European Banking Federation

Chief Executive

EBF_017728

Mr John SWEENEY
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2 March 2016

Dear Mr Sweeney,

Subject: Practical issues in complying with FATCA and the QI Agreement

I am writing to you as Chief Executive of the European Banking Federation (EBF), the voice of European banks, to draw your attention to a number of practical issues in delivering the requirements of FATCA and the Qualified Intermediary (QI) Agreement. I would like to make some suggestions for your consideration as to how these issues can be resolved to the benefit of both Financial Institutions and the Internal Revenue Service (IRS).

## 1. Multiple reporting on term deposits under FATCA

A Financial Institution may hold many term deposits on behalf of customers. These deposits often mature "overnight" and are just roll-overs, albeit they are not always identified as such. These roll-overs are currently treated as an account closure and account opening for reporting purposes, given that each roll-over results in a new account number. This means that one account holder may have reportable balances reported several times during the same calendar year. In our view this situation generates misleading information and undue complications, for instance regarding the effective wealth of a given account holder.

We note that the instructions issued by the IRS for 2015 regarding IRS Form 8966 provide that if an account holder rolls over the amounts in one type of account into another type of account with the same Foreign Financial Institution during the calendar year the account shall not be reported twice. We welcome this facility for the reasons explained above. We would, however, suggest to clarify that this facility is also applicable in cases where the amounts at hand are rolled over from an account to another (or the same) account. In essence, unless the Financial Institution maintaining the account under review elects otherwise, term deposits should be treated as a constant account with only the need to report the final closing or current balance annually at the end of the calendar year or, as the case may be, at the end of any other relevant reporting period.

## 2. Elimination of automatic extension to file Forms 1042

On 13 August 2015 the IRS published intent to eliminate the automatic 30-day extension to file certain forms, including Forms 1042-S and 1042[1]. These changes are due to come into effect for the 2017 filing season. While we fully understand the IRS' rationale behind the changes, and appreciate the importance of combating identity theft and refund fraud, we have concerns that this measure, if adopted in its current form, would put a significant strain on non-US banks and their ability to file Forms 1042 correctly as part of their FATCA and QI compliance requirements. We believe that the latter would eventually be detrimental to the quality of the

[1] https://www.federalregister.gov/articles/2015/08/13/2015-19933/extension-of-time-to-file-certain-information-returns

underlying data reporting to the IRS, resulting in a substantial number of amended returns. We refer to the specific comments submitted by EBF in November 2015, copy of which is attached hereto for your ease of reference, and reiterate our suggestion to maintain the current automatic 30-day extension to file Forms 1042-S and 1042 for non-US financial institutions.

### 3. Timing of the QI audit

The current QI agreement provides the option to rely upon internal audit procedures, or to have a review carried out by external auditors. From a practical perspective many QIs will not have adequate resources with sufficient expertise to undertake a comprehensive internal compliance audit, and thus many QIs are planning to work with external auditors. The language in the QI agreement would suggest that the audit procedure needs to be completed by 30 June 2018, i.e. within 6 months from the end of the three full calendar year QI compliance review period ending 31 December 2017.

From a practical viewpoint this would result in many QIs engaging advisors to assist with undertaking a compliance audit within the first six months of 2018. This six month compliance audit time frame is impractical for QIs which are part of large multinational banks, particularly considering that the reporting for 2017 will only be completed in many cases by mid-April 2018 since many QIs have upstream US withholding agents who do not provide them with Forms 1042-S before 15 March of each year. In such instances, external auditors would only have a 6-week period available to work with the QI Responsible Officer to complete a compliance audit.

Therefore we would like to suggest that a periodic review (as required under 10.02(A)(5)) which is conducted in respect of any calendar year during the three year period be considered sufficient to support the periodic certification required by the Responsible Officer. This more closely aligns to rules which applied to the Agreed Upon Procedures reviews under the old QI Agreements.

