German Banking Industry Committee

Die Deutsche Kreditwirtschaft

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Prepared by Ls/Nf/To

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Enclosure
Comments on Notice 2016-42

Initial comments on Notice 2016-42 (proposed changes to qualified intermediary agreements)

Dear Madam, dear Sir,

The German Banking Industry Committee[1] represents more than 1,600 German banks, the vast majority of which act as qualified intermediaries (QIs). We thank you for the opportunity to comment on the proposed qualified intermediary agreement.

The QI rules have contributed to the success of the US capital markets. Certain aspects of US tax law (such as the portfolio interest exemption) are specifically designed to make the US capital markets attractive to foreign direct investment.

The QI rules have already been expanded as a result of FATCA; harmonisation of the two regimes has been partially achieved through Revenue Procedure 2014-39. At that last complex update of the QI system no time to comment was available, so we appreciate the opportunity to do so in the course of the current revision.

[1] The German Banking Industry Committee (GBIC) is the joint committee operated by the central associations representing the interests of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Association of German Banks (Bundesverband deutscher Banken, BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. The member associations of GBIC engage in a collective opinion-forming and decision-making process on legal, political and practical issues relating to banking. These include, in particular, questions concerning prudential regulation, securities legislation and tax law.

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Our enclosed comments focus on the documentation requirements (1), the QDD rules (2) and general compliance issues (3). We believe that the burdens are wholly disproportionate, especially with respect to smaller QIs, and may lead to many of them giving up their status as a QI.

Given the complexity of the rules, not least as a result of the new qualified derivatives dealer status, we would like to suggest supplementing the text of the agreement with some explanatory notes and detailed examples. Potential QIs outside the US will otherwise struggle to fully understand the agreement itself.

We will send a copy of this letter to the German Ministry of Finance.

Yours sincerely,
on behalf of the German Banking Industry Committee,
Association of German Banks

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Comments

on Notice 2016-42 (proposed changes to qualified intermediary agreements)

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Berlin, 30 August 2016

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,600 banks.

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1. Documentation requirements

a. Request: The IRS should simplify the US forms and extend/clarify their validity period.

The new rules in section 5.03(B) of the proposed QI agreement provide that the LOB declaration (which may be used by entities that are not fiscally transparent to document their status together with "alternative" documentary evidence – typically an excerpt from the commercial register) to properly document a client's status for QI must also contain lines 14(a) and (b) of the new W-8BEN-E form.[1]

> **(B) Treaty Statement.** The treaty statement required by an entity account holder under this section 5.03(B) is as follows:
> [Name of entity account holder] meets all provisions of the applicable treaty that are necessary to claim a reduced rate of withholding, including any limitation on benefits provisions, and derives the income within the meaning of section 894, and the regulations thereunder, as the beneficial owner.
>
> The treaty statement must also include a written certification that the entity meets the appropriate limitation on benefits certification as described on Form W-8BEN-E and its accompanying instructions and that specifies the category of the limitation on benefits provision that the entity meets. QI is only required to obtain the treaty statement required by this section 5.03(B) from an account holder that is an entity. QI shall not be required to obtain a treaty statement required by this section 5.03(B) from an individual who is a resident of an applicable treaty country or from the government, or its political subdivisions, of a treaty country.

However, responding to line 14(b), in particular, will require a thorough analysis of the LOB treaty provisions in the relevant US treaty. An international tax counsel will normally need to be consulted, which will generate compliance costs.

Part III **Claim of Tax Treaty Benefits** (if applicable). (For chapter 3 purposes only.)

14 I certify that (check all that apply):

a ☐ The beneficial owner is a resident of ______________________ within the meaning of the income tax treaty between the United States and that country.

b ☐ The beneficial owner derives the item (or items) of income for which the treaty benefits are claimed, and, if applicable, meets the requirements of the treaty provision dealing with limitation on benefits. The following are types of limitation on benefits provisions that may be included in an applicable tax treaty (check only one; see instructions):

☐ Government	☐ Company that meets the ownership and base erosion test
☐ Tax exempt pension trust or pension fund	☐ Company that meets the derivative benefits test
☐ Other tax exempt organization	☐ Company with an item of income that meets active trade or business test
☐ Publicly traded corporation	☐ Favorable discretionary determination by the U.S. competent authority received
☐ Subsidiary of a publicly traded corporation	☐ Other (specify Article and paragraph):

Up to now, many German banks have avoided having to use the lengthy English W-8-forms by relying on the **documentary evidence** specified in their QI country attachment[2] (recently revised; corporate entities normally use an excerpt from the commercial register[3]) **plus the LOB declaration**. With the new LOB declaration having to include lines 14(a) and (b), however, it is questionable whether this will still be the easier option.

