process to continue by exempting Disclosing QIs with segregated accounts from nominee reporting. Such reporting should remain with the upstream custodian, otherwise duplicative nominee reporting may occur.
- ***Provide a Nominee Reporting Exception for Accounts Held for a QI (Other Than Disclosing QIs).*** The nominee reporting rules under Treas. Reg. § 1.6031(c)-1T do not provide an exception for accounts held for another QI, even though that QI has its own separate nominee reporting requirement. Since QIs will also be subject to nominee reporting, requiring the QI holding the account on behalf of another QI to file a nominee statement would result in duplicate reporting. Assuming the IRS exempts Disclosing QIs with segregated accounts from nominee reporting, this exception would not apply.
- ***Clarify That Non-Disclosing QIs Have the Ability to Issue a Statement to the PTP (or Its Agent) Without a U.S. TIN.*** Proposed section 8.07(B) states that “A QI that does not act as a disclosing QI for a PTP distribution or amount realized paid to an account holder for a calendar year with respect to the account holder’s PTP interest may provide the statement with respect to the account holder specified in Treas. Reg. § 1.6031(c)-1T(a) to the PTP in which the interest is held (or PTP’s agent).” The IRS should make clear that the non-disclosing QI can use this method (and not have to issue to each account holder receiving the distribution or amount realized the statement that is described in Treas. Reg. § 1.6031(c)-1T(h)) even if it does not have the account holder’s U.S. TIN (which is one of the items required to be provided on the Treas. Reg. § 1.6031(c)-1T(a) statement).

5. QI Documentation for Section 1446 Purposes

- ***Clarification That QI Documentation Is Not Required on a Payment-by-Payment Basis.*** Proposed Section 3.01 permits QIs to assume withholding responsibility for sections 1446(a) and (f) on a “payment-by-payment” basis based on a valid withholding certificate. Clarification is requested in the new QI Agreement that a QI is not required to provide new documentation (i.e., QI withholding certificate, and, as applicable, withholding statement or account holder documentation) with respect to each payment the QI receives subject to sections 1446(a) or (f). Instead, a QI should be allowed to provide the applicable documentation that remains valid within the general validity period, unless a change in circumstances renders the information incorrect, and should only supply additional documentation as necessary or required.

6. Procedures Relating to Payee-Specific Forms 1042-S Requested by QI Account Holders

- ***Broaden the Three-Calendar Year Time Limit to Request a Payee Specific Form 1042-S to Any Requests Made by an Account Holder of a QI.*** Proposed section 8.02(P) provides a time limit of three calendar years in which an account holder that has received gross proceeds from a disposition of a PTP or that receives a distribution from a PTP can make a request for a separate Form 1042-S. We support this three-year limitation and suggest that it be applied to any requests made by an account holder of a QI with respect to any type of income (as opposed to only gross proceeds and/or distributions from PTPs).
- ***Limiting Payee Specific Form 1042-S Reporting (i.e., Accounts De-Pooling) to Amounts That Are Subject to Section 1446(a) and/or 1446(f) Withholding.*** Under proposed section 8.02(P) , if a QI files a separate Form 1042-S for an account holder with respect to gross proceeds received from a disposition of a PTP or with respect to a distribution from a PTP, it must also file a separate Form 1042-S for each other amount paid to the account holder for the calendar year with respect to all accounts held by the account holder. It is not clear why the proposed QI agreement requires a QI to file a separate Form 1042-S for other amounts paid to the account holder that are not related to section 1446(a) and/or 1446(f) withholding. We therefore recommend the new QI Agreement be amended so that a QI can file a separate Form 1042-S for an account holder with respect to a disposition of a PTP and/or a distribution from a PTP, without requiring the QI to file a separate Form 1042-S with respect to all other amounts paid to the account holder and with respect to all accounts held by the account holder which are unrelated to the account holder’s investment in PTPs.

7. Availability of the Collective Refund Procedure to Overwithholding with Respect to Sections 1446(a) and 1446(f)

- ***Extending the Collective Refund Procedure to Withholding Under Sections 1446(a) and 1446(f).*** Under the Notice, a QI is not permitted to use the collective refund procedure with respect to amounts withheld under sections 1446(a) and 1446(f). The collective refund procedure has proven to be an efficient mechanism for QIs to collect overwithholding on behalf of their direct account holders where upstream withholding agents erroneously withhold and may be time barred from applying the reimbursement and set-off procedures to repay the overwithholding. As such, we request that the new QI Agreement permit QIs to make a claim pursuant to the collective refund procedures where the upstream withholding agent (or the QI) withheld in error (for example, the PTP issued a Qualified Notice supporting that an amount realized should not be subject to withholding but the upstream withholding agent withheld) and the reimbursement or set-off procedure can no longer be applied by the withholding agent due to timing limitations.

8. “Good Faith” Efforts Period

- A “good faith” efforts transitional period should be provided under the new QI Agreement for at least one year from January 1, 2023 to allow QIs to implement the new obligations under sections 1446(a) and (f). First, there are substantial operational challenges associated with the requirements to collect U.S. TINs prior to 2023. Second, a new build is required to support nominee reporting for QIs. Third, proposed modifications related to sections 1446(a) and (f) are different and independent of the general QI responsibility under chapters 3 and 4 and may need to be applied on a payment-by-payment basis, as opposed to the account basis within the designated range of QI accounts.

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We appreciate your consideration of our recommendations. As always, SIFMA member firms will continue to work diligently and in earnest to comply with all regulatory changes and requirements. If you have questions and would like to discuss this matter, please do not hesitate to contact me at wcardon@sifma.org or 202-962-7465.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L.C.C.', with a stylized flourish at the end.

Liam Cardon
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