### 4. Query resolution

Upon contacting the IRS in relation to Form 1042-S filing issues, Financial Institutions have encountered the requirement to send information by facsimile to the IRS. They have noted during calls that IRS representatives cannot accept emails aimed at addressing urgent issues. For many Financial Institutions facsimile is now outdated with staff no longer having access to this medium. This has seen Financial Institutions turn to written "snail mail", adding several weeks to the resolution of some issues.

We would therefore suggest in the aforementioned context that IRS representatives be allowed to accept secured emails from at least one named representative at a Financial Institution.

### 5. Issuance of reporting instructions

Normally the IRS issues revised reporting instructions on an annual basis. However, these reporting instructions are not received until very late. Since Financial Institutions use a number of external vendor solutions for FATCA and QI reporting we would like to suggest that any revised reporting instructions be issued at the very latest in July of the calendar year to be reported. This will give Financial Institutions the opportunity to update systems as necessary and report to the timeline that the IRS desires.

### 6. Portal security issues

We have noted it is possible for anyone to register on the IRS portal and register an entity, i.e. this could result in fraudulent or malicious registrations for a large multinational Financial Institution. Whilst a Financial Institution can reconcile against the Global Intermediary Identification Number (GIIN) list we would suggest that the IRS make available a facility for fraudulent of maliciously created registrations to be investigated and

removed. This is required as at the current time they can only be removed using the password set by the party that originally created them and which the Financial Institution in question would not be aware of. Going forward, we would suggest restricting the ability of Financial Institutions to access to the IRS registration portal to a limited number of named officers of the said institutions.

### 7. TIN matching

A recent technical FAQ issued by the IRS provides that, in cases a TIN is "applied for", zeros should be placed in the relevant field in 8966 returns. We are wondering in this context whether the latter would cause a problem in relation to when the IRS can match TINs, considering the timeframe usually applicable for the issuance of the same. A similar issue could, to our view, arise in the context of the exchange between competent authorities under applicable IGAs, whereby Financial Institutions enter the date of birth in the TIN field when reporting a US Reportable Account.

### 8. Specified US Persons with no U.S. TIN

Individual accountholders that qualify as Specified US Person but are unable to provide a U.S. TIN do not constitute a completely exceptional occurrence within our membership. The latter seems to be attributable to the fact that a sizeable number of individuals in Europe are not always aware of having U.S. status under U.S. nationality law or have only become aware of it recently. Some of them reported also some difficulties in applying for a U.S. Social Security Number (SSN), if they do not wish to travel or relocate to the U.S. Considering this background, we welcome the instructions issued by the IRS for 2015 regarding IRS Form 8966, which provide that, if the accountholder or payee does not have a (U.S.) TIN, a series of zeros shall be entered instead in the relevant field. Assuming that the issue referred to above will not completely disappear in the short term, we would suggest continuing this facility (or the alternative of reporting the date of birth instead, as per the provisions of the IGAs) in forthcoming instructions for subsequent reporting periods. Failure to provide a U.S. TIN by a U.S. Reportable Person should not impede the ability of *bona fide* Foreign Financial Institutions (i.e. Foreign Financial Institutions that made reasonable efforts to obtain the U.S. TINs from their Specified U.S. Person clients) to remain compliant and be able to validly submit their FATCA reports to the IRS or, as the case may be, the foreign Competent Authority.

### 9. Other pending questions

Our members would also like to understand if it is the intention of the IRS per the recent US budget to request Financial Institutions to issue recipient copies of form 8966. If so by when is this required? Further, our members are also keen to understand further details on how the error procedure for Foreign Financial Institutions under FATCA will operate – will this follow procedures similar to that of the B notice?

We would welcome any comments you are able to make on the above matters. If you require a conference call for further clarification we would be happy to participate.

Yours sincerely,

Wim MIJS

Enclosure: EBF submission dated 12 November 2015 regarding REG-132075-14 *(EBF_017893)*