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VIA ELECTRONIC DELIVERY

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**Re: Response to Consultation on Draft ‘Authorised Intermediary’s responsibilities and liabilities’ Guidance**

Dear Ms. Madetoja and Mr. Hirvonen,

The Tax Committee of the Association of Global Custodians (“AGC” or “Association”)<sup>1</sup> is committed to working on behalf of its member organizations to identify opportunities to overcome challenges in the pursuit of equitable tax services to its clients and to ensure its members are meeting the requirements of the local tax authorities. In our pursuit to fully understand the roles and responsibilities of Authorized Intermediaries in the new TRACE regime, the AGC welcomes the Finnish Tax Administration’s (FTA’s) draft guidance on the Authorised Intermediary’s responsibilities and liabilities, record number VH/1136/00.01.00/2020 (“Guidance”) and appreciates the opportunity to provide the following comments for your consideration.

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<sup>1</sup> The Association is an informal group of 12 member banks that provide securities safekeeping and asset servicing functions to cross-border institutional investors worldwide, including investment funds. In providing global custody services, AGC members routinely seek appropriate withholding tax relief on behalf of custody clients by processing millions of such claims in the aggregate each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide.

We would like to reiterate our full support for the adoption of withholding tax procedures based on the TRACE regime and the benefits this can bring to all stakeholders. We remain committed to providing feedback and suggestions to assist with the successful implementation of the new relief at source model in Finland. A key component to the model is the registration of Authorised Intermediaries (AIs) to administer the system to allow for efficient cross-border withholding tax relief and it follows that prospective AIs require a clear and full understanding of the obligations and liabilities they will assume. In reviewing the Guidance, we do have a number of questions and requests for further information to help us clarify the AI responsibilities and liabilities.

As you will certainly appreciate, a decision on the part of any financial institution on whether to take on the obligations and liability associated with becoming an AI requires extensive and in-depth internal multi-level review and must be based on a clear understanding of the risks being assumed. Even once that clear understanding exists, the internal approval process requires some time, and the process of obtaining budget approvals for and making systems adjustments to conform to the new regime requires substantial additional time.

In light of the concerns and questions outlined further below and those raised in our previous letter dated May 22, 2020, we fear that members will not be in a position to register to become an AI as at July 1, 2020, nor until such time as these concerns raised are clarified. While we remain fully committed to working closely with you to resolve outstanding questions in a timely manner, it seems unlikely that a full resolution could be achieved in time to finalize guidance before the July 1, 2020 date for opening the registration process. The AGC suggests postponement of the implementation of the AI Register to allow time to address points requiring further clarification, as well as to adequately plan for costs and resources required to implement necessary changes. We understand that any postponement of the implementation would require legislative change and therefore we appreciate if these concerns could be considered by the Finnish Ministry of Finance.

## **Key Points**

For each of the points below, we reproduce relevant language from the draft guidance, followed by our comments and suggestions.

- (1) Section 3.1.2. – Tax treaty benefits can be granted to a customer of an intermediary registered in the Register of Authorised Intermediaries if the AI, in accordance with Section 10b of the Tax at Source Act, investigates and identifies the beneficiary, reliably determines the beneficiary's country of residence for tax purposes, and verifies that the dividend regulations of the international treaty can be applied to the beneficiary (Section 10c(1) of the Tax at Source Act).*

AGC: As previously noted in our letter of May 22, 2020, the TRACE Implementation Package specifies that the determination of whether the AI knows, or should have known, that the statements on an ISD (including the investor's statement that it is the beneficial owner of the income on securities held in its account) are unreliable or incorrect "will be made by taking into account all of the information that the AI has in its possession, including the Investor's account information and other information that the AI may have in its possession as a result of complying with applicable Know Your Customer Rules". In connection with our response to the ISD Guidance, it should be understood that information that an AI has in its possession for the purposes of complying with KYC rules is not necessarily information that enables verification of beneficial owner for tax purposes pursuant to Section 10b of the Tax at Source Act. Furthermore, reference in the guidance to other information needs to be specified in order that an AI can provide tax relief with certainty. It is beyond the ability of the custodian's responsibilities to apply an objective test to verify whether beneficial ownership is established pursuant to the provisions of specific tax treaties with Finland, except to the extent that information is clearly pointing away from a customer's stated tax residency in an ISD. Clarification of this aspect of the AI role is therefore critical.

- (2) *Section 3.2.2. - An AI's annual information return is only used to report dividends paid by a Finnish publicly listed company to a nominee-registered share, the beneficiary of which is a non-resident taxpayer in Finland.*

AGC: In the event that an AI is required to apply a 50 percent withholding tax rate, it needs to be clarified in the Guidance if this information is required to be reported in the annual information return.

