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Subject: Technical issues in complying with the proposed QI Agreement (IRS Notice 2016-42)

Dear Mr Sweeney, dear Ms Perkins,

I am writing to you as Chief Executive of the European Banking Federation (EBF), which is the voice of European banks.

Our members highlight below some technical and practical issues in delivering the requirements of the proposed QI Agreement and 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 IRS.

1. Timing of the QI / QDD Review

Within a separate letter to U.S. Treasury and the IRS the EBF have requested a delay to the commencement date of the new QDD rules. If the commencement date for the QDD regime cannot be delayed, we note that the timing for the required periodic review of the QDD obligations is inadequate. This is considering that such review must occur in 2018 regarding 2017 and because the 1042-S reporting is not due until 15 March. Furthermore, due to the deadline being the same for upstream withholding agents as for QIs, most FIs will utilise reporting extensions to 14 April 2018. Therefore in order to certify compliance by 1 July 2018 the review period is truncated to around 10 man weeks, and it will be impractical to engage an external reviewer and for them to undertake the review within such a short period.

Following the point above, we propose there should be alignment of the compliance review with the certification date requirements and apply a QI compliance review (without certification of QDD compliance) for years 2015, 2016 and 2017. A joint QI / QDD review period could in that

case apply from the commencement of the new QI certification period commencing on 1 January 2018 and also covering 2019 and 2020 calendar years. We would further support this by noting that during the 1st year of operation there will be a period of bedding down and thus a strict QDD external compliance review is likely to unfairly punish QI's that are attempting to adapt to rules that have only just been issued.

As part of a staggering reviews to any year within the review period, we would also propose that the periodic certification due date is extended to 31 December 2018 and 31 December 2021, in order to allow sufficient time where 2017 and 2020 are selected as the year for review.

2. Application form to use within the QDD process

In respect of the QDD application process, we understand Form 14345 for QI application will be updated for QDDs. In order to prepare, and understand what information needs to be provided, we need to see the amendments as soon as practicable, along with instructions and a list of additional documentation that may be requested by the IRS as part of the process as soon as possible.

3. Use of Forms 1042-S for QDD reporting

Further, it seems impractical and operationally difficult, that QDD payments to non-exempt US Persons are to be reported on a Form 1042-S. Systems are designed not to include US persons on 1042S reporting and this will result in an expensive systems change to accommodate the form changes, even for those QI's that do not become QDD's and would thus appear disproportionate.

This process will cause confusion for all QIs and therefore we recommend that a separate new form is created and utilised by the IRS. Under the draft agreement, further issues will arise where a business has separate functions for QI and QDD activities and needs to produce one summary Form 1042 as the activity is within the same legal entity. The creation of a separate reporting for QDDs will ease confusion within the industry and ensure a simpler and cost effective systems solution build. In any event without a final form to be used being available, QDDs will not be able to design the required reconciliation process prior to the commencement date.

4. Confused use of Form W-8IMY for QDDs / QIs

It also seems impractical and confusing to use Form W-8IMY for QDDs, given this form is for intermediaries. We would therefore suggest that a new form is utilised, such as a W8QDD with the explicit recognition that a QI acting as a QDD can provide the following documentation in respect of any account:

- A W-8IMY indicating as a QI or NQI when acting as an intermediary,
- A W-8QDD indicating it acts as a QDD when income relates to a potential 871(m) transaction, and,
- A W-8BEN-E indicating it is acting in a proprietary capacity where income received is not related to a potential 871(m) transaction.

The W-8IMY confusion is also relevant for substitute interest payments. Section 3.03 says that a QI may now provide Form W-8IMY and its QI-EIN to the upstream payor even if QI is not acting as a QDD, electing to assume primary withholding / reporting responsibility. This would effectively bring these substitute payments into the scope of QI and the QI audit (even for QIs that are not QDDs). Here we also note that Section 6.01 appears to suggest that the QI must make this certification on Form W-8IMY when acting with respect to these transactions. Clarity should be sought that this is only optional.

