

THE ASSOCIATION OF GLOBAL CUSTODIANS

BNP PARIBAS  
BNY MELLON  
BROWN BROTHERS HARRIMAN  
CITIBANK, N.A.  
DEUTSCHE BANK  
HSBC SECURITIES SERVICES  
J.P. MORGAN  
NORTHERN TRUST  
RBC INVESTOR & TREASURY SERVICES  
SKANDINAVISKA ENSKILDA BANKEN  
STANDARD CHARTERED BANK  
STATE STREET BANK AND TRUST COMPANY

COUNSEL AND SECRETARIAT TO THE ASSOCIATION:  
BAKER & MCKENZIE LLP  
  
GLOBAL  
ATT: ROBIN TRUESDALE  
815 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20006  
TEL: 202 452 7000  
FAX: 202 452 7074  
  
WWW.THEAGC.COM

June 30, 2022

VIA E-MAIL

Charles P. Rettig  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue NW  
Washington, DC 20224

Lily Batchelder  
Assistant Secretary, Tax Policy  
U.S. Treasury Department  
1500 Pennsylvania Avenue NW  
Washington, DC 20220

William M. Paul  
Principal Deputy Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue NW  
Washington, DC 20224

**Re: Request for Guidance and Transitional Relief in Applicability Date  
for Withholding Requirements Under Final Section 1446(f)  
Regulations**

Dear Sirs and Madam,

The Association of Global Custodians (“AGC”)<sup>1</sup> serves as a non-partisan advocacy organization representing our members’ common interests on regulatory and market structure through interaction with legislative and regulatory authorities and financial industry organizations. The AGC Tax Committee appreciates the opportunity to highlight significant challenges raised by its member banks with respect to the new publicly traded partnership (“PTP”) withholding regulation under §1446(f),<sup>2</sup> which are effective January 1, 2023.

---

<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.

<sup>2</sup> T.D. 9926.

The AGC appreciates the ongoing engagement of the IRS and Treasury with the broader financial services industry to address the many complexities associated with the new regulation. The AGC understands the IRS and Treasury have received correspondence from various industry groups seeking clarification and guidance to comply with the withholding and reporting rules under §1446(f). Accordingly, the AGC fully endorses the request for deferment and guidance sought in three letters submitted by the Securities Industry and Financial Markets Association (“SIFMA”) Tax Committee on February 24, 2021, August 5, 2021, and May 4, 2022, respectively. However, due to the practical challenges custodian banks face, the AGC respectfully requests that the IRS and Treasury issue guidance, transitional relief or deferment as noted for each critical item below. Acting in a custodian bank capacity, withholding and reporting obligations under §1446(f) will primarily affect non-U.S. resident holders who transfer (for consideration) a PTP. Thus, the issues presented in this letter are purposefully limited to US withholding and reporting implications of PTPs, and not non-publicly traded partnerships (“non-PTPs”).

The following highlight the significant challenges custodian banks face to comply with the §1446(f) regulations. On behalf of its member banks, the AGC Tax Committee seeks clarification for each of the following critical issues, including additional deferment for additional time to develop systems to perform withholding and reporting to ensure operational readiness for the implementation of the §1446(f) regulation. Although each issue below presents considerable obstacles for compliance as noted below, due to the current trade settlement process, on behalf of its member custodian banks, the requirement to apply withholding on sales transactions raises fundamental issues for the business including timing, and unnecessary risk due to increased likelihood of overwithholding. In our view, the timing of withholding (as further detailed below) and the expected increase of overwithholding on sales transactions introduce significant financial, reputational and compliance risk for custodian banks as withholding agents.

- ***Significant Complexity to Apply Withholding on Sales Transactions.***

The requirement for U.S. withholding agents to deduct 10 percent tax from gross sales proceeds represents a significant change for the U.S. financial services industry, whereby U.S. paying agents have historically withheld on income events only. Thus, custodian banks are challenged to not only develop the capability to identify PTP securities and sales transactions, but also address the substantial challenge to account for the many conditions within this regulation when withholding may not apply. The following points highlight two of the critical risk areas related to withholding on sales transactions of PTPs for custodian banks.

  - ***Avoiding Disruption to Market Liquidity and Trade Settlements of PTPs.***

Custodian banks provide for the settlement of the majority of trade activity in PTPs in the US and abroad. The introduction of a withholding tax on sales proceeds places an additional burden in addition to standard market conditions to ensure timely identification of in-scope securities, capturing information on PTP issuer qualified

notices to confirm withholding and application of the various conditions under the regulation to avoid settlement issues. Today, trading and settlement platforms do not account for and deduct withholding taxes on gross proceeds on the settlement date. Further, executing brokers may not have transparency to the beneficial owner's US tax status, transferring the withholding obligation further down the payment chain to the custodian bank upon receipt of settlement proceeds on the settlement date. Due to this trade settlement process, a custodian bank is left with no alternative other than perform its §1446(f) (if any) withholding obligation post settlement. This presents a practical challenge for the timely identification of in-scope accounts, obtain critical information on a qualified notice, calculate tax, and collect tax to avoid over- or under-withholding, whereby sale proceeds will transfer upon settlement leaving withholding agents to collect tax separate from the actual transaction. The extremely short window to perform all necessary activities, even systemically, introduces a new risk for custodian banks to meet the requirement of quarter monthly withholding deposits to the IRS.

