

THE ASSOCIATION OF GLOBAL CUSTODIANS

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INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK
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April 13, 2004

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Re: Internal Revenue Service ("IRS") Form 8802

Dear Messrs. Green and Hedgpeth:

The Association of Global Custodians (the "Association"), an informal group of nine custodian banks that hold funds and assets for institutional investors, is writing to comment on IRS Form 8802, "Application for United States Residency Certification," and the related procedures ("Procedures"). The Association members, in the aggregate, hold securities assets in excess of thirty trillion dollars and therefore have a direct interest in this issue. The Associations' concerns and proposals in this letter arise from our members' duty to provide their U.S. clients with the tax treaty benefits to which they are entitled and to reduce administrative burdens for both the U.S. taxpayer and the custodian banks which have arisen from the Procedures as noted below.

Background

Year 2004 has so far been very problematic, with virtually no transition period to the new Procedures. The IRS originally announced written Procedures applicable to Form 8802 that

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would come into effect on July 5, 2004. However, the IRS subsequently stated that notwithstanding the planned July 5, 2004 transition date for such Procedures, all requests for U.S. residency certifications would be rejected unless they complied with all the substantive requirements of the Procedures, effective January 5, 2004. Because Form 8802 only became final on December 19, 2003, custodians and their clients had only an approximate two-week period to implement the new rules over the Christmas and New Years holidays.

To compound matters, in January 2004, the IRS made further changes to the Procedures, again without written notice. An oral announcement was made of a new signature requirement, which permitted only the most senior officers of a U.S. taxpayer entity to sign Form 8802. This resulted in an across the board rejection of numerous Form 8802 submissions and a further delay in, and in certain cases outright loss of, treaty relief. (It should be noted that in countries such as Russia there is no practical means of obtaining treaty relief after the date of the income payment so failure to obtain treaty relief at source results in the permanent loss of treaty relief. Such lost relief can be measured in tens of millions of U.S. dollars.)

The Procedures failed to take account of previous verbal assurances from the IRS (made in November 2003) that the IRS would provide relief from the one-year renewal requirement of Form 8802 by means of a Power of Attorney, which would authorize the taxpayer's agent to complete Form 8802 on the taxpayer's behalf. Moreover, the failure of the IRS to update Publication 686 to reflect the revised Form 8802 requirements has meant that U.S. taxpayers completing Form 8802 encounter conflicting information about the process.

The overall lack of proper coordinated guidance from the IRS has placed custodian banks in an awkward position with their clients. Many clients have sought tax advice from custodian banks in the absence of proper publicly available guidance from the IRS.

Position of the Association

The Association accepts the basic premise that the absolute integrity of bilateral treaty arrangements should be beyond question by our bilateral partners. We appreciate the concerns that led to the IRS issuing the new Form 8802, and we support the IRS initiative in many ways.

However, the Association believes that the new Form 8802 Procedures are so driven by exceptional considerations, that the average U.S. taxpayer has effectively been forgotten. The Association believes the Procedures need to be carefully reconsidered to assure that U.S. clients are not so unilaterally burdened by U.S. compliance mandates that it frustrates the fair and bilateral administration of any applicable treaty. Set forth below are the six key issues the Association believes need further consideration, as well as our proposed resolution for each.

1. Form 8802 Renewal Period

Issue: The Procedures require that Form 8802 be renewed on an annual basis. The annual renewal requirement is inappropriate for the vast majority of U.S. residents. The Association understands that the IRS justifies this requirement on the basis that U.S. individuals may change their residency and receive treaty relief they are not entitled to. However, the one-year validity period for Form 8802 disproportionately burdens the vast majority of legitimate U.S. individual taxpayers in order to target those subject to exceptional circumstances. Moreover, the extension of the annual renewal requirement to other types of U.S. taxpayers such as companies and pension funds is unwarranted.

Proposal: Form 8802 should generally be subject to a three-year plus validity period, and annual renewal should be restricted to only those instances where the IRS has reason to believe that treaty entitlement/abuse may be at issue (notification to the custodian bank should also be made accordingly).

2. Form 8802 Signature Requirement

Issue: The IRS has imposed a signature requirement in respect of Form 8802 that is not outlined in the Instructions for Form 8802 or anywhere else in writing. The IRS has rejected numerous Forms 8802 that have been properly completed by clients meeting the "binding officer" criteria, despite the IRS's own lack of actual knowledge as to the authority of the signor to bind the corporation.

