IIACACCVM
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May 31, 2022

Submitted via Federal eRulemaking Portal

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Re: IRS Notice 2022-23 (the "Notice") Proposed Amendments to the Qualified Intermediary Agreement ("QI Agreement")

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 investment dealer members in the Canadian securities industry.[1]

The IIAC has made several submissions with respect to section 1446(f) of the Internal Revenue Code ("1446(f)") and its final regulations relating to transfers of interests in publicly traded partnerships ("PTPs") by foreign persons, and we appreciate the responsiveness of the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") to the financial industry's concerns with respect to how to implement these complex requirements. The IIAC appreciates the opportunity to comment on the

[1] For more information visit, **http://www.iiac.ca**

proposed amendments to the current Qualified Intermediary Agreement[2] to operationalize 1446(a) and (f) requirements.

I. U.S. TIN Requirement for Withholding Certificates

Proposed sections 5.02(B) and (C) appear to require Qualified Intermediaries ("QI") to obtain a U.S. TIN from a non-U.S. account holder in order to consider the account documented for purposes of 1446(a) and 1446(f), respectively. QIs are not currently required to obtain TINs, US or otherwise, in order to fully document account holders for purposes of Chapter 3 and Ch. 4.

We believe the policy objective of the proposed requirement - to increase the instances of non-U.S. account holders obtaining U.S. TINs to facilitate their U.S. tax return filing requirements, should not disproportionately have negative outcomes for QIs. In particular, where QIs are unable to obtain the U.S. TIN, we ask that the IRS, consider that the QI may be otherwise complying with all requirements, including proper withholding. Further, U.S. withholding agents would not have similar requirements under 1446(f) or challenges in collecting U.S. TINs from account holders, as most QI account holders are foreign holders without U.S. TINs.

We believe U.S. TINs should not be a requirement for an account to be treated as documented under the terms of the QI Agreement, but should be required only where the non-U.S. account holder makes a claim for a treaty benefit. If the non-U.S. account holder does not provide the U.S. TIN, then they are unable to obtain the reduced withholding rate. It would not impact documentation requirements which, as drafted, would unfairly penalize QI.

If the requirements to obtain the U.S. TIN for all account holders for which a QI holds PTP interests were to remain in proposed sections 5.02(B) and (C), then transition relief is needed to provide sufficient time for QIs to obtain U.S. TINs for existing clients who, despite being fully documented today, will be considered undocumented as of January 1, 2023. Given the challenges collecting U.S. TINs from existing clients, as well as delays in obtaining U.S. TINs as a result of the pandemic, we believe these provisions should have a delayed implementation date. Even with transition relief, QI documentation is not generally linked to an account holder's individual holdings, as securities held in accounts can change constantly. It would be extremely burdensome to require QIs to monitor and request updated QI documentation (U.S. TINs) each time an account holder purchases securities subject to 1446 in order to be documented for purposes of 1446(a) and 1446(f).

Further, if the requirement to obtain the U.S. TIN for all account holders for which a QI holds PTP interests were to remain in proposed sections 5.02(B) and (C), we request clarification on the QI's obligation to exercise "best efforts" to obtain required documentation (i.e. U.S. TIN). As previously stated, there are considerable challenges for QIs to obtain U.S. TINs from non-U.S. account holders. QIs should be able to rely on a "best efforts" safe harbor, and existing "reasonable clause" related to requirements for missing TINs.

[2] Rev. Proc. 2017-15

II. Material Failures and Events of Default

The proposed expansion to the definition of Material Failures and Events of Default in sections 10.03(B)(1)(i), (j) and 11.06(B), (E) would include failure to comply with certain requirements related to sections 1446(a) and (f), including with respect to documentation. If the proposed sections 5.02 (B) and (C) are not revised and would require a U.S. TIN to be collected for withholding certificates to comply with documentation requirements for 1446(a) and 1446(f) purposes, then we believe that references to compliance with 1446(a) and 1446(f) should state that failure to collect the U.S. TIN is not considered a material failure and will not lead to an event of default.

QIs may have properly documented an account holder for Chapter 3 and 4 purposes before the client subsequently purchases a PTP, and if the QI is unable to collect a U.S. TIN, that client is undocumented for 1446 purposes only, and not Chapters 3 and 4. If the QI complies with their 1446 withholding requirements, there should not be a material failure or event of default as a result of missing U.S. TINs in the above scenario. The challenges associated with collecting U.S. TINs from non-U.S. account holders should not result in such a disproportionate penalty for the QI, when the QI can only enforce withholding, and is dependent on compliance from the non-U.S. account holder with the U.S tax return filing obligation.

In addition, should a U.S. TIN be required in order to treat an account holder as documented for purposes of 1446(a) and 1446(f), QIs require additional guidance with respect to how such accounts will be factored into any determination that a QI has a significant number of undocumented accounts under the QI Agreement. As a simplified example: QI maintains 100 accounts, all of which are currently documented for purposes of Ch. 3 and Ch 4. and 20 of those accounts hold PTP interests, but do not have a U.S. TIN on file. As of January 1, 2023, how does the QI calculate the number of undocumented accounts for purposes of determining whether it has an event of default under the QI Agreement? In this example, are 20% of the accounts considered undocumented, despite the fact that these accounts are fully documented for all other purposes?

III. Claim for Treaty Benefit

The IIAC would appreciate clarification on the interaction of treaty benefit claims and what the QI can expect to accept as a valid claim for 1446(f) purposes. In general, it may be expected that treaty benefit claims would be made under Article VII for business profits. However, in the Convention Between Canada and the United States of America (the “Canada U.S. Tax Treaty”), there are several potential articles that may be applicable, including a gains provision, Article XIII. Article VII(6) provides that if an item of income is dealt with in another article of the Canada U.S. Tax Treaty, that other article should prevail. This would indicate that a treaty claim under Article XIII of the Canada U.S. Tax Treaty would be acceptable with respect to withholding on dispositions of partnership interests under 1446(f).

