IIACACCVM
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Marjorie Rollinson
IRS Associate Chief Counsel, International
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224
Marjorie.A.Rollinson@irscounsel.treas.gov

Delivered via e-mail

Re: Limitation on Benefits (LOB) certification on Form W-8BEN-E and reporting on 2016 Form 1042-S

Dear Ms. Rollinson:

The Investment Industry Association of Canada (IIAC) is writing to express our concerns relating to the new required elements with respect to the certification and reporting of "limitation on benefits" (LOB) provisions which are now part of both the Form W-8BEN-E[1] and the 2016 Form 1042-S[2].

Background

The IIAC is the national association representing 144 IIROC-regulated[3] investment dealer member firms in the Canadian securities industry. These dealer firms are the key intermediaries in Canadian capital markets, accounting for the vast majority of financial advisory services, securities trading and underwriting in public and private markets for governments and corporations. Our largest dealer members are Qualified Intermediaries (QIs), and the vast majority of these are QIs who have assumed both primary non-resident alien (NRA) withholding responsibility and primary Form 1099 reporting and backup withholding responsibility under their QI Agreements. As such, our concerns are written

[1] Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities) (revised April 2016).
[2] Foreign Person's U.S. Source Income Subject to Withholding (2016).
[3] Investment Industry Regulatory Organization of Canada.

from this perspective, and largely focus on the challenges and problems the implementation of these new elements will create for Canadian withholding QIs and their clients.

Issues Raised by Canadian Withholding QIs

Our industry's issues can be broadly categorized into the following areas:

1. The benefits to be gained from requiring the beneficial owner to certify as to the specific LOB provision have not been clearly articulated by the IRS, and are likely to be outweighed by the administrative and operational burden to withholding agents and QIs, in addition to increased confusion on the part of clients. It has not been clearly explained by the IRS (through a published notice, for example), why these form requirements have been changed, and until this is adequately explained, we believe it should be sufficient for a beneficial owner to simply certify that they meet an LOB provision in the applicable treaty.

2. There is a lack of clarity in the Form W-8BEN-E instructions about how Line 14b is to be completed (or if it is required to be completed) which will increase the likelihood of the client completing the form incorrectly (or not completing this part of the form at all), and also the likelihood that the client will seek guidance from the withholding agent or QI providing the form – guidance that the withholding agent or withholding QI cannot provide.

   For example, in the Form W-8BEN-E instructions for Line 14b, it states that residents of foreign countries that have entered into an income tax treaty with the United States that contains an LOB article "must" complete one of the checkboxes in line 14b. However, the next sentence in the guidance states that the beneficial owner can only check a box if the LOB article corresponds to the checkbox. Furthermore, the instructions later state that if the treaty does not have an LOB article, that the beneficial owner should enter "N/A" in the "other" category. The confusion about whether the beneficial owner needs to complete Line 14b at all is compounded by the text on the face of the Form itself, which states "if applicable" and "check all that apply".

   The Form W-8-BEN-E is already a complex document for clients, and has been challenging for QIs and other FFIs to administer, generating a large number of questions about determination of status from clients. The revision of Line 14b and its associated instructions will generate even more questions from clients. *Withholding agents and QIs cannot provide counsel to their clients about their U.S. tax statuses or whether a client meets the requirements of a treaty provision.* Additionally, withholding agents and withholding QIs should not be held to any kind of "reason to know" standard for rejecting a Form W-8BEN-E based on the beneficial owner's answer to Line 14b, as the facts required for making (or questioning the validity of) these determinations are largely outside of the knowledge of the withholding agent or QI requesting the form.

3. Minimal guidance was provided in the recently published 2016 Instructions for Form 1042-S as to how LOB Code reporting in Box 13j of Form 1042-S is to be completed by QIs and U.S. withholding agents. The instructions state that "withholding agents that are withholding at a reduced rate based on a treaty claim by an entity must include a limitation on benefits code (LOB code) in box 13j for the recipient when they receive documentation establishing the applicable limitation on benefits provision of the treaty", but also state that "withholding agents are not, however, required to obtain new documentation unless they are otherwise required to renew such documentation." If the intent of this language is to indicate that reporting of LOB codes is optional with respect to clients who have already completed Forms W-8BEN-E which did not contain the LOB certification, this should be more clearly explained in the instructions.

4. For QIs relying on the treaty statement language contained in section 5.03(B) of the QI Agreement, it has not been adequately explained by the IRS whether QIs will be able to continue relying on these provisions.

5. Changes to certification and reporting of this magnitude, which would require significant corresponding changes to a withholding agent or QI's systems and processes, *requires adequate lead time of at least 18 months*, in particular given all of the other implementation requirements faced by withholding agents and QIs, such as ongoing FATCA reporting phase-in, section 871(m), expected amendments to the QI Agreement, and the OECD Common Reporting Standard. The capacity of financial institutions – in particular QIs – has been stretched to the limits by the onslaught of international tax reporting and withholding requirements, many of which are requiring FIs to develop systems on an extremely short timeframe without adequate regulatory guidance.

Recommendations

Given the deep concerns our industry has raised with respect to these requirements, we propose the following recommendations:

1. We note that the IRS has published the final version of Form W-8BEN-E with the proposed changes to Line 14b, requiring the LOB certification. However, we believe that the IRS should address the issues around the clarity of the instructions identified above, potentially as revisions to the Instructions for Requesters of the Form W-8-BEN-E, as a cover sheet to the Form W-8BEN-E, or in some other kind of written guidance. In particular, it would be appreciated if a statement could be included in the instructions for Part III that the beneficial owner should seek their own tax counsel in making the determination of whether they meet an LOB test and that the withholding agent or QI to whom they are providing the Form cannot provide assistance in making this determination.

2. Similarly, without adequate justification or explanation about the use of this LOB provision information by the IRS, we believe that the related reporting on Form 1042-S should be

eliminated. If LOB Code reporting will be required, we would appreciate amendments to the Form 1042-S instructions, clarifying that the LOB Code reporting is optional with respect to clients who have already completed Forms W-8BEN-E which do not contain the LOB certification, as indicated above. The IRS should also provide clear guidance for QIs relying on the documentation requirements of the QI Agreement with respect to the use of Treaty Statements.

3. If the LOB Code reporting is not eliminated, it would be highly advisable for the IRS to generally clarify that reporting Box 13j on the 2016 Form 1042-S is *optional for 2016*, to allow for adequate implementation time for all withholding agents and QIs. It would also be advisable for the IRS to continue a "phased-in" approach, making it optional for 2017 as well.

We would appreciate meeting with you to discuss our recommendations above, and would be happy to do so in person or via teleconference. You may contact me directly via email at **ataylor@iiac.ca** or by phone at 416-687-5476.

Yours sincerely,

"*Andrea Taylor*"
Managing Director
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Cc:

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