German banks already have to comply with FATCA IGA legislation, which may in many cases mean having to obtain a "self-declaration". Corporate entities will often find the combination of **"self-declaration" plus (enhanced) LOB plus documentary evidence** as difficult to accomplish as populating a form

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[1] Cf. https://www.irs.gov/pub/irs-pdf/fw8bene.pdf.

[2] Cf. https://www.irs.gov/pub/irs-trty/qiattachgermany.pdf.

[3] Readily available at www.unternehmensregister.de / https://www.handelsregister.de/rp_web/mask.do?Typ=e.

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W-8BEN-E. It should be borne in mind that this form poses substantial technical and language challenges for German banks. And although some institutions work with translations, these raise technical issues of their own.[4] If the intention is nevertheless to further "incentivise" German QI institutions to use the W-8BEN-E, an extension of its validity period should at least be considered. There is substantial debate in Germany about whether a W-8BEN-E may be used without the traditional time-limitation of "the year of issuance plus three" if accompanied by corresponding documentary evidence.[5] The IRS should at least clarify the validity and retention period in the instructions for completing W-8BEN-E (without modifying the form itself yet again). Preferably, the form should remain valid until a change in circumstances.

b. Request: The IRS should limit the granularity of the reporting under the certification/ review-waiver procedure and align the FATCA classifications of the US forms with IGA rules.

German IGA legislation requires the reporting of certain "specified" US persons (cf. Art. 1 (1)(gg) of the German IGA). As individuals with US citizenship and individuals with US tax residency always qualify as "specified", there is merely a need to differentiate between "specified" and "non-specified" US entities. There is no requirement, under IGA law alone, to further differentiate between the various FATCA designations for reporting purposes (other than NPFFI, cf. Art. 4 No. 1a of the IGA).

German banks are, however, concerned that the FATCA designations of the IGA and those of the form W-8BEN-E have not been properly aligned.[6] If the QI rules now require more granular information on specific types of account holder as part of the documentation process, banks will need to make further substantial investments in their QI systems. This may often lead to retail banks, especially, no longer considering QI status to be "worthwhile". At present, only 6% of Germans directly invest in stock, and even fewer in US stock[7].

The requirements to report in greater granularity mostly stem from the QI certification process proposed in Appendix I, such as:

- Having to produce actual figures for PAIs, trusts and partnerships with the agency or joint-account option *(applying the agency option did not until now require a particular data field designating such account holders).*

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[4] In order to qualify as "substitute form", the translation has meet the highly technical language of the original; further, the certification line at the end of the form has to be "under penalties of perjury" (https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal#GeneralQ8); under German general principles of penal law, perjury requires a certain competent authority (typically a judge, cf. § 154 StGB, https://dejure.org/gesetze/StGB/154.html).

[5] The reference in the instructions of the W-8BEN-E form are overly indirect, https://www.irs.gov/instructions/iw8bene/ch01.html:
"Expiration of Form W-8BEN-E. Generally, a Form W-8BEN-E will remain valid for purposes of both chapters 3 and 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For example, a Form W-8BEN signed on September 30, 2014 remains valid through December 31, 2017.
However, under certain conditions a Form W-8BEN-E will remain in effect indefinitely until a change of circumstances occurs. To determine the period of validity for Form W-8BEN-E for purposes of chapter 4, see Regulations section 1.1471-3(c)(6)(ii). To determine the period of validity for Form W-8BEN-E for purposes of chapter 3, see Regulations section 1.1441-1(e)(4)(ii)."