IV. PTP Attachment to Form W-8

We request clarification that a QI can have a separate attachment listing an account holder's PTPs to accompany the W-8. Further, if the account holder purchases additional PTPs, it should be sufficient to update the PTP attachment without any requirement to update the other documentation, including the W-8.

V. QI Documentation for Payment-by-Payment Basis

The proposed amendments to section 3.01 of the QI Agreement note that QIs are permitted to assume withholding responsibility for sections 1446(a) and (f) on a "payment-by-payment" basis where there is a valid withholding certificate. We request confirmation that the reference is not intended to require QIs to provide new documentation with respect to each payment the QI receives subject to sections 1446(a) or (f). The QI should be allowed to rely on 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.

VI. New Income Codes Needed

The IIAC seeks confirmation that the default withholding rules for when a qualified notice fails to provide sufficient detail for a nominee to determine the amounts subject to withholding on a PTP distribution, would also apply where no qualified notice is provided.

With respect to the presumption rules for income classification outlined in 1446-4(d), we appreciate the additional clarity, however we require assistance from the IRS in order to operationalize these rules. Current systems generally allow a QI to classify a distribution based on income information provided by the upstream payor, and withholding is then applied automatically based on the confluence of income code and documentation status of each account holder. When applying the presumption rules, the end result is a withholding rate based on the recipient and not the income type. For example, the same distribution, under the new rules, would be subject to 30% withholding as FDAP when paid to a corporation, but to 37% withholding as ECI when paid to any other recipient.

Consequently, there is not alignment with the current income codes and permitted withholding amounts. We propose that the IRS create a new income code for unclassified PTP income, and that Form instructions and the e-file system allow 30% and 37% withholding rates associated with this new income code. This would alleviate challenges of trying to manipulate current systems to accurately track, withhold on and report unclassified PTP distributions, and would prevent potential reconciliation or upstream reporting issues associated with trying to use current codes based on the withholding rate. This may particularly be a concern when considering the chain of information that is passed between DTCC, CDS, and various QIs. There should be clear coding as to what income is what throughout the chain.

VII. Payee Specific Reporting

The IIAC is supportive of the three-calendar year time limit in proposed section 8.02(P) of the QI Agreement, 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. It is burdensome for QIs to produce the payee specific forms and refile, and the defined time limit is helpful.

We would like to reiterate comments made by various financial institutions that the late filing penalties that are habitually assessed as a result of these specifically requested payee-specific Forms 1042-S are unduly burdensome and result in significant losses in time and effort for taxpayers. Where a QI is filing amended 1042s and issuing new and amended Forms 1042-S, as a result of an account holder requesting payee specific form, the QIs should not be subject to late filing penalties. We propose a separate tick box on Form 1042-S that would allow a filer to indicate whether a new Form 1042-S is being generated at the request of an account holder, which would allow the service centers to easily identify these forms and avoid assessing unwarranted penalties.

VIII. Nominee Reporting

The IIAC requests clarification as to the expectations for reporting by QIs under proposed Section 8.07 of the QI Agreement. For example, can a simplified or modified Schedule K-1 be provided.

IX. Other

While outside the scope of the proposed QI Agreement amendments, there remain some significant implementation issues for firms with respect to 1446(f). We would like to highlight two concerns that we have previously raised with the IRS and Treasury, and we ask for additional consideration on how these issues can be addressed to assist the financial industry comply with the requirements.

Clarification regarding the scope of section 1446(f)

We request that the Treasury and IRS provide written guidance that:

1. there is a presumption for brokers that an entity which offers flow-through features and limited liability to the members, and that is organized outside the U.S. is not a PTP, absent knowledge to the contrary, such as the broker receiving a qualified notice from the entity; and

2. there is a presumption that a non-U.S. PTP does not have U.S. effectively connected income ("ECI"), absent the entity publishing a qualified notice to the contrary.

Absent an entity publishing a qualified notice, IIAC Members note it will be very onerous for brokers to try and ascertain if an entity should be classified as a PTP for purposes of section 1446(f).

DVP Transactions – Brokers vs. Custodians for 1446(f)

Brokers face important challenges in implementing withholding for DVP dispositions due to the operational uncertainties that still exist, and this is problematic as this affects the settlement processes. Most, if not all, of the Canadian custodians are withholding QIs and we understand that DTCC is considering sharing the W-8 information between financial intermediaries that are members of DTCC, to let custodians be able to withhold, so that the settlement process is not unduly affected by the new withholding requirements under 1446(f). We are concerned with the risk of potential double withholding. For example, due to a different interpretation or a lack of information about what withholding was applied, the broker and the custodian both withhold to ensure they are compliant with the QI agreement.

As a result, we request additional guidance confirming the intermediaries' responsibilities for DVP transactions. For instance, it would be helpful to confirm that the broker, and not the custodian, is responsible for the withholding. In the absence of additional guidance, we would appreciate an extension for the application of 1446(f) to provide additional time for industry to further review the settlements processes and make necessary modifications to comply with the requirements and avoid duplicative withholding.

X. Good Faith Efforts Transition Period

QIs need sufficient time to implement the new requirements proposed in the Notice. As noted above, there are operational challenges for QIs to comply with potential U.S. TIN collection requirements, nominee reporting among other revisions to policies and procedures. The IRS and Treasury have included good faith efforts transition periods for other rules, for example section 871(m). We respectfully request a two-year good faith efforts transition period from the expected January 1, 2023, effective date.

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

Sincerely,
Investment Industry Association of Canada