Proposal: Box 11 of Form 8802 should be used to signify that the individual signing the form has authority to bind the taxpayer entity, therefore giving the IRS the needed assurance that the applicant is meeting the IRS's requirements.

3. Additional Requirements for Partnerships and Common Trusts

Issue: The current IRS practice of naming the U.S.-resident partners/beneficiaries on the Form 6166 issued in respect of a U.S. partnership/common trust creates an exceptional administrative burden by requiring the submission of Forms 8802/8821 for each partner/beneficiary (for public disclosure purposes). Details of U.S. resident partners/beneficiaries are generally not required by U.S. treaty partners, which have their own independent procedures for validating the percentage of U.S. ownership of a partnership or U.S. beneficial interest in a trust.

The Instructions for Form 8802 (line 4b) state, "Partnerships are not considered U.S. residents within the meaning of the residency article of U.S. income tax treaties".

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However, most U.S. treaties do treat partnerships as “residents” of the U.S. under Article 4 of such treaties, to the extent underlying partners are U.S. residents. The same is often true for trusts and estates.¹

Proposal: The IRS should change its Procedures so that it simply issues Form 6166 in the name of the partnership/common trust without further details of the underlying U.S. partners/beneficiaries. If necessary, the IRS could internally validate whether a partnership/common trust had one or more U.S.-resident partners within the meaning of Article 4 of U.S. treaties using a listing of partner/beneficiary names and Identifications furnished by the taxpayer or its custodian bank, without recourse to any further documentation.

4. Country-specific Form 6166 Requirement

Issue: The change in practice from the IRS issuing “generic” Forms 6166 “Certification of United States Residency,” which a U.S. investor can use to obtain tax relief in any foreign country, to “country-specific” Forms 6166 pre-printed with the name of a specific country, has created an undue administrative burden for custodian banks.

A custodian bank may have thousands of U.S. clients. Most of these clients invest in more than one foreign market, and receive foreign source dividends, interest, and other types of income from multiple payers. Under the country-specific arrangements, anticipating and maintaining each client's Form 6166 needs for each year by means of Form 8802 will be extremely burdensome for the custodian bank - more costly, time-consuming, and error-prone than the present system of obtaining one large supply of Forms 6166 for each United States client every year.

Proposal: The IRS should return to its previous practice of issuing generic Forms 6166. Line 10 of the Form 8802 (detailing country-specific certification volumes) should be ignored except for those isolated cases where a country-specific certification is required rather than a generic certification.

¹ Under the 1996 U.S. Model Treaty, the term “person”, as defined by Article 3, includes a partnership. This explicit inclusion is significant as only a “person” can be a “resident” under the treaty and all “persons” are eligible to claim relief under Article 25. Furthermore, in defining “resident”, Article 4 Paragraph 1(d) addresses the partnership issue by providing, “An item of income, profit or gain derived through an entity that is fiscally transparent under the laws of either Contracting State shall be considered to be derived by a resident of a State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident.”

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5. Transitional Relief

Issue: The custodial industry has not been in a position to properly plan for the new Form 8802 Procedures effective January 5, 2004. The Association considers that in these circumstances, transitional relief is warranted.

Proposal: For a transitional period ending December 31, 2004, Form 8802 submissions should be accepted if they contain all requisite information contained in the predecessor Form 8821.

6. Transitional Arrangements - ongoing

Issue: The Association believes it is essential that the IRS adopt proper transitional arrangements in the future, enabling the IRS and the custodial industry to work together to ensure successful implementation of impending changes to existing rules or procedures.

Proposal: The IRS should adopt a consistent practice of providing advance written guidance and adequate comment periods for proposed changes to procedures and processing requirements. This will allow for reasonable and fair administration of the proposed changes.

Conclusion

The Association would welcome the opportunity to discuss the issues raised in this letter in more detail with the IRS, with a view to achieving mutually acceptable arrangements for the future handling of Form 8802 applications for U.S. residency certifications. Please feel free to contact Patrick Costello, Chair of the Association's Tax Issues Committee or the undersigned if you have any questions.

Sincerely,



Margaret R. Blake
Counsel to the Association