[6] Cf. for the categories available under the US FATCA regulations in the form itself: https://www.irs.gov/pub/irs-pdf/fw8bene.pdf, for the categories available under the German IGA: http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2013/2013-05-29-tax-compliance-agreement-with-us-agreement.pdf?__blob=publicationFile&v=3

[7] Cf. http://www.bloomberg.com/news/articles/2010-09-30/why-dont-germans-invest-in-stocks-businessweek-business-news-stock-market-and-financial-advice

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- **While we very much appreciate the ability to waive the periodic review,** additional granularity will be generated for smaller QIs by the requirement for a breakdown in the waiver application of the total number of direct and indirect account holders by
  - foreign persons *(minimal burden since US persons are a separate category; we would appreciate specification that this only relates to "foreign" as recipient "payees" of US source payments),*
  - US exempt and non-exempt ***(please amend to "reportable/non-reportable"),***
  - intermediaries and flow-through entities *(neither criterion is readily available: while the QI category will occur only infrequently and thus be readily retrievable, the category of "flow-through entities" (typically partnerships) will require a thorough analysis of all entities and not be readily available).*
- For larger QIs, the above-mentioned issue of additional granularity also arises:
  On page 137, in No. 8, the notion of specified/non-specified should again replace the reporting of "*US non-exempt recipient account holders*".

The further distinction between direct and indirect account holders will also not be readily available. Banks would often have double entries both for their immediate customer and for the indirect beneficiaries (partners in a partnership). Substantial work would be needed to align the figures and eliminate double entries.

We would therefore suggest eliminating the requirement to further specify during the certification process whether the account holder is "direct" or "indirect".

2. QDD rules

The German banking industry will find it extremely difficult to implement the QDD rules (most of which will be applicable from 1 January 2017).

The German banking industry is particularly exposed to compliance difficulties: Germans tend to be risk-averse and many invest in "certificates" (listed retail structured products) with a risk exposure somewhat less than that of stock. A retail product frequently sold in this context is the "bonus certificate". The German certificate market is by far the largest in Europe.[8] As German retail investors would typically benefit from the US-German tax treaty (and the corresponding 15% reduction on dividends), section 871(m) IRC in its entirety does not really lend itself to the German context. We assume the rules have been set primarily with US financial institutions in mind, but the scope of the new rules is overly broad and may impede sound investment and thus the development of the global financial markets.

a. Request: The IRS should allow an optional de minimis threshold of USD 50K to exempt typical securitised, foreign-issued retail investments from section 871(m) IRC.

We believe that there should be an optional de minimis threshold (such as USD 50K) per account holder, below which section 871(m) IRC and substitute interest rules should not apply.

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[8] Cf. http://www.ifre.com/germany-2007-warrants-and-certificates-boom/546036.fullarticle; for a better view of the respective products and market size:
http://www.derivateverband.de/DE/MediaLibrary/Document/PM/09%20PM%20Marktvolumen%20September%202015.pdf

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b. Request: The IRS should also allow an easier "rule of thumb" approach for foreign-issued QI products.

The delta of an option is possibly readily available in this US.

In Germany, however, no such availability exists. We have checked publicly available information about certificates (in prospectuses or elsewhere) with a group of experts from various banks (including the German ISIN[9] designator "WM Datenservice" – our equivalent to Reuters/Bloomberg). We found no way to calculate delta based on public information "at issuance". While the issuer may have such information from its pricing engine, nobody else does. As a result, only the issuer bank would be in a position to possibly calculate the delta for German securitised products under the currently proposed rules.

Further, most German certificates would presumably currently qualify as complex products. The required substantial equivalence test would consequently require substantial analysis for a product that is entirely retail.

c. Request: If the substitute interest rules are applied, the IRS should specify whether German banks that hold US Treasury bonds on the asset side of their balance sheet and use them in repos and securities lending to obtain USD liquidity still have any QI compliance burdens.

Typically, German banks hold no US stock. If they hold US securities, these are usually debt securities issued by federal, state or municipal entities, with the bulk being Treasury bonds. If German QIs only sell such bonds, they are recipient-payees of substitute payments on the date of interest payments.

We take the view that no compliance burden need fall on the recipient of such repo business (only the reverse-repo side of the transaction would be a "payor" and have to observe the substitute interest rules). We would ask the IRS to clarify this point.

d. Request: Alignment of the documentation of QDD status with form W-8BEN-E and W-8IMY

Up to now, it has not been necessary to complete both form W-8BENE and form W-8IMY for the same business case, with use of the form depending on whether an institution acts as a beneficial owner or as an intermediary. The draft of the new W-8IMY now deviates from that logic and requires representation as a QDD in line 14a(ii). Notice 2016-42 stipulates that QDD status requires a dealer to act in a principal capacity, whether or not payments are received or made. This would – according to former criteria – suggest the application of form W-8BEN-E.

The proposed Qualified Intermediary (QI) agreement defines "dealer" in section 2.16 as having the meaning given to the term dealer in Treasury Regulations section 1.871–15(a)(2) (i.e. a dealer in securities within the meaning of section 475(c)(1) IRC).