- *Overwithholding and Refunds on Sales Proceeds.* Comparatively, the amount withheld on sales proceeds is significantly larger than on a distribution generally. This fact creates an opportunity for significant operational risk for withholding agents for the timely collection of the tax, and procedures for the reconciliation and remittance of any refunds associated with these transactions when and if due. As referenced above, due to the many conditions under this regulation, the timing to obtain critical information from the issuers of PTPs must occur prior to settlement date to avoid significant overwithholding. Under the presumption rules of this regulation, in the absence of receiving a qualified notice, a withholding agent must withhold 10 percent on the full amount of the transfer or sale<sup>3</sup>. In the event a withholding agent receives a qualified notice shortly after the settlement date, which changes the withholding tax outcome, the agent is then faced with recovering a significant amount of tax in the case of any underwithholding, or issuing sizeable refunds, which creates additional risk for withholding agents between deposit periods. This issue is only exacerbated when a payment chain contains multiple qualified intermediaries, each of which is simply passing the tax liability to the end beneficial owner, or liable intermediary as applicable.

---

<sup>3</sup> In the case of a distribution, the presumption rules apply 21% for a foreign partner that is a corporation, 37% for a non-corporate foreign partner and for a recipient with an indeterminable classification the highest of the (2) aforementioned tax rates, or 37%.

Due to the need for market level industry change for the ability to apply sales withholding inclusive in net proceeds on settlement date, the AGC Tax Committee requests a minimum of a (1) year extension for the requirement to withhold on sales proceeds allowing withholding agents to collect critical information on frequency and applicability of the §1446(f) withholding regulations on PTP activity to further develop and refine systems to mitigate the outweighed risks cited above.

- ***Proposed change to the qualified intermediary (QI) withholding agreement introduced by Notice 2022-23.*** On 3 May 2022, the Internal Revenue Service (IRS) published Notice 2022-23 which sets forth proposed changes to the qualified intermediary (QI) withholding agreement (QI agreement) that will permit a QI to assume withholding and reporting responsibilities for purposes of Sections 1446(a) and 1446(f). Notice 2022-23 states that the proposed changes will apply to QI agreements that are in effect on or after January 1, 2023. Most notably, and a change from current policy and practice, Notice 2022-23 requires a disclosing QI to obtain a U.S. taxpayer identification number (TIN) for each Form W8 it provides to its upstream agent (the QI's nominee) for purposes of Sections 1446(a) and 1446(f) withholding. Under the new proposed QI agreement, a QI may only act as a disclosing QI if it furnishes a Form W8IMY, QI 1446 Withholding Statement, and relevant Form W-8 with a U.S. TIN. Failure to provide a Form W-8 with a U.S. TIN will prohibit a QI from disclosing its underlying account holders and delegating the Sections 1446(a) and 1446(f) withholding and reporting obligation to its upstream agent. Thus, with only a short period remaining, intermediaries and custodian banks must solicit tens of thousands of its account holders for refreshed U.S. tax documentation, and in the case of certain intermediary clients, indirect clients to ensure compliance, or excessive overwithholding and associated challenges as referenced previously. Upon receipt of valid documentation, global custodians also need to prepare internal systems to reference the changes made in revised tax forms to ensure correct withholding and reporting on payments made to respective accounts. Custodian banks will have a limited time to provide technology teams with the requirements to update systems accordingly once the changes are made. The AGC Tax Committee urges Treasury and the IRS for transitional relief of at least (1) year (to QI agreements in effect on or after January 1, 2024) to allow for sufficient time to refresh U.S. tax documentation for the proposed modification to the QI agreement requiring the collection of U.S. TINs on the form on relevant for W-8.

Whereby, on average, non-US residents have not obtained a US TIN, and the IRS only recently introduced the requirement for QI's to collect this information from its disclosed payees, the AGC Tax Committee respectfully requests transitional relief from this requirement for one year. Transitional relief will allow QI's to refresh tens of thousands of U.S. tax documentation forms with its non-US clients, and most importantly, allow non-US residents much

needed time to obtain a US TIN. Failure to accommodate transitional relief will result in overwithholding and reporting complexities.