- (3) *Section 3.5.2 and 3.5.3 – Under-withholding / Over-withholding during the payment year*

AGC: These sections deal with situations where an AI may find that under or over-withholding has occurred during the payment year and how to correct it. In 3.5.2 it states, "*The AI provides the payor with the necessary information through the chain and submits the details on the correction in its own annual information return after the end of the payment year.*" Please can it be clarified if this information is limited to corrected pooled information? In today's environment global custodians pass information to the payor through our local custodian, but in the new TRACE model, one of the benefits is to provide pooled information up the chain of custody, so will this remain the case when corrections must be made for under-withholding during the payment year?

Furthermore, in section 3.5.3 it states, "*The AI has to provide the payor with all the information the payor deems necessary for completing the return. ... The*

*details of the correction made are submitted after the payment year on an AI's annual information return, itemising recipient-specifically both the corrected amounts of the dividend and tax, and the amount of the correction."* This could be interpreted by the payor to necessitate beneficial owner information, which potentially may still need to be passed through the chain of custody, negating one of the benefits of TRACE. The Guidance implies the dividend beneficiary information is only needed from the AI in their annual information return, but it would be helpful if the details the payor may deem necessary are limited appropriately.

- (4) *Section 6.1. – The tax liability of an AI concerns situations in which it has submitted or forwarded the annual information return information on the dividend in question (Section 10c(3) of the Tax at Source Act).*

AGC: When reviewing the opening sentence of this section, it seems to indicate that tax liability of an AI only applies where the AI has submitted or forwarded annual information on the dividends. We assume, but this should be clarified, the sentence is seeking to suggest that the AI has liability for an incorrect return or perhaps the point is that liability arises because they are reporting on behalf of another AI or CI. We respectfully suggest amending this to clearly outline the instances where an AI assumes and has tax liability.

*Section 6.1. – Also in situations, where the tax levied is 30 per cent and the AI reports the identity information of the beneficiary to the Tax Administration, the AI does not have tax liability.*

AGC: We suggest the Guidance clarifies whether there is any obligation to perform additional verification of the information about the person to whom a 30% withholding tax has been applied. We observe that a customer that has disclosed its identity to avoid the penalty withholding of 35% is likely not able to confirm beneficial ownership pursuant to the Tax at Source Act therefore an expectation to perform any verification beyond the collection of name and address would require guidance to clearly outline what verification steps would be required and liabilities for any potential assumption that incorrect withholding has been applied. This issue is of specific concern in regards to identity information when this is provided by a contractual intermediary to the AI, we would suggest this it seems reasonable to receive the identity information, apply the 30 per cent and report the beneficiary information?

- (5) *Section 6.2. – An AI must also always verify that an intermediary that is submitting information through it is registered in the Register of Authorised Intermediaries at the time of the dividend payment. If the intermediary is not registered, the AI is deemed to have assumed responsibility for the dividend*

*payment information in question, unless an AI closer to the beneficiary has not showed assuming responsibility.*

AGC: The TRACE IP provides that AIs may receive an Intermediary Declaration for AIs (ID-AI) which will remain valid indefinitely, or until the circumstances of the AI providing the document change, and therefore invalidate the document. We expect that upon receipt of an ID-AI, the receiving party could check the register before authorizing the document for use. The ID-AI places the onus on the AI who is providing it to confirm any change in circumstances within the requisite 30 days.

In addition, the requirement to check that an AI is on the register at each dividend payment would result in a manual and inefficient procedure. In following the procedure as foreseen in the IP, this would remove the barriers to administering the receipt of information in the chain from AIs. Similarly, there is a Declaration for Contractual Intermediaries (ID-CI), which would commit the CI in question to providing necessary documentation, including confirmation of any other AIs in the chain. Would the FTA consider the inclusion of the TRACE IP ID-AI and ID-CIs and the 30-day change in circumstance notification into the Finnish implementation of TRACE? We would also ask that the Guidance be amended to remove the requirement to check AI status on a per event basis, in line with the procedure outlined in the TRACE IP.

*(6) Section 6.3. – Release from liability*

AGC: This section deals with situations where an AI may show a release from liability, by way of proof that the liability has been transferred to another AI or that reasonable measures have been taken with respect to the information received from a dividend beneficiary.

Please can you include examples of what proof is sufficient to show liability has been transferred to another AI? For example, would the receipt of an ID-AI (should the ID-AI be a part of the Finnish implementation of TRACE) and pooled Tax Rate Information of a dividend be sufficient? Similarly, can you please include examples of what would you expect reasonable measures to include in this context for the AI to be released from tax liability and thus transferred to the dividend beneficiary (also mentioned in section 6.4)?

*(7) Section 6.4. – It must provide the Tax Administration with access to all information and documents related to the dividend payment, the beneficiary or otherwise to the transaction in its possession or in the possession of a service provider.... In situations where the AI notices that the dividend beneficiary intentionally gave false information or otherwise acted fraudulently, the AI*

*must notify the Tax Administration without undue delay and take other appropriate measures.*

AGC: As it is written, it would appear the AI would be obligated to provide not only information with respect to the specific dividend payment and transaction, but potentially all information and documents in relation to the beneficiary. We appreciate this may be a mis-reading of the intent, but currently it does raise concerns with respect to data privacy laws and limiting the sharing of client information to that which is required by law. May we respectfully suggest this be amended to reflect that the information and documents will be limited to that utilized in connection with identifying and verifying the beneficiary?

