

August 6, 2020

*Submitted via email*

Mr. L.G. “Chip” Harter III  
Deputy Assistant Secretary (International Tax  
Affairs),  
Office of the International Tax Counsel  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Mr. Krishna P. Vallabhaneni  
Tax Legislative Counsel,  
Office of Tax Policy  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Ms. Erika W. Nijenhuis  
Senior Counsel,  
Office of Tax Policy  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Ms. Kamela K. Nelan  
Attorney-Advisor,  
Office of Tax Policy  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Mr. Peter H. Blessing  
Associate Chief Counsel (International),  
Office of Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Ms. Nancy J. Erwin  
Branch Chief,  
Office of Associate Chief Counsel (International)  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. John J. Sweeney  
Special Counsel,  
Office of Associate Chief Counsel (International)  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Ronald M. Gootzeit  
Attorney-Advisor,  
Office of Associate Chief Counsel (International)  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Priority Recommendations on proposed regulations under section 1446(f)**

Dear Sirs and Mesdames:

The Investment Industry Association of Canada (the “IIAC”) is the national association representing the investment industry’s position on securities regulations, public policy and industry issues on behalf of our 115 IIROC-regulated investment dealer members in the Canadian securities industry.<sup>1</sup>

The IIAC understands that the proposed regulations under section 1446(f) (REG-105476-18) relating to transfers of interests in publicly traded partnerships (“PTP”) is expected to be finalized shortly. The IIAC would like to highlight certain concerns raised in our previous July 15, 2019 letter<sup>2</sup>, and support the additional concerns raised by SIFMA in their December 20, 2019 letter<sup>3</sup>, as well as their July 15, 2019 letter<sup>4</sup>. The IIAC also included these recommendations in our July 22, 2020 submission on the Priority Guidance Plan 2020-2021<sup>5</sup>. Without additional guidance or amendments, the proposed regulations under section 1446(f) create substantial additional burdens for industry participants, and especially for Qualified Intermediaries (“QIs”) and other withholding agents. In particular, we would like to reiterate:

- 1) the need for an extended effective date from 60 days to 18 months following the finalization of all guidance;
- 2) the IIAC’s support for SIFMA’s expanded discussion on the rationale for why the executing broker should not be required to collect withholding tax under section 1446(f) for delivery versus payment (“DVP”) transactions, and we similarly recommended that the custodial broker who receives the gross proceeds should be solely responsible for collecting withholding tax under section 1446(f); and
- 3) the need for QIs to be permitted to pool report payments under section 1446(f), and clarity that pool reporting is allowed under the existing section 8.01 of the current QI Agreement published in Rev. Proc. 2017-15 and in the proposed amendments under section 1446(a) and §1.1446-4.

1) Extend the effective date to 18 months following finalization

IIAC Member Firms appreciate that the IRS and Treasury have been recently more mindful of the amount of time needed for withholding agents to build systems and to change corresponding policies when mandating effective dates for new or revised regulations. However, as currently drafted, the proposed regulations under section 1446(f) would become effective 60 days after the finalization date. These regulations introduce a new U.S. withholding tax on gross proceeds paid to foreign persons. As previously outlined in the IIAC’s and SIFMA’s submissions, withholding agents require significant system builds in order to be compliant that cannot be undertaken until the final rules are published. These changes cannot be made within 60 days.

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<sup>1</sup> For more information visit, <http://www.iiac.ca>

<sup>2</sup> [https://iiac.ca/wp-content/uploads/Submission-to-IRS\\_Withholding-of-Tax-and-Information-Reporting-with-Respect-to-Interests-in-Partnerships-Engaged-in-the-Conduct-of-a-US-Trade-or-Business\\_July-12-2019.pdf](https://iiac.ca/wp-content/uploads/Submission-to-IRS_Withholding-of-Tax-and-Information-Reporting-with-Respect-to-Interests-in-Partnerships-Engaged-in-the-Conduct-of-a-US-Trade-or-Business_July-12-2019.pdf)

<sup>3</sup> [https://www.sifma.org/wp-content/uploads/2020/01/SIFMA-1446f-Follow-Up-Letter\\_Dec-20.19.pdf](https://www.sifma.org/wp-content/uploads/2020/01/SIFMA-1446f-Follow-Up-Letter_Dec-20.19.pdf)

<sup>4</sup> <https://www.sifma.org/resources/submissions/proposed-regulations-under-section-1446f/>

<sup>5</sup> <https://iiac.ca/wp-content/uploads/IIAC-Submission-re-Notice-2020-47-Priority-Guidance-Plan-2020-2021.pdf>