In line with industry practice, where a SBL / repo transaction gives rise to a US-source FDAP payment, a QI would instead provide Form W-8BEN-E as it is acting in a principal capacity. By doing this the QI essentially assumes primary withholding / reporting responsibility anyway, and would manufacture the substitute interest payments and report on a separate Form 1042 using its US-EIN rather than its QI-EIN. The draft Form W-8IMY has a new QI chapter 3 certification which anticipates this change. Using the Form W-8IMY for this purpose (even where acting in a principal capacity to the transaction) is bound to cause widespread confusion and thus we recommend the use of forms as highlighted above.

5. Changes to Form W-8IMY

The proposed changes to the existing form would have a disproportionate impact on QIs, particularly those that are not QDDs as a number of QIs use established vendor systems for validation that would need to be reprogrammed. It is crucial that any new or revised form and instructions for it are released at an early stage to allow QI's to amend their systems accordingly, given the lead time for systems development. In the event that forms are changed we would ask that new requirements are inserted at the end of existing categories in order to reduce systems change impact.

6. Limitation on benefits provisions

Notice 2016-42 provides at pages 64-65 that "*For accounts maintained by QI prior to January 1, 2017 that were documented with documentary evidence and for which treaty benefits are being claimed, QI is required to obtain the appropriate limitation on benefits statement prior to January 1, 2019.*"

In the meantime, instructions for Form W-8BEN-E provide that "*generally, a Form W-8BEN-E will remain valid for purposes of both chapters 3 and 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect*". As per the said instructions, a Form W-8BEN-E (old form Feb. 2014 with no limitation on benefits statement included) signed on 30 March 2016 thus remains valid through 31 December 2019.

It is understood that for accounts documented with documentary evidence (including treaty statement) before 1 January 2017, Notice 2016-42 allows for a transition period until 31 December 2018 to update the treaty statements. However, if a QI used Forms W-8BEN-E (instead of documentary evidence), the expiration date is still as defined in the instructions for such form. In the example given above (i.e. W-8BEN-E signed in 2016), it is thus understood

that the form at hand should remain valid until 31 December 2019. We seek confirmation of this understanding.

7. QDD – Equity linked products

There are many Equity Linked products that are listed instruments and which are sold to many thousands of retail customers in some markets, for example Germany. They are effectively baskets of US equities. Where such products are caught by Section 871(m) this will result in the need for the FI to document the customer with a Form W-8BEN, and potentially withhold on each payment date of each underlying security. This is disproportionate for the amount of income received by the customer, and the amount of tax at stake, we would therefore suggest that a *de minimis* amount could be applied of say USD 50, for the customer for the calendar year. If this proposal cannot be agreed, then we suggest consideration be given to holding the withholding in escrow accounts, for payment at a later given date, given the complexity of the QDD calculations.

8. QDD Withholding

We would like to clarify that whilst QDD activity may require acting as a primary withholding agent that this does not prevent the traditional QI activity to continue to delegate withholding to a US withholding agent.

9. QDD – Joint Account Provisions

It is unclear to us why the joint account provisions are not available to a QI acting as a QDD. We respectfully ask that due consideration is given to this. The joint account rules require the partnership or trust to provide all underlying owner documentation and the QI applies the highest rate of withholding for any one owner. In addition, none of the partnership or trust's owners can be a U.S. person or any person subject to chapter 4 withholding and reporting. Also unclear is the compliance review requirement for partnerships and trusts treated as joint accounts. The joint account provisions explicitly mandate the partnership or trust to provide proof that it has provided all ownership documentation (e.g., partnership agreement) to the QI's reviewer within 90 days of a request. Because providing proof that the documentation provided is comprehensive when requested by the QI's reviewer is a condition for using the joint account rule it is unclear why there are compliance requirements for those partnerships or trusts that do not provide such proof.

