

THE ASSOCIATION OF GLOBAL CUSTODIANS

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April 5, 2017

CC:PA:LPD:PR (REG-134247-16)  
Room 5203  
Internal Revenue Service  
PO Box 7604  
Ben Franklin Station  
Washington, DC 20044

Internal Revenue Service  
Federal eRulemaking Portal at  
<http://www.regulations.gov>  
(IRS REG-134247-16).

Re: Comments on Proposed Treasury Regulation (82 FR 1645, 1/6/17) and Temporary Regulations (T.D. 9808, Fed. Reg. Vol. 82, No. 4, p. 2046, 1/16/17) regarding requirement for Form W-8BEN to include foreign TIN and date of birth

Ladies and Gentlemen:

We appreciate the opportunity to submit this letter on behalf of the members of the Association of Global Custodians ("AGC" or "Association")<sup>1</sup> to provide comments in respect of the Proposed and Temporary Regulations under section 1441 of the Internal Revenue Code released on December 30, 2016 and published in the Federal Register on January 6, 2017.

The attached submission sets forth the Association's comments, which focus specifically on the difficulties posed by the requirement in Temporary Treasury Regulation § 1.1441-1T(e)(2)(ii)(B), effective January 1, 2017, for withholding agents to collect foreign taxpayer identification number ("FTIN") and date of birth ("DOB") information on Forms W-8BEN for accounts maintained inside the United States.

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<sup>1</sup> The Association is an informal group of 12 member banks that provide securities safekeeping and asset serving functions to cross-border institutional investors worldwide, including investment funds.

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Please do contact the undersigned should you wish to discuss the Association's comments.

Sincerely yours on behalf of the Association,

A handwritten signature in black ink that reads "Mary C. Bennett". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Mary C. Bennett

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**COMMENTS OF THE ASSOCIATION OF GLOBAL CUSTODIANS ON  
PROPOSED AND TEMPORARY REGULATIONS UNDER INTERNAL REVENUE  
CODE SECTION 1441 REQUIRING FOREIGN TIN AND DATE OF BIRTH  
INFORMATION ON FORM W-8BEN**

We wish to comment on a number of obstacles to implementing the requirement in Temporary Regulation section 1.1441-1T(e)(2)(ii)(B), announced December 30, 2016 and effective January 1, 2017, repeated here, for withholding agents to collect foreign taxpayer identification number (“FTIN”) and date of birth (“DOB”) information on beneficial owner Forms W-8 for accounts maintained inside the United States (the “FTIN/DOB Requirement”):

Requirement to collect foreign TIN and date of birth beginning January 1, 2017. Beginning January 1, 2017, a beneficial owner withholding certificate provided to document an account that is maintained at a U.S. branch or office of a financial institution is required to contain the account holder's foreign TIN and, in the case of an individual account holder, the account holder's date of birth in order for the withholding agent to treat such withholding certificate as valid under paragraph (e)(2) of this section. For withholding certificates associated with payments made on or after January 1, 2018, if an account holder does not have a foreign TIN, the account holder is required to provide a reasonable explanation for its absence (e.g., the country of residence does not provide TINs) in order for the withholding certificate not to be considered invalid as a result of the application of this paragraph (e)(2)(ii)(B). A withholding certificate that does not contain the account holder's date of birth will not be considered invalid as a result of the application of this paragraph (e)(2)(ii)(B) if the withholding agent has the account holder's date of birth information in its files.

In sum, we respectfully request that the IRS issue the following guidance, promptly, as withholding agents are unclear on how to satisfy the FTIN/DOB Requirement:

1. Provide that withholding agents may obtain an FTIN or DOB in any manner.
2. Provide that for Forms W-8 provided prior to 2017, FTINs and DOBs need not be provided while the forms otherwise remain valid, subject to a deadline of December 31, 2019 for any such Forms W-8 that do not expire.
3. Provide that the absence of the FTIN and DOB does not cause payments made to the account holder to be subject to full withholding, at least for payments made in 2017 with respect to Forms W-8 delivered in 2017.
4. Automatically waive all sanctions for Forms W-8 delivered in 2017.
5. Clarify that “account” for this requirement means “financial account,” as that term is defined in Treas. Reg. § 1.1471-5(b).
6. Clarify that this requirement does not apply to underlying beneficial owner Forms W-8 that accompany Forms W-8IMY provided by foreign intermediaries and flow-through entities.

7. Provide that withholding agents may leverage their knowledge to support the absence of an FTIN.
8. Confirm that withholding agents need not validate FTINs.

## Discussion

### 1. Provide that withholding agents may obtain an FTIN or DOB in any manner

The FTIN/DOB Requirement appears to require that FTINs be provided on a Form W-8, and DOBs be provided on a Form W-8 except if the withholding agent has the DOB in its files. The manner in which FTINs are required to be collected should be changed to be identical to the manner in which DOBs must be collected. Further, withholding agents should be given more flexibility in the manner in which DOBs and FTINs may be collected.