In trying to prepare for new requirements under section 1446(f), IIAC Member Firms have identified operational issues such as:

- implementing a system and process to review Qualified Notices, or source reliable data for Qualified Notices;
- implementing a system and process to withhold and report under section 1446(a), which relies on different withholding rates and logic from FDAP income, and was previously only performed by U.S. withholding agents;
- implementing a system and process to track and withhold on gross proceeds for non-U.S. account holders, which was previously only tracked and withheld on for certain U.S. account holders; and
- implementing a system and process to issue a recipient-specific Form 1042-S to each non-U.S. holder who transfers a partnership interest, which will greatly increase the QI's reporting obligations as these amounts cannot be pooled.

As these builds are entirely new for non-U.S. withholding agents, extensive analysis on existing systems are required, causing undue burden to meet the requirements under sections 1446(a) and 1446(f).

Further, we anticipate that financial institutions will continue to be impacted by the COVID-19 pandemic through 2020 and possibly into 2021. In many locations in Canada there are still restrictions with respect to having personnel in offices which can impact IT coordination and builds. In addition, many budgets have been decreased as FIs had to divert funds and planned IT builds to meet emergency and continuity plans. Given the scope of changes required to implement the proposed regulations and the additional challenges related to COVID-19, a 60 day implementation period is not achievable. An 18 month implementation period following rule finalization would allow sufficient time for withholding agents to evaluate and implement necessary systems and process changes.

## 2) DVP Transactions

The IIAC would like to reiterate the concerns expressed in the IIAC's and both of SIFMA's submissions regarding the complexity and burden that would result if executing brokers were required to withhold pursuant to section 1446(f). As SIFMA noted, when PTP interests are sold, "there could be several brokers involved in the clearing and settlement of the trade or a single broker could assume multiple roles." SIFMA provided an example of a DVP transaction in which the executing broker may not know the identity of the ultimate beneficial owner of the PTP interests being sold, demonstrating the burden that would result if the executing broker was required to withhold.

In order to avoid unnecessary confusion and increased complications, the IIAC continues to recommend that a custodial broker who receives the gross proceeds from the sale of the PTP from the clearing organization be the party responsible for collecting the U.S. withholding tax under section 1446(f), unless the proceeds are paid to another broker that has assumed primary withholding responsibility.

### 3) QIs Related Concerns

The proposed regulations imply that a recipient-specific Form 1042-S must be issued for transfers subject to section 1446(f). QIs are entitled to file Forms 1042-S using pooled reporting methods. Only in certain limited circumstances, based on account holder criteria, are Forms 1042-S issued to specific payees or account holders. The availability of pooled reporting is one of the main benefits of QI status and is of particular importance as it reduces the burden of Form 1042-S reporting and ensures compliance with local privacy law requirements. If the proposed regulations are intended to require payee-specific reporting for all transfers subject to section 1446(f), the number of Forms 1042-S produced and filed by QIs would increase dramatically. More troubling, however, is the inability of QIs to rely on existing reporting systems or processes, which are not designed to produce payee-specific Forms 1042-S based on income type. As such, we request that the final regulations and new QI Agreement clearly provide that reporting requirements for payments subject to section 1446(f) will follow existing reporting requirements under the current QI Agreement.

In addition to the above concerns regarding pooled reporting, we believe that QIs should be given as much flexibility as possible with respect to whether they take on withholding responsibility for 1446(a) or 1446(f) and these choices should be separate from whether they take on withholding responsibilities under section 1441.

We appreciate the ongoing consultation with industry participants as our members have a vested interest in fully understanding and being able to comply with these proposed regulations. If you need any clarification or have questions regarding this letter, we kindly ask that you contact the undersigned at [awalrath@iiac.ca](mailto:awalrath@iiac.ca). Thank you.

Sincerely,

*"Adrian Walrath"*

Adrian Walrath  
Director  
Investment Industry Association of Canada

CC:

Mr. Chadwick P. Rowland, Attorney, Office of Associate Chief Counsel (International), Internal Revenue Service  
Ms. Nikole C. Flax, Deputy Commissioner, Large Business & International (LB&I) Division, Internal Revenue Service  
Ms. Deborah T. Palacheck, Director, LB&I - WIIC Practice Area, Internal Revenue Service  
Ms. Kimberly A. Schoenbacher, Director, LB&I - Field Operations Foreign Payments Practice, Internal Revenue Service  
Mr. Yuen Chan, Senior Manager, LB&I - FPP Program Office, Internal Revenue Service