- **Foreign PTPs.** The AGC Tax Committee respectfully requests an additional year delay to allow the industry sufficient time to develop a solution for the identification of these entity types or exclusion of the applicability of §1446(f) withholding on foreign issuers of a PTP. To enhance current capability to identify PTP securities, custodian banks have taken measures to enrich internal security reference databases or otherwise subscribe to vendor services to assist in the timely identification of PTP securities for purposes of §1446(f) withholding. For PTPs organized, traded, and settled in the US, identification to confirm partnership status of an issuer is accessible and often widely available through vendor data services. The same does not occur for a security issued by a PTP organized, traded, and settled outside the US, and there is very limited information available for the timely identification of an in-scope foreign PTP security for purposes of complying with this regulation. For example, in the US, mechanisms exist to identify PTPs, access qualified notice information, and, at a market level, receive automated event announcements alerting withholding agents of potential §1446(f) withholding and reporting obligations. Outside of the US, this same infrastructure does not exist, leaving withholding agents with the onerous task of reviewing all securities settled and traded outside the US to develop criteria and a monitoring mechanism to capture potential foreign PTPs. The absence of a market solution leaves withholding agents the insurmountable task to analyze any foreign security for §1446(f) considerations. Without the necessary tools to monitor for these securities, and information made available by issuers, it is highly likely payments could result in significant overwithholding due to identification errors or absence of published information by the issuer to confirm the final tax character of a transfer for an in-scope account.

Due to the absence of a mechanism in the financial services industry today to a) identify foreign PTPs and b) monitor for and access information available in a qualified notice to inform §1446(f) withholding, the AGC Tax Committee requests a temporary exclusion of this requirement until a market level solution is available. Whereby a foreign PTP conducting business in the US may have an obligation to file a US return, the AGC Tax Committee proposes the IRS work with Congress to modify the § 6103 disclosure rules to allow the IRS to make a list of foreign PTPs available to the public on an annual basis.

- **Significant Systemic Development Remains to Be Completed for Compliance.** At the time of the finalization of the §1446(f) regulations late in 2020, financial institutions had forecasted budgets and confirmed schedules for systemic development for the 2021 tax reporting year. Practically, this forced custodian banks to reprioritize existing developments, and reallocate significant resources due to the complexity of the rules to enable systems to perform §1446(f) withholding. Although a one-year deferral allowed for custodian banks to prepare for compliance, many open questions requiring

guidance from the IRS and Treasury remain, in addition to practical application of the rules on identification of withholdable transactions<sup>4</sup>, documentary requirements and availability of information in the market to inform withholding agents. Following the same timeline, major data providers to financial institutions had to develop solutions to collect and distribute key information from PTPs to ensure downstream U.S. withholding agents had the ability to comply with the §1446(f) rules. Consequently, custodian banks must manage an even narrower time-period than other parties subject to the requirements in the § 1446(f) rules to evaluate the proposed solutions at a market level and conduct all activities to identify business requirements to develop and test internal systems for compliance on January 1, 2023. Additionally, and as further detailed below, in a significant departure from current U.S. withholding regulations, §1446(f) and its associated regulations require U.S. withholding agents to develop the ability to withhold on all transfers of partnership interests, which includes sales proceeds. Due to the inherently complex nature of transaction processing across financial institutions, the ability of custodian banks to evaluate all possible transaction types, collect information from Qualified Notices issued by PTPs, identify account holder tax status, and apply withholding on sales proceeds without disrupting the trade settlements process is a formidable task. While progress has been made, the AGC Tax Committee requests an additional year, and further guidance provided by the IRS to avoid significant disruptions due to overwithholding under this new regulation and compliance.

- **Support SIFMA Tax Committee Request for “Good Faith Efforts” Transitional Relief.** Due to the significant complexity, operational challenges and needed guidance, the AGC Tax Committee supports SIFMA Tax Committee’s request for a transitional period of one year from the effective date, allowing withholding agents to make a “good faith” effort to comply with the regulations set forth under the withholding requirements of §1446(f), including any modifications to the existing QI Agreement proposed by Notice 23-2022.

\* \* \* \* \*

---

<sup>4</sup> Clear guidance from the IRS is needed to confirm the applicability of treatment of short sale transactions under §1446(f). AGC Tax Committee supports SIFMA Tax Committee's request for guidance on this matter in its letter to the IRS dated May 4, 2022.

The AGC Tax Committee greatly appreciates your consideration of our request for guidance, deferral and transitional relief as stated above for the implementation of §1446(f) withholding and associated regulations. Our member firms continue to develop the infrastructure to comply with this regulation on January 1, 2023. However, for the reasons cited above, there are significant and practical challenges remaining for financial institutions to develop sustainable and repeatable processes for the timely collection and reporting of taxes associated with this new regulation.

The AGC Tax Committee is happy to meet with you to discuss the concerns raised in this letter, and we would be pleased to provide any additional information that you need to better understand the significant impact this regulation presents to financial institutions.

Sincerely yours on behalf of the Association,



Alexandra Minkovich  
Baker & McKenzie LLP  
Counsel for the Association  
+1 (202) 452-7015  
alexandra.minkovich@bakermckenzie.com

cc: Kamela Nelan, Attorney-Advisor, US Treasury Department

ADM/lac