Furthermore, it is not clear why Treasury and the IRS are requiring the RO to disclose the names and addresses of partnerships and trusts treated as joint accounts. The primary purpose of the rule was to address local law prohibitions of recipient specific Form 1042-S reporting that would have otherwise been required for the underlying owners. The same prohibitions should exist for the disclosure of the partnerships and trusts themselves.

10. QI – Review procedures

We note that the life of the QI agreement and the compliance certification periods are not aligned, i.e. the certification covers to end of 2017, whilst the QI agreement is renewed on 1 January 2017. We suggest that the certification period ending 2017 remains as is, with the next certification period either shortened to two years or lengthened to five years, three years thereafter in order to align it to the life of the QI agreement.

The agreement proposes that under a consolidated audit a QI compliance FI is appointed, and the RO of such FI makes the certification. In practice a large FI with many entities will appoint different ROs, who will only be able to certify for that particular entity for which they have responsibility. From a practical viewpoint, we would ask that where an external reviewer prepares a consolidated compliance review report, that we are able to make several RO certifications in support of the consolidated audit according to the RO in charge of the entity.

We note under section 10.04(3) that an external reviewer cannot review systems, policies, procedures or the results thereof, that it was involved in designing, implementing or maintaining. This is a problem given the 5 year audit rotation rules applicable within the EU. As a result of these reforms, FIs generally do not rely on advice from their statutory auditor. Therefore, with this rule there is a distinct danger that the QI has a very limited population of external reviewers that it can rely upon, which in turn means fees charged may be less competitive. We would ask thus if separate personnel from the same external accounting firm could be allowed to undertake the review. If not, we seek confirmation that the restriction does not cover the provision of advice on QI, for example on understanding of some of the provisions, which are unrelated to the design, implementation or maintenance of systems, policies and procedures.

Section 4.05(A)(1) refers to a certification that the account holder has maintained their chapter 4 status during each certification period. We seek clarification whether the term "certification period" refers to a calendar year or to the 3-year certification period of compliance under the QI agreement. Furthermore, we ask for confirmation whether or not this certification is an additional requirement what customers provided under Section 4.A of the current QI agreement.

Under the review procedures in Appendix 1, Part III, B4, a condition of the QI review waiver is a 100% review of the documentation. This would appear to defeat the purpose of a waiver. We would suggest instead that the safe harbour sampling methodology be able to be utilised here. Also in respect of the waiver in the event that it is refused we would ask that the QI has 6 months to conduct the periodic review and to make the new certification of internal controls which take this review into account.

Under 10.05, (D)(3), the QI rules require a review of Form 8966 FATCA reporting. However, under the FATCA requirements FIs are only obliged to provide an XML schema file and FIs do not provide hard copy reports. Therefore, we seek confirmation that a review of the XML schema by the reviewer will suffice.

Sections 10.05(A)(2) & (3) & (4) & (5) & (6) deletes the references to "a sample of QI designated accounts". We seek confirmation that this should be read in the context of the audit sample selection rather than implying that all accounts have to be reviewed.

In Sections 10.5(D)(2)(iii) and (3)(i) the reference to a review of a "sample" has been deleted, implying that all account statement issued by QI to account holders and all US accounts have to be reviewed. We kindly ask you to confirm this is the case.

In Section 10.05(D)(3)(iv) the reference to "controlling persons" has been deleted. A FFI in an IGA country would report the Controlling Persons, rather than the substantial US owners, of a Passive NFFE. We seek clarification whether this deletion is correct.

Generally for the purpose of compliance review, we ask that the agreement sets out the precise requirements which will allow acceptance for a consolidated compliance programme.

11. QI – Collective refund procedures

Section 9.04 creates a potential administrative issue. In our view, it will lead to multiple Form 1042-S re-filings (if QIs even have the system functionality to strip out and name report one customer) or an increase in the number of QI collective refunds (which for one customer would not be cost effective for the QI to raise). Today many QI's rely on Terms & Conditions to say they would never issue a named Form 1042-S to individual customers due to the economic factors involved. We would therefore ask that this requirement is made optional, rather than a "must". Further, we would suggest that if this requirement needs to remain, then a new form is introduced that allows the QI to demonstrate that the issuance of the individual report is a subset of the pooled Forms 1042-S (for example it could be called a "1042-S subset form").

