

THE ASSOCIATION OF GLOBAL CUSTODIANS

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BY E-MAIL

Mr. John Sweeney
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Re: Validity of Print-Outs of Forms W-8 and W-9 Generated by an Electronic W-8/W-9 System Maintained by a Downstream Withholding Agent

Dear Mr. Sweeney,

The member banks of the Association of Global Custodians ("AGC" or "Association")¹ would like to propose an addition to the IRS's FATCA Frequently Asked Questions ("FAQ") webpage to address an uncertainty that exists about the validity of print-outs of Forms W-8 and W-9 generated by an electronic W-8/W-9 system maintained by a downstream withholding agent. An explanation for the proposed Q&A and a draft of the proposed language is included in the Appendix to this letter. The Association members appreciate your willingness to consider this proposal, and we would be pleased to discuss it with you by telephone if desired.

Sincerely yours on behalf of the Association,



Mary C. Bennett
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Counsel to the Association

¹ The Association is an informal group of 11 member banks that provide securities safekeeping and asset serving functions to cross-border institutional investors worldwide. Members provide custody-related services to most types of institutional investors, including investment funds, pension funds, and insurance companies.

APPENDIX

Proposed FATCA Q&A from Association of Global Custodians

Background:

In the investment fund industry, it is common for fund vehicles to be structured as partnerships, in which case if the partnership is a non-U.S. partnership investing in U.S. securities, it would ordinarily need to collect withholding certificates (Forms W-8 or Form W-9) from its partners and provide a copy of such documentation together with its own Form W-8IMY to withholding agents as part of the tax due diligence obligations of the withholding agents under Chapter 3 and Chapter 4 of the Internal Revenue Code (the "Code") and for purposes of domestic 1099 reporting and backup withholding rules.

As soliciting, validating and maintaining paper withholding certificates from their partners (some funds may have numerous investors) can be burdensome and prone to human error, investment funds have begun utilizing electronic W-8/W-9 systems to collect tax forms from their investors. A fund would generally send an investor a link and secure user credentials in order for the investor to access an online module that would allow the investor to enter information as would be requested on a paper Form W-8 or Form W-9. The investor would electronically sign the form within the electronic W-8/W-9 system.

The electronic W-8/W-9 system hosted by such an investment fund would meet requirements of Treas. Reg. §1.1441-1(e)(4)(iv) for Forms W-8² and the electronic Form W-9 requirements as specified in Announcement 98-27, 1998-1 C.B. 865 (April 13, 1998) and the Instructions for the Requester of Form W-9. In part, the system must make it reasonably certain that the person accessing the system and submitting the relevant tax form is the person identified on the form and require that the form be signed under penalties of perjury. The system must also be able to produce a hard copy of the electronic form upon request by the IRS. These systems would generally be akin to the electronic W-8/W-9 systems utilized currently by custodian banks receiving such tax forms from direct account holders.

When such investment funds open accounts with custodians and other brokers, such funds, as noted above, generally would need to transmit to such brokers or custodians the tax documentation for their investors. In reliance on their own electronic W-8/W-9 systems, such funds have been transmitting to their withholding agents hard copy print-outs of the electronic Form W-8 or Form W-9 (or PDF or TIFF versions of the same).

A similar situation may occur with financial intermediaries that need to transmit to their withholding agents tax documentation for underlying beneficial owners. In such case, the financial intermediary may ask an underlying beneficial owner to complete a Form W-8 or Form W-9 electronically under an electronic W-8/W-9 system meeting IRS requirements and thereafter provide a print-out of the electronically completed Form W-8 or Form W-9 to their withholding agents.

Custodian banks and other withholding agents have been uncertain as to whether these electronic Form W-8 or Form W-9 forms should be accepted as valid tax documentation when such forms are produced using an electronic W-8/W-9 system

² The same requirements apply for Forms W-8 for Chapter 4 purposes pursuant to a cross-reference provided under Treas. Reg. 1.1471-3T(c)(6)(iv).

maintained by another withholding agent (e.g., an investment partnership) since Treasury regulations do not seem to directly address this.