Treasury Regulations section 1.871–15(a)(2) refers to section 475(c)(1) IRC, which appears to be "Mark to market accounting method for dealers in securities" and states the following:

[9] ISIN is the equivalent of CUSIP outside the US.

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Definitions For purposes of this section—
(1) Dealer in securities defined The term "dealer in securities" means a taxpayer who—
(A) regularly purchases securities from or sells securities to customers in the ordinary course of a trade or business; or
(B) regularly offers to enter into, assume, offset, assign or otherwise terminate positions in securities with customers in the ordinary course of a trade or business.

Section 2.46 of the proposed QI agreement, however, defines "intermediary" as "any person that acts on behalf of another person such as a custodian, broker, nominee, or other agent".

It is our understanding that an institution acting as a QDD would have to provide both forms for securities it holds with another bank on its own account – W-8BEN-E as beneficial owner and W-8IMY for documentation of the QDD status for its (own) "hedging securities". Another "normal" W-8IMY would have to be given to the up-stream custodian for securities held on behalf of customers. We would ask you for greater alignment of, and guidance on, the documentation of QDD status and for facilitation of the handling of future versions of the W-8 forms.

e. Request: Eligible persons within the meaning of Treasury Regulations section 1.871-15(a)(9) should be able to rely on information concerning potential section 871(m) transactions made available centrally by a data services provider and should not have to take any further action to obtain information about potential section 871(m) transactions.

Treasury Regulations section 1.871-15(p)(3) basically sets out
- who is entitled to request information on potential section 871(m) transactions,
- who has to communicate certain information on potential section 871(m) transactions to the requesting party, and in what form and by when this information has to be communicated, and
- under which circumstances the requesting party is not permitted to rely on the information on potential section 871(m) transactions.

We would nevertheless welcome it if eligible persons within the meaning of Treasury Regulations section 1.871-15(a)(9) were permitted to rely on information about potential section 871(m) transactions made available by a data service provider such as WM Datenservice in Germany and were not required to take any further action to obtain information on potential section 871(m) transactions as set out under Treasury Regulations section 1.871-15(p)(3)(i).

The background is that custodian banks in Germany always obtain the market, product and tax information they need from a data service provider such as WM Datenservice. German lawmakers already allow all market participants in Germany to rely on information provided by WM Datenservice a or comparable service provider for the purposes of calculating German flat rate withholding tax ("Abgeltungsteuer").

From the perspective of the German financial market, granting our request would have the following advantages:
- Both issuers of certificates and also the custodian banks holding the certificates could use a data-exchange infrastructure already in place to provide and obtain information on potential section 871(m) transactions.
- Issuers of certificates would only need to make information on potential section 871(m) transactions available to a single party (WM Datenservice or a comparable service provider).

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- Custodian banks holding certificates could obtain information on potential section 871(m) transactions from a single data service provider and would not need to take any further action.
- The same information on potential section 871(m) transactions would be available to all market participants (i.e. complete transparency would be established).

f. Request: We would ask the IRS to clarify how institutions should deal with cases in which a certificate issuer which is responsible for providing information on potential section 871(m) transactions fails to meet this obligation.

We would appreciate clarification of how custodian institutions should deal with cases in which an issuer of certificates fails to meet its obligation to provide information on potential section 871(m) transactions. In such cases, the custodian banks holding the certificates would not be able to calculate and retain the correct amount of US withholding tax on a dividend equivalent and pay this amount to the US government.

We would welcome it, against this background, if custodian banks were not required to calculate, retain and pay to the US government US withholding tax on a dividend equivalent if only one item of information on potential section 871(m) transactions was not made available by the issuer.

g. Request: The IRS should require issuers of listed Section 871(m) transactions to put arrangements in place in derivative contracts to help custodians who are QIs to be compliant.

Since custodian banks have no local legal authorisation to withhold tax on foreign derivatives, QIs with primary withholding responsibility need to be authorised by the issuer by means of the derivative contract with its counterparty to withhold tax on payments to the counterparty which is a customer of the QI. The QI therefore needs the cooperation of the issuer to be able to comply with QI requirements and pass the tax burden onto the customer. Otherwise, the QI would have to pay the tax itself. It would therefore be helpful if the IRS required issuers to include arrangements in derivative contracts to make it easier for custodians who are QIs to be compliant.

h. Request: The IRS should temporarily exclude the section 871(m)/QDD-relevant requirements from the scope of the periodic review and compliance certification to be conducted by mid-2018 by the responsible officer.