It is also unclear why Section 9.04(A) refers to a collective refund not being available to any account holder described in the FFI agreement. We kindly ask you to clarify whether this is intentional and explain the reasoning.

12. Qualification as a QI

Section 3.02 states that a NFFE can be a QI even if it's not in a KYC-approved jurisdiction if it collects W forms. It appears illogical that the same cannot apply to an FFI that relies solely on W-forms instead of KYC documentation. i.e. FI's may have entities within a Group that are forced to act as NQI because they are not in a KYC-approved jurisdiction. It would appear that under this rule FFIs are at a disadvantage compared to NFFEs and we would request therefore that an FI should be able to be a QI in a non KYC jurisdiction if it relies solely on W series forms.

13. Definition of US Person

We consider that the IRS should have a clear and consistent definition of US person applied consistently across all regimes as there seems to be a different definition in the QI Agreement.

In section 2.91 the following has been added to the definition of "U.S. Person" – An individual will not be treated as a U.S. person for purposes of this section for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer (within the meaning of §301.7701(b)-7(a)(1)) who is treated as a non-resident alien pursuant to §301.7701(b)-7 for purposes of computing his or her U.S. tax liability. This change seems to a difference between

the FATCA and QI definition of U.S. Persons, and between the definition used by US withholding agents and QIs. How would the QI verify this status? Would it be sufficient for the account holder to provide a Form W-8BEN for Chapter 3 purposes but still a Form W-9 for Chapter 4 purposes? This definition creates exclusion that an individual will not be treated as a US person where they are dual resident. We ask the IRS to provide a clear and consistent definition of US person applied consistently across all regimes (FATCA, QI, 871(m), etc.) that applies to QIs, US Payors, FFIs and all other Withholding Agents.

14. Associating payments with documentation

Under section 5.13(B), Reliably Associating a Payment with Documentation, this does not appear to permit the use of procedures described in Annex I of the Model 1 IGA to establish an entity account holder's claim of FATCA status. In order to claim the portfolio interest exemption, the QI Agreement should coordinate with rules under FATCA; therefore, documentation allowed under the IGA should also be sufficient documentation under the QI Agreement.

15. Typo's and small requested amendments to text

There is a typo in Appendix I, highlighted below. Should be section 10.07(A).

Part I:	All QIs.
Part II:	All QIs.
Part III:	QIs eligible pursuant to section 10.07(A) and (B) of the QI Agreement to apply for a waiver of the periodic review requirement (as described in section 10.07 of the QI Agreement) and who wish to apply for such a waiver. Under section 10.071(A) and (B) of the QI Agreement, the following QIs are not eligible for a waiver: (a) QIs that are NFFEs, (b) QIs that are acting as QDDs, and (c) QIs that are part of a consolidated compliance program.

Under section 5.09 we would ask for the wording in bold to be added as follows:- QI shall treat an account holder as a U.S. non-exempt recipient if QI obtains a valid Form W-9 from the account holder or **a similar agreed form obtained under FATCA requirements."**

On page 133 (Appendix I, Part II, F), we suggest the following addition detailed in bold, for "Registered deemed-compliant Model 1 IGA FFI:
For the most recent certification period under the QI agreement, QI (or a branch of QI) has been resident in or organized under the laws of a jurisdiction that has in place a Model 1 IGA with the United States (or in the case of a branch of QI, the branch operates in the jurisdiction) **and is not regarded as a non-participating FFI according to chapter 5-2-b of the Model 1 IGA (i.e. a significant failure has not been rectified in the 18 months following a notification).**"

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We appreciate your consideration of our comments and concerns, and would be happy to further discuss the issues in this submission with you and your teams. Please do not hesitate to contact us at r.kaiser@ebf.eu.

Yours sincerely,

Wim MIJS
Chief Executive