The provision in the FTIN/DOB Requirement permitting withholding agents to use the DOB in the withholding agent's files is presumably intended to be limited to instances in which the withholding agent has already collected the DOB for non-Chapter 3/FATCA purposes. The withholding agent may have collected the DOB for non-Chapter 3/FATCA purposes in any manner, even orally. Accordingly, the provision in the FTIN/DOB Requirement enabling withholding agents to rely upon a DOB in the withholding agent's files effectively means that the withholding agent may rely upon a DOB which may have been collected in any manner. Naturally, then, for Chapter 3/FATCA purposes, a withholding agent should be allowed to collect, in any manner, a DOB that is not already in the withholding agent's files. The same should hold for FTINs. This option would be particularly helpful for withholding agents that are required to collect FTIN and DOB information with respect to unexpired Forms W-8 already in hand that do not include this information (see recommendation #2 below).

Therefore, we request that the IRS issue guidance to enable a withholding agent to collect FTINs and DOBs in any manner, and at a minimum, in any written manner.

### 2. Provide that for Forms W-8 provided prior to 2017, FTINs and DOBs need not be provided while the forms otherwise remain valid, subject to a deadline of December 31, 2019 for any such Forms W-8 that do not expire.

The FTIN/DOB Requirement appears to provide that for Forms W-8 provided prior to 2017, FTIN and DOB information will need to be collected by December 31, 2017, or else payments made on or after January 1, 2018 will be subject to US withholding, even for Forms W-8 collected prior to 2017 that would not otherwise expire on December 31, 2017. This would mean withholding agents having to collect, by December 31, 2017, a new Form W-8 that includes the FTIN and DOB information or, if recommendation #1 above is adopted, FTIN and DOB information in any manner, for every account holder that provided a beneficial owner Form W-8 prior to 2017.

Withholding agents recently completed a massive FATCA documentation effort, which was executed in phases. It would be unreasonable to, immediately on the back of this effort, require that withholding agents and taxpayers complete a total re-documentation effort in such short order.

We envision a more orderly re-documentation effort for beneficial owner Forms W-8 collected prior to 2017, under which withholding agents would be required to collect FTIN and DOB information when the pre-2017 Form W-8 expires, which would be no later than December 31, 2019 (regarding Forms W-8 signed in 2016), and by December 31, 2019 for pre-2017 Forms W-8 that do not expire. We request that the IRS issue guidance to this effect.

3. Provide that the absence of the FTIN and DOB does not cause payments made to the account holder to be subject to full withholding, at least for payments made in 2017 with respect to Forms W-8 delivered in 2017.

The FTIN/DOB Requirement appears to require that withholding agents invalidate a beneficial owner Form W-8 provided on or after January 1, 2017 (for an account maintained inside the US) that does not include the FTIN and DOB information and, thus, impose full US withholding on payments made on or after January 1, 2017 on account of the absence of this information. It is our understanding that this information is needed solely to enable the US to satisfy its reciprocal reporting obligations under reciprocal Model 1 intergovernmental agreements (“IGA”). See, e.g., [subparagraph 3\(a\) of Article 6 of the Model 1 IGA \(Reciprocal\)](#). In other words, this information is not needed for US income tax purposes. The purpose of US withholding taxes is to backstop the US’s ability to collect US income taxes. FTINs and DOBs of non-US persons have no connection to US income taxes. Therefore, the absence of FTIN and DOB information should not give rise to US withholding at a rate above the rate that would apply in the presence of such information.

Accordingly, we recommend that the IRS issue guidance stating that the absence of FTIN and DOB information does not invalidate a Form W-8. If the IRS does not adopt this recommendation for all situations, we urge the IRS to adopt this recommendation for payments made in 2017 with respect to Forms W-8 provided in 2017. The FTIN/DOB Requirement was sprung on the industry on December 31, 2016, and the industry cannot reasonably be expected to implement this requirement beginning one day later, January 1, 2017. Even though prior year Form 1042-S instructions and the W-8 requester instructions (July 2014) had forecasted that withholding agents would eventually be required, in all cases, to collect FTIN and DOB information, these instructions were not actionable by withholding agents. Withholding agents need precise rules well in advance of the effective date of the rules in order to be able to implement the rules. Withholding agents will not have these precise rules until the FTIN/DOB Requirement is clarified, as requested in this letter. Thus, it would be inappropriate for the IRS to assess an underwithholding liability to withholding agents on account of not satisfying the FTIN/DOB Requirement in 2017.

We do appreciate that there needs to be a sufficiently strong regulatory incentive for withholding agents to collect FTIN and DOB information, or else the US’s ability to satisfy its FATCA reciprocal reporting obligation would be compromised. The

information reporting penalties under IRC § 6721 (regarding failures to file correct information returns) could be this incentive. Treas. Reg. § 301.6721-1(a)(2)(ii) provides that these penalties may be assessed for failures to include on information returns (Forms 1042-S in this case) the information required by any administrative pronouncements, such as form instructions. Accordingly, one way to incentivize withholding agents to collect FTINs and DOBs would be for the IRS to change the Form 1042-S instructions to reflect the FTIN/DOB Requirement. In other words, the IRS could change the Form 1042-S instructions to require that FTINs and DOBs be included, when required, on Form 1042-S. If the IRS adopts this approach, we recommend that the IRS issue guidance confirming that withholding agents would be granted a waiver of the § 6721 penalties for failure to report FTIN information if the requirements under Treas. Reg. § 301.6724-1(e)(1)(i) (regarding the initial and two annual TIN solicitations), when applied to FTINs, are satisfied.