The implementation of the rules under section 871(m) IRC and Qualified Derivatives Dealer (QDD) status will be highly complex and pose many challenges. Over the last month major associations such as SIFMA, the OCC and ICMSA have expressed concerns that there is insufficient time to develop and implement a workable market-based solution for section 871(m) IRC before the 1 January 2017 deadline and have requested a postponement until 1 January 2018.

Since implementation needs industry-wide coordination, responsible officers have concerns with respect to the periodic review and the 2018 compliance certification for the certification period of 2015 to 2017, which is already supposed to cover the section 871(m)/QDD requirements for the year 2017. In light of the anticipated delay in a compliant implementation of the requirements throughout the market, responsible officers will face significant difficulties in finding a good-faith basis for the upcoming renewal of QI agreements and potential applications for QDD status.

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Irrespective of the above-mentioned request to postpone the implementation date of section 871(m) IRC until 1 January 2018, we would ask the IRS to temporarily exclude the section 871(m)/QDD-relevant requirements from the scope of the periodic review and compliance certification to be conducted by mid-2018. This would enable responsible officers to certify compliance with the existing QI requirements for the years 2015 - 2017 in good faith while implementation efforts for the section 871(m)/QDD requirements are underway. For future compliance certifications, this would further align certification periods and validity periods of the QI agreement, which would significantly reduce complexity.

i. Request: Avoid double taxation in cases where derivatives are sold to non-issuers after first dividend payment dates.

In Germany, many derivatives are traded on a stock exchange. As a result, the issuer does not know the beneficiary or the custodial institution that holds the derivatives for the beneficiary. If the beneficiary sells a derivative to another person who is not the issuer and dividend payments have already occurred, the sale of the derivative will trigger a withholding event. The custodial bank, assuming it is a QI, will be obliged to withhold tax.

If the derivative lapses at maturity, a QDD will be obliged to withhold tax relating to all dividend payment dates (taxation on underlying). The dividend payment dates before sale will consequently be taxed twice. This needs to be avoided. We would therefore suggest that the sale of such products should not trigger taxation and that the dividend equivalent payment by the issuer should be paid at maturity only. There will not be a danger of avoiding tax since the final taxation at maturity will be reflected in the price the first beneficiary is able to offer.

j. Request: Clarification is needed concerning the treatment of provisions for retail structured products.

It is our understanding that the issuer has to set up provisions each time a section 871(m) product is sold or even has to transfer cash in the amount of the dividend equivalent amount (DEA) to a dedicated account that can only be wound up when the customer has been taxed.

It is not feasible to comply with this requirement where retail structured products with a liquid secondary market are involved since the issuer has no way of knowing where the securities are or who has bought or sold them. As a result, the issuer would have to add to the provisions on every sale, but could not release them when buying securities back because it would not know how much DEA its counterparty had already paid. The following brief example illustrates the problem:

Client A buys 100 shares in a certificate. On the first ex-dividend day, the issuer sets aside provisions equalling 100 DEAs. Client B then also buys 100 shares. On the second ex-dividend day, the issuer sets aside provisions equalling 200 DEAs. Then 100 shares are returned. Since the issuer does not know whether they have come from A or B, it is also unable to know whether provisions equal to 100 or 200 DEAs can be unwound.

The provisions would therefore continue to grow and could only be unwound when the product finally matured. Given the brisk trading with these products in the retail market, issuers would need to make huge amounts of their own money available.

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k. Request: The methods of calculating the amount of tax to pay under section 871(m) IRC need to be modified.

Our current analysis suggests that implementation of the QI agreement, which refers to section 871(m) IRC and the corresponding requirements, may result in more tax being deducted than that which the US is actually entitled to. We basically assume that dividends (under the broad interpretation) paid from the US to issuers of relevant products will limit the level of the tax assessment base. Only the amount of tax will depend on the individual tax rate of the persons actually receiving the dividends on the relevant products. Our calculations show, however, that the assessment base from the relevant products may be higher than the dividends accruing to the issuer. It is essential to avoid such a situation since each further inclusion of value in the assessment base will exceed the right of the US to levy taxation. The envisaged calculation methods under section 871(m) IRC therefore need to be modified.

l. Request: The IRS should clarify the requirement to impose withholding tax unconnected to a payment from which funds could be withheld.