Request for Guidance:

We believe hard copy print-outs of electronic Forms W-8 or Form W-9 should be considered as valid tax documentation. In addition, such print-outs transmitted electronically (e.g., in PDF or TIFF format) should also qualify as valid tax documentation either as allowable copies provided by an intermediary or flow-through entity or, alternatively, if the transmission meets the electronic transmission requirements of Treasury Regulation Section 1.1441-1(e)(4)(iv)(C). The arguments for these points are outlined in the proposed questions and answers below.

We respectfully request IRS issue guidance on these points and believe the guidance can be issued in the form of Frequently Asked Questions (FAQs). With respect to Question 1, we have provided two alternative rationales for the response (Q1A and Q1B).

We propose the IRS issue the following FAQs (Q1A or Q1B and Q2) to address the uncertainty with respect to the ability of custodian banks and other withholding agents to accept print-outs of electronic Forms W-8 and Form W-9.

Proposed FAQs:

Q1. Can an upstream withholding agent accept as valid an electronically signed, printed Form W-8 or Form W-9 that was produced through an electronic W-8/W-9 system maintained by another withholding agent?

A withholding agent may accept a hard copy print-out of a Form W-8 or Form W-9 that has been electronically completed utilizing an electronic W-8/W-9 system that meets the requirements of Treas. Reg. Sec. 1.1441-1(e)(4)(iv) (for Forms W-8) and Announcement 98-27 (for Forms W-9) even if the system is maintained by an unrelated withholding agent.

Treas. Reg. §1.1441-1(e)(4)(iv) provides that a withholding agent may establish a system for a beneficial owner or payee to electronically furnish a Form W-8. Under this section, the system must allow for the form to be signed electronically under penalties of perjury by the person whose name is on the Form W-8. The electronic version of the form is considered an original, and is therefore subject to the same standards as a Form W-8 with a “wet-ink” signature. A printed version of a Form W-8 that has been electronically completed using a system meeting the requirements of Treas. Reg. §1.1441-1(e)(4)(iv) thus may be treated by withholding agents as if it were a Form W-8 with a “wet-ink” signature.

Similar standards apply for purposes of an electronic system for Forms W-9 as prescribed under Announcement 98-27. There must be procedures to make it reasonably certain that the person accessing the system and submitting the Form W-9 is the person identified on the form. The form must also be signed with the “electronic signature” of the person whose name is on the form and made under penalties of perjury.

Electronic W-8/W-9 systems meeting IRS tax documentation requirements must be able to provide a hard copy of such electronically completed forms to the IRS upon request as documentation of the electronic submission. Such hard copies may be

treated by withholding agents (including upstream withholding agents) as if signed with “wet-ink”.

[If the IRS deems it necessary that the upstream withholding agent must certify that the system used to collect the electronic W-8 or W-9 and electronic signature satisfies the applicable requirements, then the AGC suggests the following:]

The withholding agent must receive a written statement confirming that the electronic Form W-8 or Form W-9 was generated from a system that satisfies the requirements of Treas. Reg. §1.1441-1(e)(4)(iv) and Announcement 98-27, as applicable.

See Treas. Reg. §1.1441-1(e)(4)(iv)(B)(4) in connection with a similar statement to be made when providing a hard copy of an electronic Form W-8 to the IRS.

Q2. Can the printed Form W-8 or Form W-9 generated by an electronic W-8/W-9 system be transmitted electronically (e.g., as a PDF or TIFF file) to the upstream withholding agent?

Yes, the electronic transmission of the print-out of the Form W-8 or Form W-9 described in Q1 (e.g., as a PDF or TIFF) file may be treated as valid by a withholding agent receiving such transmission either 1) in the situation where the digital form is being provided as a copy of otherwise valid tax documentation submitted by an intermediary or flow-through entity or, alternatively, 2) as a valid electronic transmission to an upstream withholding agent if the transmission meets the standards of Treas. Reg. Sec. 1.1441-1(e)(4)(iv)(C).

Conclusion

The issue of whether we are able to accept print-outs of electronic Forms W-8 and Form W-9 generated within an electronic W-8/W-9 system maintained by another withholding agent remains a pressing issue for members of the Association. We appreciate your consideration of the above comments and request for guidance.