4. Automatically waive all sanctions for Forms W-8 delivered in 2017

As explained in recommendation #3 above, withholding agents are not in a position to fully satisfy the FTIN/DOB Requirement for 2017. Therefore, we request that the IRS treat 2017 as a transitional year by automatically waiving any sanctions for failure to satisfy this requirement in 2017. We request that the IRS issue guidance that provides that for Forms W-8 provided in 2017, withholding agents must obtain FTIN and DOB information by December 31, 2017, in any manner (see recommendation #1 above).

5. Clarify that “account” for this requirement means “financial account,” as that term is defined in Treas. Reg. § 1.1471-5(b)

As stated above, it is our understanding that the FTIN/DOB Requirement was instituted to enable Treasury to satisfy its reciprocal reporting obligations under reciprocal Model 1 IGAs. These reciprocal reporting obligations are limited to financial accounts (held by residents of the applicable Model 1 IGA jurisdiction). It stands to reason, then, that the FTIN/DOB Requirement ought to be limited to financial accounts.

Further, because the Treasury regulations, not the IGAs, govern withholding agents that are subject to the FTIN/DOB Requirement, and because the definition of “financial account” in the Treasury regulations is substantively similar to the definition of that term in the IGAs, we recommend that IRS clarify that the term “account” in Treas. Reg. § 1.1441-1T(e)(2)(ii)(B) has the meaning of the term “financial account” in Treas. Reg. § 1.1471-5(b).

6. Clarify that this requirement does not apply to underlying beneficial owner Forms W-8 that accompany Forms W-8IMY provided by foreign intermediaries and flow-through entities

When a foreign intermediary or flow-through entity holds an account maintained inside the US and provides a Form W-8IMY for itself to its withholding agent, and because a Form W-8IMY is not a beneficial owner Form W-8, the FTIN/DOB Requirement does not compel the withholding agent to obtain an FTIN or DOB for the foreign intermediary or flow-through entity, as the FTIN/DOB Requirement is

limited to beneficial owner Forms W-8. Further, because underlying Forms W-8, if any, that accompany the Form W-8IMY are generally not for persons who are the holders of the account maintained by the withholding agent (see Treas. Reg. § 1.1471-5(a)(3)(i), which provides that an intermediary or a flow-through entity is the account holder if that person is listed as the holder of the account, in the case of an intermediary, subject to the intermediary being a financial institution), we do not see that the FTIN/DOB Requirement generally applies to the underlying Forms W-8, and request that the IRS confirm this point in written guidance.

The only exception to the foregoing known to us is with respect to a Form W-8IMY for an individual or NFFE acting as an intermediary – an uncommon form – in which case the person on whose behalf the individual or NFFE is acting would be treated as the account holder under Treas. Reg. § 1.1471-5(a)(3)(ii). For such a Form W-8IMY, it would appear that the withholding agent would be required to obtain the FTIN and DOB information for the person on whose behalf the intermediary is acting. If the IRS agrees with this interpretation, we request that the IRS issue guidance that provides that such FTIN and DOB information need only be obtained by the withholding agent if the intermediary has provided to the withholding agent a Form W-8 or, when permitted, documentary evidence, for the person on whose behalf the intermediary is acting.

7. Provide that withholding agents may leverage their knowledge to support the absence of an FTIN

The FTIN/DOB Requirement appears to say that when an account holder does not have an FTIN, the withholding agent must obtain a reasonable explanation for the FTIN's absence from the account holder. We request that this requirement be loosened to provide that a withholding agent must obtain a reasonable explanation, in any manner, for the absence of an FTIN from the account holder, except if the withholding agent has actual knowledge that the applicable jurisdiction does not issue TINs. This request, if adopted by the IRS, would enable a withholding agent to not have to needlessly collect a reasonable explanation from an account holder who is a resident of, for example, the Cayman Islands, as the Cayman Islands does not issue TINs (see [http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/Cayman\\_Islands\\_TIN.pdf](http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/Cayman_Islands_TIN.pdf)).

8. Confirm that withholding agents need not validate FTINs.

TIN structures vary dramatically by country. Therefore, it would be a monumental, if not impossible, task to implement functionality and procedures to validate FTINs. Accordingly, the IRS should issue affirmative guidance confirming that withholding agents are not required to validate FTINs. Such guidance would be consistent with OECD guidance on the common reporting standard ("CRS"), the global counterpart to FATCA, which states, in relevant part, "[t]he Standard does not require a Reporting Financial Institution to confirm the format and other specifications of a TIN with the information provided on the Automatic Exchange Portal." [Standard for Automatic Exchange of Financial Account Information in Tax Matters: Implementation Handbook](#), page 105.