The Treasury Regulations on section 871(m) IRC envisage that in certain cases, if the amount to be paid out is not enough to meet the tax liability, an obligation will nevertheless exist to pay the excess tax.

As we see it, a financial institution in Germany is only required to carry out "cashless" withholding of this kind if it acts as a **QDD**. QDDs have an obligation to transfer tax under section 2.66 of the QI agreement in conjunction with Treasury Regulations section 1.1441-1T(e)(6)(i)(C). This does not mean the QDD undertakes to settle the shortfall in the assessment base from issued derivatives. Rather, it has to tax the dividends paid on its hedging position without the deduction of tax in such a way that there is taxation of the revenue which was not passed on to the customer via the product and the portion which consequently remained untaxed in the hedging position. The amount will depend on the tax rate of the issuer (QDD) of the product, not that of the customer. The relationship between incoming payments on hedging positions and outgoing payments on the product should be clear from the reconciliation schedule.

We do not, by contrast, assume that a **QI** is under any such obligation to pay excess tax. In our view, the QI is merely required to withhold tax on payments. If the tax amount exceeds the payment or if a payment is not made (because the certificate lapses, for instance), the QI has **no obligation** to withhold or transfer tax. We infer this from section 2.60 of the proposed QI agreement, which admittedly makes general reference in its definition of payment to Treasury Regulation 1.1441-2(e) and thus, with respect to section 871(m) IRC, also to the broader definition of payment under section 1.1441-2(e)(8)(ii)(C). But section 2.60 of the proposed QI agreement goes on to say that, for any dividend equivalent payment (and such payments paid to US persons), the payment definition in section 1.871-15(i) of the Treasury Regulation will apply. This definition does not require cashless withholding. Under the principle of lex specialis, therefore, the latter, specific definition overrides the definition in section 1.1441-2(e)(8)(ii)(C) of the Treasury Regulations for QIs and the cashless withholding obligation does not apply. We would ask the IRS to confirm this view. It would be virtually impossible in contractual terms for the QI to shift this obligation onto the recipient of the payment, so the custodial QI, which is not a counterparty to the derivatives contract, would otherwise have to bear the costs itself.

Please note: by cashless withholding we do not mean products where payments are calculated only after the netting of positions. This request refers to products which can also be traded on exchanges and where only the issuer undertakes to make a payment.

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m. Request: Please align section 871(m) regulations and the proposed QI agreement.

The Section 871(m) Treasury regulations and the proposed QI agreement are inconsistent on the question of when withholding tax is due. The proposed QI agreement requires the QDD to deposit tax related to its "871(m) amount" on the dividend payment date for the applicable dividend, while the section 871(m) Treasury regulations require the QDD to deposit tax when the payment is made or the transaction is closed.

n. Request: Please simplify the rules regarding the determination of the QDD's tax liability.

The rules in section 3.09 of the proposed QI agreement regarding the determination of the QDD's tax liability are overly complicated, in our view, especially for a foreign financial institution. It will be difficult to self-assess tax on any residual dividend equivalent amounts left with a dealer that essentially represent the spread earned on a client transaction. It will also be challenging to providing the extensive reconciliation schedules envisaged by the IRS to show fully offsetting payment amounts.

3. General compliance issues

a. Request: Please postpone the responsible officer certification to whenever 1042-filing is due.

Most QIs do not file their 1042 forms until September 15. Responsible officer certification is currently due by July 1, 2018, i.e. well in advance of the 1042-filing deadline. The reporting reconciliation for the review period (assuming it relates to the 2017 calendar year) would, however, in practice have to be done beforehand in order to certify compliance for the respective period. The currently proposed certification requirements would therefore make it impossible to make use of the possibility to report only in September.

b. Request: We believe, while documentation-review should be done for all accounts of the strata, WHT-review should be further limited.

We appreciate the IRS's decision to revert to testing actual documentation/withholding/reporting instead of applying Rev. Proc. 2002-55. In the past, however, the review was a two-step process: if the documentation was adequate, the auditor was only required to review 20 accounts for the purposes of the WHT test. Reviewing all accounts for WHT purposes will generally increase the cost of the review.

c. Request: The projection of under-withholding should – if required at all – be limited to cases where under-withholding is not remedied during the review period ("cured") and exceeds a de minimis threshold.

Similarly, projection of under-withholding now seems to be required in all cases, irrespective of whether or not the error rate exceeds a certain threshold. This may further impact the attractiveness of QI status.