

THE ASSOCIATION OF GLOBAL CUSTODIANS

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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

September 23, 2021

**VIA ELECTRONIC DELIVERY**

Ms. Nikole Flax  
Commissioner, Large Business & International  
Internal Revenue Service  
1111 Constitution Ave., NW  
Washington, DC 20224

**Re: Ongoing Delays in Receiving Requested Forms 6166**

Dear Commissioner Flax,

Since April 2020, the Association of Global Custodians (AGC)<sup>1</sup> has engaged with the Internal Revenue Service (IRS) on the timely processing of Forms 8802, Application for United States Residency Certification, and the issuance of Forms 6166, Certification of U.S. Tax Residency, to protect US investors from the negative impacts of the COVID-19 crisis. The AGC appreciates the IRS's continued engagement on this issue. We have previously provided the IRS with informal data from the AGC's members about processing time and the impact of delayed Forms 6166 on US investors, and the AGC's members would like to provide you with updated information to further highlight the significant financial impact of these delays.

As you are aware, Form 6166 allows US investors to obtain treaty benefits on a global basis. During the COVID-19 crisis, a delay in issuing Forms 6166 negatively impacted US investors' ability to receive relief at source in certain markets. While some markets provided a "grace period" during which technically outdated Certificates of Residency

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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.

would be respected, those grace periods have generally expired. The AGC, along with other trade associations, has engaged with relevant foreign tax administrations and the Organisation for Economic Co-operation and Development (OECD) to seek an extension of those grace periods. We understand that the IRS participated in a March 2021 meeting with officials from foreign tax administrations and the OECD, and that the IRS expressed support for the AGC's request for an extension at that meeting. We appreciate the IRS's support.

However, extensions have generally not been granted. This, coupled with the ongoing delays in issuing Forms 6166, has resulted in US investors being unable to receive treaty benefits that they are entitled to at the time that dividends and interest are paid. These investors will, instead, need to file a refund claim with the relevant foreign jurisdiction. In some jurisdictions, it may be years before these claims are processed. In other jurisdictions, refunds are not available as a legal or practical matter, and relief at source is the only option. Investors in these jurisdictions who do not receive a timely Form 6166 are permanently harmed.

At the same time that the AGC and other trade associations have engaged with foreign tax administrations, we have engaged with the IRS to provide the IRS with real-time information on AGC members' experience with the IRS's processing backlog. It has generally been the AGC's experience that the IRS is processing requests for Forms 6166 in 2021 on a much slower basis than in previous years, and the AGC's members have generally been unable to reach IRS personnel to determine the status of requests or information on when a particular Form 6166 will be issued. In addition, AGC members have had a substantially higher-than-usual number of rejections when requesting a Form 6166. In many cases, these rejections appear to be due to the fact that the IRS has not yet processed the underlying investment fund's tax return--which means that processing delays in one area of the IRS's operations are having a cascading effect on other areas of the IRS's operations. For these requests, additional documentation needs to be submitted to the IRS, creating additional work for the IRS, as well as AGC members and their clients.

Based on a survey of AGC members conducted in July 2021, AGC members have collectively submitted more than 6,600 Forms 8802 requesting a Form 6166 for 2021. We note that these numbers represent the Forms 8802 submitted directly by AGC members; some clients of AGC members that are financial intermediaries would have submitted Forms 8802 for their underlying clients directly to the IRS, and those numbers are not reflected here. To date, AGC members have collectively received approximately 2,600 Forms 6166 from the IRS--a response rate of approximately 40%. In prior, non-COVID years, by this point in the year, AGC members have typically received between 82 and 98% of the Forms 6166 that they request on behalf of their clients. We also surveyed AGC members on how many outstanding Forms 6166 were requested on behalf of US pension plans and, while all members did not provide such data, we have determined that AGC members have yet to receive 2021 Forms 6166 that were requested on behalf of 190 US pension plans.

In addition to the number of forms requested and received, we also surveyed the AGC's members about the number of outstanding reclaims where the statute of limitations expires at the end of 2021, as well as the value of those outstanding reclaims. A Form 6166 is needed for these reclaims. AGC members reported that they have more than 25,000 reclaims where the statute of limitations expires at the end of 2021<sup>2</sup> and that these reclaims represent \$354 million in value. At least 8,000 of these reclaims, representing approximately \$105 million in value, are attributable to US pension plans.

We would greatly appreciate your assistance in ensuring that the outstanding requests for Forms 6166 are processed promptly, the 2021 process is completed soon, and proper resources are dedicated to the 2022 issuance process that begins on December 1, 2021. We would also appreciate if you could provide a dedicated point of contact (both email and telephone) for AGC members and others who have requested Forms 6166 to contact for information about the status of pending requests and assistance in processing pending requests. We respectfully suggest that going forward, meetings are tabled between the AGC and a Manager of the Unit where updates on processing Forms 8802 and 6166 are provided. This will allow both parties to share best practices and raise concerns timely, allowing for a smoother process.

Lastly, the COVID-19 crisis has highlighted the inefficiencies of the current paper-based request process. As the IRS works to modernize, we would be happy to be part of a working group and contribute to the discussion on alternative approaches to tax residency certification, based on our experiences with foreign tax authorities and their processes.

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Once again, the AGC appreciates the attention the IRS pays to making sure U.S. investors are effectively able to benefit from the foreign treaty benefits to which they are entitled. Our members would of course be willing to meet with you to discuss these issues or to answer any questions you may have. We appreciate your assistance and ongoing engagement in resolving this critical issue.

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<sup>2</sup> Please note that some members provided only the value of the outstanding reclaims, while other members provided both the number of outstanding reclaims and the value of those claims. As a result, the number of outstanding reclaims is, in fact, larger than reflected above.

Ms. Nikole Flax  
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Sincerely yours on behalf of the Association,



Alexandra Minkovich  
Baker & McKenzie LLP  
Counsel for the Association  
+1 (202) 452-7015

Cc: Senator Ron Wyden, Chair, Senate Committee on Finance  
Senator Mike Crapo, Ranking Member, Senate Committee on Finance  
Representative Richard Neal, Chair, Ways & Means Committee  
Representative Kevin Brady, Ranking Member, Ways & Means Committee  
Nicole Welch, Senior Manager, Treaty Assistance and Interpretation Team,  
Internal Revenue Service  
Erin Collins, National Taxpayer Advocate