Furthermore, can you please provide examples of what a dividend beneficiary “error” is, in contrast to intentionally providing false information? In these situations, is it always required to inform the Tax Administration if there is uncertainty as to whether the investor made an error or was deliberately misleading? Please can you specify what “other appropriate measures” the AI should take?

*(8) Section 7 - In Finland, taxpayers can use service providers (subcontractors) to fulfil their responsibilities under tax legislation.*

AGC: The term service provider is not defined – please can you confirm the requirements of who may be considered a service provider for the provision of fulfilling an AI’s responsibilities?

*Section 7 - The tax legislation does not lay down provisions on what kind of agreements an AI should make with a CI for the fulfilment of its responsibilities under the tax legislation. An AI may thus decide itself how to ensure that its responsibilities are fulfilled in situations where, for example, the identification of the dividend beneficiary is done by a CI on its behalf. An AI may utilise the agreements in TRACE IP in these respects.*

AGC: As noted in our letter of May 22, 2020, we remain concerned that AIs are responsible to verify the reliability of the ISD, as if the beneficiary was the AI’s own customer and to ensure it is verified in the same manner, when there is a CI as the Direct Account Holder. It is not at all clear how an AI could verify the reliability of an ISD received from a Contractual Intermediary as if the beneficiary was the AI’s own customer when the AI does not have account information for the Indirect Account Holder. Furthermore, an AI has no access to the underlying transactional data (for example, in relation to the 30 day holding period) of the CI’s customers, which would effectively result in an inability to provide services to CIs and ultimately non-resident investors not benefiting from relief at source.

Please can you clarify in the Guidance, with examples, how an AI can therefore consider it has fulfilled its responsibilities, in light of the above?

*Section 7 – In an under-withholding situation caused by a CI, the AI is liable for the tax as if it were its own. Essential errors of a CI may result in removal from the register, if because of this an AI cannot fulfill its responsibilities. If the AI can prove that it has been a question of error of a CI alone and it has taken proper measures as soon as it has noticed the error, removal from the register can be left undone.*

AGC: Please can you expand on the meaning of “essential errors of a CI” and what proper measures an AI may take to avoid removal from the register in the case that it is a CI error only.

(9) *Section 8 – Sanctions*

AGC: With respect to this chapter, please could you provide examples of the circumstances that may lead to the need for presentations, hearings and sanctions? It would be helpful to understand and be clear what type of behavior by the taxpayer (AI or dividend beneficiary) would merit these actions.

(10) *Section 8.2.2 – The Tax Administration will impose a tax increase on the taxpayer according to Section 37(1) of the Act on Assessment Procedure of Self-assessed Taxes if:*

- 1) the tax return or some other report or other statutory information or clarification has been submitted with deficiencies or errors, or not submitted at all;*
- 2) tax has not been withheld or tax at source collected within the statutory time.*

AGC: Please can you confirm that the term “tax increase” is considered to be a penalty in connection to the taxation that was withheld incorrectly? Please can you also clarify that the tax increase may apply if both the above conditions are satisfied or does it mean in either situation?

(11) *Section 9.1.2 - An AI and the Tax Recipients' Legal Service Unit may appeal a decision made by the Tax Administration due to a claim for adjustment by lodging an appeal with the Administrative Court. The appeal is lodged with the Administrative Court with jurisdiction over the domicile of the AI at the time the decision was made. If none of the Administrative Courts are competent to process the appeal, the appeal may be lodged with the Helsinki Administrative Court. (Act on Assessment Procedure, Section 66, and Act on Assessment Procedure of Self-assessed Taxes of Self-assessed Taxes, Section 64)*

Ms. Salla Madetoja and  
Mr. Kalle Hirvonen  
June 12, 2020  
Page 8

ASSOCIATION OF GLOBAL CUSTODIANS

AGC: Will an Administrative Court have jurisdiction over a non-Finnish AI? In the event that an appeal by the taxpayer is successful, and a decision is overturned in favor of the taxpayer, will there be any interest due in addition to the return of payments already made to the Tax Administration?

The Guidance makes reference to numerous sections of Finnish legislation. Please could these be made available in English for prospective AIs to review in conjunction with the final Guidance notes to permit a full understanding of how the relevant legislation applies?

Finally, the AGC members are currently collating examples of situations we foresee presenting challenges and where this Guidance could be revised to assist in providing clarification. We aim to provide you with these examples during the first half of July.

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Thank you very much for the opportunity to comment on this draft guidance and for your regular outreach to the intermediary community concerning developments regarding these proposals. As indicated above, we greatly appreciate your efforts to introduce a regime based on the TRACE model, and we stand ready to pursue a dialogue with you to try to resolve the ambiguities and concerns outlined above.

Please do not hesitate to contact the undersigned if you have any questions concerning the Association's comments.

Sincerely yours on behalf of the Association,



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